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THE
I R I S H J U R I S T .

VOL. I.—MISCELLANEOUS.

CONTAINING

**ARTICLES ON LEGAL SUBJECTS, THE STATUTES RELATING TO IRELAND,
RULES AND ORDERS OF THE SEVERAL COURTS, CAUSE LISTS,
AND OTHER USEFUL LEGAL INFORMATION.**

FOR THE YEAR 1849.

WITH

AN INDEX OF THE MATTER CONTAINED THEREIN.

DUBLIN :
EDWARD J. MILLIKEN, 15, COLLÈGE GREEN.
MDCCCXLIX.

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DUBLIN: PRINTED BY THOMAS L. WHITE, FLEET STREET.

THE Irish Jurist

No. 1—Vol. I.

NOVEMBER 4, 1848.

PRICE 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT W. OSBORNE, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.	Queen's Bench, including Civil Bill and Registry Appeals.....	{ JOHN T. BAGOT, Esq., and FLORENCE Mc'CARTHY, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARE HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.	Exchequer of Pleas, including Manor Court and Registry Appeals.....	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	{ ROBERT LONG, Esq., Barrister-at-Law.

DUBLIN, NOVEMBER 4, 1848.

WE think it necessary to lay before our readers the reasons and purposes for which this journal has been established, and to give an outline of the matter and subjects which it is intended its columns shall contain. It may be, that we shall not offer a bill of fare which may tempt the imagination, or stimulate the passions; but we hope to present one that will be substantial, without being heavy, and of solid usefulness, not only to the legal profession, but also to the country gentleman, and every person connected with the administration of justice, or interested in the improvement and transfer of property—subjects which the recent and contemplated changes in the law render of paramount importance.

There is no journal in Ireland exclusively devoted to law reports, and law intelligence, and it cannot be doubted that there ought to be such a journal, and that the professional Irish law world should not be without a recognised organ, and medium to convey its sentiments, communicate intelligence, and discuss calmly and temperately changes in the law, whether accomplished or intended, and which affect not only the interests of the profession, but the whole fabric of society.

The necessity for such a law newspaper, which has always existed, has never, perhaps, been greater than at present; for it must be conceded that a revolution in the laws relating to real property in Ireland is rapidly taking place. The effect of this on the well-being of the country, cannot be estimated, but unquestionably each step should be canvassed, weighed, and matured, before it be taken; there are *nulla vestigia retrorsum*. It is not presumption to suppose that by no class should every change connected with the jurisprudence of the country be discussed with more practical benefit, than by legal men—their trained habits of thought, and familiarity with the subject pre-eminently fit them for the task; but yet hitherto there has been

no established medium for the interchange of legal ideas!

If illustration were required to prove the utility of possessing such a medium, it is presented in the instance of the Irish Law Society. That very useful body, which has frequently interfered with success to prevent or postpone the passing of either mischievous or crude legislation, publish annually a condensed summary of the measures of the preceding year which they have opposed or procured, disapproved or promoted; but though this epitome be ably compiled, it labours under the disadvantage of being too compressed, and being a single publication, it not only wants the force of frequent repetition to produce effect, but also the power of discussing each separate matter, as the necessity arises; and dealing with the past or the future does not act upon the present with sufficient force.

It is unjust to suppose that lawyers are opposed to amendments in the law; but their knowledge of the subject, and of mankind, render them peculiarly alive to the difficulty of altering laws under which rights and complicated relations have been created, and whilst they are willing and anxious that well considered improvements should be introduced, they wish to see them the result of that skill and caution their importance demands. Can it be denied that the temperate discussion by lawyers of law reform, would be conducive to the public good? Every important change, if based on sound principles, can with advantage be tested, probed, and examined. The interest of the lawyer and the legislator are not in antagonism.

But the utility of such a publication as the JURIST, is not confined to the discussion merely of contemplated acts of Parliament; it becomes more practically useful when those measures are being carried into actual operation, for then it is the intelligencer of the mode in which they are worked, it conveys with speed and authenticity the decisions made on them, and can indicate the consequences

which they are likely to produce, and their practical bearing and effect.

We may take—as examples of the advantages to be derived, with reference to past and future legislation, from our journal—the Poor Law acts, and the act for the Sale of Incumbered Estates. The former will be entirely reconsidered in the next session of Parliament, and it can hardly be denied that a preliminary and careful discussion of the whole question connected with the compulsory relief of the poor, will be of great practical utility. We invite this discussion.

Rapid and careful reports of the decisions pronounced on the Incumbered Estates Act, and frequent statements of the practical working of the measure, must, we should think, be important, not only to the practitioner, but to half the landed proprietors of Ireland, whose interests are so wound up in the measure.

For these reasons, if there were none other, the advantages of a journal in which present and future laws can be weighed and considered, are apparent; and these advantages are not limited, but universal; equally beneficial to the lawyer, the country-gentleman, and the senator. The latter, in the progress of a measure through either House of Parliament, will have his attention directed to defects or omissions, and those niceties of detail which only strike the legal mind. Hence may be avoided “Acts to amend Acts,” and laws rudely shaped, which yet deeply affect some of the most important interests in the community.

We do not seek to set an undue value on the ability with which this journal may be conducted; our judgment may be wrong, but still we shall be useful, we are established, we are ready to hear the opinions, to receive the advice of others, and we shall form a nucleus, round which may be collected the opinions of men of capacity and intelligence.

We promise to be influenced by neither personal nor sordid motives; if we know ourselves and the spirit with which we have undertaken this journal, our single aim is, to conduct it with an earnest desire for truth, impartiality and justice.

We do not, however, mean to fill our columns solely with dissertations; the greater portion of our space will be occupied with concise Reports of cases which involve questions of law or of general interest. Thus, without interfering with the regular reports, it is our object to give information equally authentic, and with more rapidity.

It is both impolitic and dishonest to be liberal in promise and meagre in performance, but we may state, that it is our design to insert not merely cases which occur in this country, but also questions of law or interest which are taking place in others; variety of food, provided it be wholesome, is as agreeable to the intellect as to the body. We shall give Reviews of law works, and Biographies of eminent legal men, and Reports in full of interesting public trials, enlarging our space according to the press of matter, *and the support with which we meet.*

It is our purpose to omit no source of information, consistently with our limits, which will be useful to the working practitioner of both professions, he will have the decisions of the judges almost as soon as pronounced, and will thus be at once apprized of

every new principle and every modification in practice.

Every important Act of Parliament will be analyzed, and a careful Annual Index compiled, not merely of the cases reported in this periodical, but of those which have been reported within that time in Ireland. That portion devoted to Law Lists and Tables will be compiled with the most pains-taking accuracy.

The questions and principles of law and practice to which this journal will be devoted, must necessarily be useful to every landed proprietor and magistrate—the laws which affect the one, and those which are to be administered by the other, will be frequently the subject of practical exposition.

If we fulfil our part, the experiment will be tested, whether the Irish public will lend its support to a journal which professes to give useful information, apart from the struggles of party and the excitement of politics.



THE act for the sale of Incumbered Estates in Ireland forms a very important chapter in the history of the law of real property. We shall endeavour, in this article, to lay before our readers a general statement of the changes which this statute has introduced into the law. We neither seek to exaggerate nor underrate their magnitude, and our comments will be written in no unfriendly spirit.

The bill, as introduced by Lord Cottenham into the House of Lords, contained no provision for the sale of lands without the order of the Court of Chancery—these were added to the measure during its progress through the House of Commons. Their dovetailing has marred the symmetry of the act, and we venture to predict this portion of it will be practically inoperative. The owner of an estate for life being invested with the power of selling the inheritance, it was necessary to provide stringent guarantees for the safety of incumbrancers and remainder-men—those which have been provided by the statute will occasion such loss of time, and such publicity, that no owner will be likely to resort to them, and a purchaser will prefer a sale by order of the Court, in which case his title will not be kept in abeyance for five years.

The operations of the act will also be more limited than is generally supposed, as will be apparent from the fact that the owner, the first incumbrancer, and the incumbrancer having possession of the title-deeds, can alone proceed for a sale under the order of the court; a puisne incumbrancer cannot, except he is prepared to apply to the court for liberty to redeem the prior incumbrances, and—in case the amount of such prior incumbrances is unascertained—is ready to pay into court the amount claimed, to abide the result of the taking of an account, whilst he is precluded from questioning the validity or title of such prior incumbrances. Sec. 70. This will operate as a practical exclusion to all puisne incumbrancers proceeding under the order of the court; they will—and they form the vast majority of plaintiffs in courts of equity—consequently be obliged to resort to the present system of filing foreclosure bills.

We now proceed to mention the principal alterations and novelties introduced by the statute.

1st. It allows an *owner* to initiate proceedings for a sale of his estate, for the payment of incumbrances affecting the inheritance; and an *owner*, as defined by the 1st section, includes every person from the tenant in fee, to the tenant by the courtsey, and in the case of leaseholds, from the person entitled in perpetuity, to the possessor of an unexpired term of fifty years, not being an under-lessee at a rent.

2ndly. It confers a parliamentary title on a purchaser; in the case of sales under the direction of the Court of Chancery, as soon as the conveyance is executed, and in the case of sales without the order of the court, within five years from the conveyance.

3rdly. In case of sales under the order of the court, the Master in Chancery has the power of apportioning head rent amongst the lots into which the land may be distributed for sale or reservation; but this power does not exist in cases where the sale is without the order of the court.

4thly. The owner of a judgment affecting lands may, under the provisions of section 72, release a portion of such lands, without nullifying the effect or validity of such judgment upon the residue of such lands, or any other property which it is intended should remain subject thereto. This power diminishes the evil of judgment securities, and will afford considerable facility in making title, not only under this act, but generally.

5thly. All proceedings under the court are to be commenced by petition; the effect of this will be, to dispense with the necessity of all the steps hitherto required as preliminary to the taking of an account. All their old remedies, however, are left to incumbrancers, it being optional with them to avail themselves of the provisions of this act. But pending proceedings for a sale, the court has the power to restrain proceedings at law or in equity for foreclosure, redemption, or sale. Previously to this enactment, until a decree in one cause was obtained, the court had no power to restrain the prosecution of any number of suits for the same purpose.

7thly. The Master in Chancery is the only necessary party to a conveyance to a purchaser, thus dispensing with conveyances from all persons having the legal estate.

8thly. It enables persons entitled to unredeemable charges, such as jointures and annuities, to accept a gross sum by way of compensation, and enables the Master in Chancery to sell the lands discharged of those charges, and include the compensation in his report.

9thly. The obvious design of the act is to transfer litigation from the land to the purchase-money, which is to be lodged to the credit of the accountant-general.

Such are some of the most prominent features of the measure which we shall from time to time canvass in detail.

The distinguishing characteristic of the act may be said to be, that it confers power on the owner of an incumbered estate to initiate proceedings to get rid of the incumbrances affecting the inheritance

by a sale of so much of the security upon which they were charged, as will be sufficient for their liquidation, and to render the residue available for himself and his family. In fact the term owner in such cases was a mockery, he was in reality more often the agent of his creditors. He could not have effected his purpose by a *judicial* sale, inasmuch as our courts of equity did not recognise the right of any person other than an incumbrancer, to put its jurisdiction in motion for such a purpose. Neither could he have disposed of it by private contract, inasmuch as the law required the consent of every creditor, whose debt was registered a matter of record, to be evidenced by his executing the conveyance to the purchaser, or releasing the lands, as a condition precedent to the validity of the sale—a requirement, which, although intended as a protection to the creditor (whose interests would otherwise, in the absence of any controlling power as to the rate of purchase or mode of disposition, have been completely at the mercy of the owner) was, from its very nature, an absolute prohibition against alienation by a proprietor. In this dilemma—debarred upon the one hand, from all participation in the privileges of a suitor to the equitable tribunals of the country, and practically shut out, upon the other, from the right of disposition by private contract, with which, as we have seen, he was but *nominally* invested—the owner of an incumbered estate, desirous to sell, had no other alternative left him, by which to bring his estate into the market than to solicit the co-operation of a “friendly creditor,” and to procure the institution in *his* name of what was well known by the title of “an amicable suit,” the object of which was to obtain thus indirectly the intervention of a court of Equity.

But here again the owner was not unfrequently destined to find himself disappointed, inasmuch as the circuitous expedient of an amicable suit, as a means of converting the lands charged with incumbrances into a fund for their liquidation, was dependent for its success, not merely upon the disposition of the friendly incumbrancer, but upon the priority of his demand, or his ability to redeem the prior incumbrances, which it was necessary, in the first instance, to offer to redeem, otherwise his bill was not in strictness maintainable, so that even the co-operation of a creditor was far from being a certain resource upon which the owner could fall back in his extremity.

This disability, on the part of an owner to sell his estate for the legitimate purpose of paying the incumbrances affecting it, has been removed for the first time, in the history of our Jurisprudence. Proprietors of incumbered properties are, at last, regarded as practically competent to sell them, without the assent of their creditors, and this they are empowered to do in two ways, either by private contract, or through the medium of a judicial sale, under the direction of the court of Chancery.

In our next number we will examine the different modes of proceeding under the act, and contrast their relative advantages.

GENERAL ORDERS FOR THE OFFICES OF THE TAXING MASTERS OF THE COURT OF CHANCERY.

Dated the 9th day of October, 1848.

1. That the offices of John O'Dwyer, Esq., and Edward Tandy, Esq., two of the said Taxing Masters, shall, until further ordered, be held at No. 20, *Upper Ormond Quay*, in the city of *Dublin*; and the office of the third Taxing Master, to be appointed under the said Act, shall be in such place as the Lord Chancellor shall direct.

2. That the several orders of the 26th day of *October, 1845*, relating to the office of Taxing Master, the times and hours of attendance thereat, the duties of the Taxing Master, his powers, and the course of proceeding in his office, shall in all respects apply to and govern the several Taxing Masters appointed and to be appointed under the said Act of the last session, and their respective offices, and the clerks therein.

3. That all Bills of Costs now standing by the said General Orders of the 26th day of *October, 1845*, or by any decree or order, referred to the said John O'Dwyer, Esq., as the Taxing Master of the court, and on which he has not certified the costs due, are hereby referred as well to the said John O'Dwyer as to the other Taxing Masters appointed and to be appointed under the said Act, who shall regulate among themselves the distribution thereof for taxation, so as to avoid any unnecessary delay to the solicitors and suitors of the court; and, to that end, each of said Masters shall be at liberty to adopt the whole, or such part as he shall think fit, of the proceedings which have already taken place in respect to the taxation of any of said bills; and the certificate of any other of the said Taxing Masters, of the sum due on such bills, shall be of the same force as that of the said John O'Dwyer, notwithstanding any reference of such costs to him by name.

4. That the said Taxing Masters shall arrange a plan for determining the future references of all costs under the decrees, or orders of the court, or under requisitions to each of them, in weekly rotation; such plan to be submitted to and approved of by the Lord Chancellor.

5. That when there shall have been any former taxation of costs in the same cause or matter, all references therein for the taxation of costs shall be made to the Taxing Master before whom such former taxation has taken place, either on a reference from the court, or upon the request of a Master in Ordinary; but any taxation had before the said John O'Dwyer, Esq. before this date, shall not be deemed a former taxation within this rule, so as necessarily to require that all future references for taxation in the same cause or matter should be made to him.

6. That the Taxing Masters shall be respectively assistant to each other; and that in the discharge of their duties, and for the better despatch of the business of their respective offices, any Taxing Master may tax, or assist in the taxation of a bill of costs which has been referred for taxation to any other Taxing Master, and in such case may certify sum due in respect thereof.

MAZIERE BRADY, C.
T. B. C. SMITH, M. R.

GENERAL ORDERS IN CHANCERY.

*Pursuant to the provisions of the 11th & 12th Vic. c. 68.
"An Act for better securing Trust funds, and for the relief of Trustees."*

Dated the 9th day of October, 1848.

1. Any trustee desiring to pay money, or transfer stock or securities into the name of the Accountant-General of the court of Chancery, under the said Act, is to file an affidavit, entitled in the matter of the act and of the trust, and setting forth:—

(1.) His own name and address.

(2.) The place where he is to be served with any petition, or any notice of any proceeding or order of the court relating to the trust fund.

(3.) The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into court, to the credit of the trust.

(4.) A short description of the trust, and of the instrument creating it.

(5.) The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.

(6.) The submission of the trustee to answer all such enquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in, under the Act, as the Court may think proper to direct.

2. The party filing such affidavit on production of an attested copy thereof, is to be at liberty to enter a side bar rule to lodge or invest the money, stock, or security specified in such affidavit, in the Bank of *Ireland*, with the privacy of the Accountant-General, to the account of the particular trust.

3. The Accountant-General, on production of an office copy of the affidavit and rule, is to give the necessary directions for transfer, deposit, or payment, and to place the stock, securities, or money, to the account of the particular trust; and such transfer, deposit, or payment is to be certified in the usual manner.

4. The trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in, or entitled to the fund.

5. Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

6. The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein, or entitled thereto.

7. The parties interested in, or entitled to the fund, are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

8. No petition is to be set down to be heard, until the petitioner has first named a place where he may be served with any petition, or notice of any proceeding or order of the Court, relating to the trust fund.

9. Petitions presented, and affidavits filed, and rules entered, under the said Act, are to be entitled in the matter of the said Act, (11th and 12th Victoria, c. 68.) and in the matter of the particular trust.

MAZIERE BRADY, C.
T. B. C. SMITH, M. R.

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Hunt v. Hodges, P.P.
Booth v. Dublin, Dundrum, and Rathfarnham Railway Company, P.P.
Burke v. Killikelly, P. P. order pro Con.

Morgan v. Roe, P.P.
Duffy v. Mitchell, P.P.
Littledale v. Stratford, P.P. order pro Con.
Littledale v. Foxall, P.P. order pro Con.
Littledale v. Dwyer, P.P.
Banfield v. O'Shaughnessy, P.P.
Kelly v. Murphy, P.P. order pro Con.
Rainy v. Blake, R.M.
Bristow v. Bristow, P.P.
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den.

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Bunton.

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Campion.

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Walsh v. St. George.

AN ABRIDGMENT

OF THE

PUBLIC GENERAL STATUTES

PASSED IN THE 11 VIC. 1847.

An act to facilitate the Completion, in certain Cases, of
Public Works in Ireland. [30th December 1847.]

CAP. I.

Sec. 1. *Three or more Justices may, by Notice, convene a
Special Meeting of the Justices and Cess-payers
associated at the last Presentment Sessions held
under 6 & 7 W. 4. c. 116 Justices and Cess-pay-
ers present at such Meeting to constitute a Special
Presentment Sessions for the Purposes of
this Act.*

2. *Provisions of 6 & 7 W. 4. c. 116, to extend so far
as same are applicable, to Special Presentment
Sessions convened under this Act.*

3. *County surveyor to report to Special Presentment
Sessions held for any Barony or Half Barony the
Works for which Presentments and Advances have
been made under 9 & 10 Vict. c. 107, remaining
unfinished in the same. What such Report shall
contain.*

4. *Special Presentment Sessions to decide whether any
such Works ought or ought not to be completed
under the Provisions of this Act. If presentment
Sessions decide that such Works ought to be com-
pleted, County Surveyor to prepare Tenders, &c.*
5. *Special Presentment Sessions may make Present-
ments for completing Works to be raised by Instal-
ments off Barony, &c. wherein Works are situated.
Amount presented not to exceed a certain Amount.*
6. *Schedule of Works to be submitted to Lord Lieut-
enant for his sanction and approval, and the same
not to be undertaken under this Act without his
Consent.*
7. *Secretary of the Grand Jury to notify, by public
advertisement his readiness to receive Tenders for
the Execution of Works, and shall furnish Forms
for the same. Contents of Tenders, &c.*
8. *At adjourned Sessions Tenders to be opened and
Contract entered into with the Party making the
lowest Proposal. If no Tender or Proposal be
made, or approved of by Special Presentment
Sessions, the Work may be given in charge to
County Surveyor, who shall cause the same to be
executed.*
9. *Form of security.*
10. *Secretary of the Grand Jury shall keep a Book
with Particulars of Contracts; and shall prepare
Schedules.*
11. *Money for Completion of Works to be raised by
compulsory Payment.*
12. *County Treasurer may borrow Money on Security
of Presentment.*
13. *Advances may be paid to Contractor in certain
Cases not exceeding Three Fourths of the Cost
of Work.*
14. *County Surveyor when satisfied of the Completion
of the Work may grant his Certificate of approval
to the Contractor.*
15. *On production of such Certificates to the County
Treasurer he shall give a Draft for the Amount
thereof, 1 & 2 Vict. c. 53.*
16. *Secretary of Grand Jury in any Barony or Half
Barony where special presentment Sessions have
been held to convene a Special Presentment Ses-
sions for the County for Purposes of this Act.*
17. *How such Special Presentment Sessions for the
County shall be composed.*
18. *One Cess-payer for every Barony or Half Barony
to be associated with Justices of the County at
Special Presentment County Sessions. Proceed-
ings at Special County Presentment Sessions.*
19. *Five per Cent Interest to be allowed on all Sums
advanced by Treasurer or Bank under the Pro-
visions of this Act.*
20. *Definition of "County"*
21. *Definition of "Terms."*
22. *Act may be amended, &c.*

Whereas an Act was passed in the 9 & 10 Vict. to facili-
tate the Employment of the Labouring Poor, in the dis-
tressed Districts in Ireland: And whereas Presentment
Sessions have been held for certain baronies, half bar-
onies, counties of cities, and counties of towns in Ire-
land, and presentments have been made thereat under the
said recited act, and whereas the period for executing
works under the said Act has expired, and several of the
said works being unfinished, it is expedient that provision
should be made, for the completion of the same: Be it
enacted, that any three or more justices of the peace, not
being stipendiary magistrates, for any county in Ireland, may
by notice under their hands to be posted on the places ap-
pointed for posting notices of applications to presentment ses-
sions in the barony or half barony in which such works are
proposed to be completed, convene a special meeting of the
justices and cess-payers associated at the last special or pre-
sentment sessions held in such barony or half barony, under
the 6 & 7 W. 4. c. 116. and such meeting shall be held at the
place appointed for the holding of such sessions at the time
specified in such notice not been sooner than seven days from

the posting of such notice, and the secretary of the grand jury shall attend; and the justices and cess-payers, or so many of them as shall be present shall constitute a special presentment sessions for the purposes of this act: provided that before such meeting shall be convened the justices shall inquire from the county surveyor and determine the most convenient time for holding such meeting, having regard to the report to be made by such county surveyor, under the provisions herein-after contained.

2. That all the provisions contained in the 6 & 7 W. 4. c. 116, relative to the selection of a chairman, and to his powers, duties and authorities at presentment sessions, and to the powers, duties, and authorities of justices and cess-payers at presentment sessions, shall, extend to all sessions under this act, and to the proceedings thereat; and that the provisions contained in the said act relating to the declarations to be made by the justices and cess-payers who shall act at any presentment sessions, and to the powers, duties and authorities of the secretaries of grand juries, county surveyors, clerks of the crown, clerks of the peace, and all other officers shall as amended by the 7 W. 4. & 1 Vict. c. 2, extend to all proceedings under this act, as if the same were herein repeated and enacted, unless where other provisions are hereby substituted; provided that in any declaration to be made by any justice or cess-payer the title of this act shall be inserted together with the title of the 6 & 7 W. 4 c. 116.

3. That the county surveyor shall report to the presentment sessions the nature and description of any public works for which presentments have been made at any extraordinary presentment sessions held for such barony or half barony, and the expense of which, or any part thereof, shall be chargeable thereon, and in respect to which advances have been made by her Majesty's Treasury under the 9 & 10 Vic. c. 107, and which works, or any part thereof, still remain unfinished; and such report shall be prepared by such county surveyor with all possible expedition after the passing of this act, and shall contain a description of the said works, and the townland, barony, or half barony wherein the same are situate, and shall specify the amount which has been authorized by Her Majesty's treasury to be applied to such works under the said last-mentioned act, and the amount unexpended, and the expense of completing such works and the utility thereof, and the barony or half barony by which the expense of completing the same should be defrayed.

4. That at the special sessions held for any barony or half barony under this act the justices and cess-payers associated at such sessions shall take such report into consideration, and decide by a majority of votes on the merits of the works specified and whether the same ought or ought not to be completed, and whether wholly or in part, or conditionally in the event of the expense thereof not exceeding a certain sum, and what modification thereof may be proper; and if such justices and cess-payers approve thereof they shall direct the county surveyor to prepare a form of tender for the execution of the same, together with such specifications, maps &c. as may be necessary, expressing the nature and extent of such work, and in case the same shall be a public road, the quantity *per* perch and the description of the material proper in the execution of the same, and the term within which such work ought to be completed, and such other particulars as the said justices and cess-payers shall think fit, and such chairman shall endorse on such report the decision of the said justices and cess-payers, and sign his name thereto, and deliver such report, to the secretary of the grand jury, and such county surveyor shall deliver such forms of tender, specifications, &c. as soon as convenient to the secretary of the grand jury; and the said justices and cess-payers shall appoint the manner in which notice for the receipt of tenders and proposals for the execution of such works shall be given, and the period during which they shall be received, and shall adjourn such sessions until an early day, for the opening of such sealed tenders and proposals, not being later than thirty days from the day of adjournment.

5. That the justice or justices and cess-payers at any sessions held under this act are authorized to make presentments for the completion of such public works within the

barony or half barony for which such sessions shall be held, to be raised if they shall think fit, by instalments, not exceeding twenty, as the said justice or justices and cess-payers shall direct, with interest at five *per cent.* to be levied off the baronies or half baronies in which such works shall be situate, and chargeable therewith: provided that the amount to be presented shall not exceed the residue of the amount authorized to be applied to the execution of such works by Her Majesty's treasury under the first-recited act.

6. That the secretary of the grand jury for each county wherein special sessions have been held under this act shall cause to be made out, as soon as convenient, and shall sign, a schedule specifying each work approved and presented at any such sessions, and the sum presented, and shall transmit the same to the Lord Lieutenant for his sanction; and it shall be lawful for the said Lord Lieutenant, to signify to the secretary of the grand jury, by a certificate under the hand of the chief or under secretary, approval or disapproval of such works or any part thereof; and no work or part thereof so disapproved of shall be executed under this act.

7. That the secretary of the grand jury shall, upon being furnished by the county surveyor with the specification or form of tender for the execution of any work and the maps, plans, &c. belonging thereto, notify, by advertisement in such manner as the justices and cess-payers at such sessions shall direct his readiness to receive sealed tenders and proposals for the execution of any work during such period as shall have been appointed for the reception of the same, and the time to which such sessions has been adjourned for the opening of such tenders and proposals, and that forms thereof may be obtained at his office; and such secretary shall prepare a sufficient number of forms of tenders and proposals, and furnish to any person who shall demand the same a copy thereof, receiving therefor, the cost of preparing the same, not exceeding sixpence; and each of such sealed tenders and proposals shall contain a statement of the lowest sum for which the party is willing to contract for the performance of the work or works specified and described in such notification, with the name, description, and residence of the party so desirous to contract, and also the names, descriptions, and residences of two persons willing to be bound with him for the faithful performance of the said contract within the time and in the manner prescribed, in double the sum specified in such presentment; and all maps, plans, &c. relating to such work, shall be open to public inspection in the office of such secretary, without fee or reward.

8. That at the meeting of such adjourned sessions the secretary of the grand jury shall in court produce, duly numbered and arranged, and with the seals unbroken, all the tenders and proposals delivered to him, and shall open consecutively all those relating to the same work; and so soon as the lowest proposal for the performance of each work shall be ascertained the party making such proposal and his sureties shall be called, and if the said party and his sureties shall appear, and shall satisfy the justices and cess-payers of their sufficiency and ability to make good the penalty for the non-performance of such contract, and that such proposal has not been made for any unfair or fraudulent purpose, and shall enter into security for the performance of such contract, conditioned in such penalty as aforesaid, such proposal shall be accepted, and the party making the same shall be entitled to execute the work to which such proposal may refer unless there appear reason for rejecting it; but if the party making such proposal and his securities shall not appear, or shall fail to satisfy the justices and cess-payers at sessions in any of the particulars aforesaid, or shall decline to enter into security, or if the sessions shall see cause to reject it, then the proposal of the party making default shall be deemed null and void, and the next proposal shall be ascertained and dealt with in the same manner, and so on until the said security shall be entered into, and the contract completed: provided that if no proposal shall be made in respect of any work as so approved by the Lord Lieutenant within the time limited or if no proposal or tender shall be approved of by such sessions
(To be continued.)

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John Squire and others, Plaintiffs.
Charles Blake & others, Defendants.

PURSUANT to the decree in this cause, bearing date the 3rd day of July, 1848, I hereby require all persons having charges and incumbrances affecting the estates of the defendant, Charles Blake, situate in the Counties of Mayo and Galway, and County of the Town of Galway, in the pleadings in this cause mentioned, to come in before me, at my Chambers on the Inn's Quay, in the city of Dublin, on or before Thursday, the First day of February next, and prove the same, otherwise they will be precluded from the benefit of the said Decree.—Dated this 1st day of November, 1848.

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THE Irish Jurist

No. 2.—VOL. I.

NOVEMBER 11, 1848.

PRICE 9d.

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DUBLIN, NOVEMBER 11, 1848.

THE last Act in the Statute Book for last session—11 & 12 Vic. cap. 133, makes but little progress in the legislation which is necessary for the amendment of the whole system of laws relating to Savings' Banks, which requires thorough revision. We accept it, however, as a first instalment, deprecating that piecemeal legislation, which spreads in a detached and unsatisfactory shape the laws which regulate any particular subject, which should be combined in one comprehensive measure.

The late Act repeals so much of the 7 & 8 Vic. c. 83, s. 6, as exonerated Trustees or Managers from making good any deficiency, except they had in writing, deposited with the Commissioners for the reduction of the National Debt, declared their willingness to be liable, and, instead of this senseless provision, which made Trustees practically irresponsible—leaves it in the power of a Trustee or Manager to limit his liability to a specific amount, which must at least amount to £100. It provides also for the appointment of Auditors, but leaves untouched the pre-existing rights, or rather wrongs, and remedies—or no remedies, of depositors.

The history of these institutions is of modern origin. It was not till the year 1817 that the Legislature made any provision for Savings' Banks, although before that period there were four such institutions existing in Ireland.

By the 57 Geo. 3, c. 105, being an Act entitled, "an Act to encourage the establishment of Banks for Savings in Ireland," it was enacted amongst others, that the Commissioners for the reduction of the National Debt should be authorized to allow for the deposits of Savings' Banks an interest of £4. 11s 3d., per cent. per annum, and as the same Act contained no restrictions as to the amount of the investments by the depositors, who might have deposits in as many banks as they pleased, it was inevitable from the high rate of interest, and unre-

stricted liberty of investment that classes of persons became depositors, for whom the benefits of this Act of Parliament were never intended. To remedy this abuse, the 5th Geo. 4. c. 62, sec. 21, (being the next Act passed regarding Savings' Banks in Ireland,) enacted, "that from and after the 20th of November, 1824, it shall not be lawful for the Trustees of any Savings' Bank in England and Ireland respectively to receive from any one depositor any sum or sums exceeding £50 in the whole, during the year then next ensuing, or exceeding £30 in the whole, exclusive of interest in any one year afterwards nor to receive from any depositor any sum or sums whatever which shall make the sum to which such depositor shall be entitled to, exceed the sum of £200 in the whole, exclusive of interest." The 35th sec. of 9 Geo. 4, c. 92, (which is at present in operation,) makes it illegal for the Trustees to receive more than £30 in the whole, exclusive of compound interest, in any one year, or to receive any sum or sums of money whatever which shall make the sum to which such depositor shall be entitled exceed £150, provided that when the sum, standing in the name of the depositor, amounts to £200, no interest shall be payable.

The 27th sec. of the 9 Geo. 4, c. 92, extends the amount of deposits in favour of the Trustees or Treasurers of any charitable or provident institution in England or Ireland for the maintenance of the poor, to £100 per annum, provided the amount invested shall not at any time exceed £300, exclusive of interest.

With the view of giving to the depositors, (in case of any disputes arising between them and the Trustees,) an easy and expeditious remedy, for recovering their demands, without the expense and difficulty of sustaining actions in the superior courts, the 45th sec. of the same Act, (9th Geo. 4, c. 92,) enacts "that if any dispute shall arise between any such institution and any individual depositor therein, or any executor, administrator next of kin, or credi-

tor, then the matter shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the Trustee or Manager, and the other by the party with whom the dispute arose, and in case the arbitrators shall not agree, then such matter shall be referred in writing to the Barrister-at-law to be appointed by the said Commissioners as aforesaid, who shall receive a fee of not more than one guinea, and whatever award, order, or determination shall be made, shall be binding and conclusive against all parties, and shall be final to all intents and purposes without any appeal.

The 14th sec. of the 7th & 8th Vic. c. 83, (Aug. 1844,) takes away from depositors the power of appointing an arbitrator, and refers the matter in dispute directly to the Barrister, whose award is final as before; the Barrister under the last section has also the power of proceeding *ex parte* on notice in writing to the Trustees and Managers. It would appear from the 8th section, which invests all the property in the Trustee or Trustees of such institution for the time being, that the awards of the Barrister must be against the Trustees as Trustees, and that in no case can they be personally liable, except when the funds are misapplied. The cases of *Crisp v. Bunbury*, (8 Bing. 394,) and *Ring v. Midenhall Savings Bank*, (6 A. & Ell. 952,) have decided that the 45th section took away the jurisdiction of the courts of law, whilst *Cooke v. Courtown*, (6 Ir. Eq. Rep. 266) establishes that a suit in Equity cannot be maintained by a depositor against the Trustees, on the ground that arbitration as directed by the statute is the only mode of proceeding in case of disputes between the depositors and the Bank; the late Act makes no alteration in the manner of proceeding by depositors. In the case of *Cooke v. Lord Courtown*, the Bank had closed without paying the depositors, and it certainly appears very questionable whether the jurisdiction of a court of Equity was removed by the 45th sec. of 9 Geo. 4, c. 9. It appeared a very reasonable construction, that the arbitration clause only applied to cases where the institution was existing, and the dispute arose between the Trustees and an individual depositor, and not to cases where the Bank closed, and there was a complicated account to be taken. The question was raised on demurrer, and the case was never carried farther. It seems at variance with the spirit of our constitution that questions of such magnitude should be left to the adjudication of one individual, from whom there is no appeal, and there is an obvious defect springing from the arbitration system, that the acts do not give a summary mode of recovering the awards when decreed by the Barrister.

Before the depositor can be in any way benefitted by the award he must bring an action into the superior courts to recover the amount, and thus be harassed with the delay and expense, from which it was the object of the Legislature to free him. Chief Justice Tindal, in his judgment in *Crisp v. Bunbury*, after deciding that the remedy by action was taken away, and that by arbitration substituted, proceeds, "It is evident, I hope, that the Legislature contemplated the cheap, simple, easy and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of the more expensive, dilatory, and uncertain remedy by action

at law, and we think that we should defeat that very serviceable object, serviceable alike to the depositor and the institution, unless we construe the words, used, as words which import an obligation to refer, and take away the right to sue in the superior courts." We conceive the intentions of the Legislature, as declared by the learned judge, are not carried out, in the absence of a summary mode of enforcing the awards.

We think the appointment of auditors, given by the third section of the late Act, and their certificate as to the half-yearly inspection of the depositor's books, required by the fifth section, will be found to insure greater accuracy and correctness in the annual returns of the accounts to the Commissioners, than has yet been attained. Whilst the 46 sec. of the 9 Geo. 4, c. 92, merely require that the Trustees should annually cause a general statement to be prepared, shewing the balance or principal sum due to all the depositors *collectively*; the third sec. of the late Act enacts, "That Trustees of every Savings Bank shall cause the annual and other statements required to be transmitted under the Acts relating to Savings Banks, to be certified and verified by the auditor or auditors appointed by the said Trustees, in addition to the attestation by Trustees and Managers now required by the said Act, and shall also cause a certificate from the said auditor or auditors as to the result of his or their examination of such of the depositors books, as may have been produced to him or them for examination, to be transmitted with the said annual statement to the said Commissioners."

This last sec. must be taken along with the 5th which enacts, "That the rules of the Savings Banks in Ireland shall specify a number of days, not less than two, in every year, ending the 20th of Nov., on which the book of each depositor shall be produced at the office of the said Savings Bank, for the purpose of being inspected, examined and verified with the books of the institution by the auditor or auditors, and in case the said book shall not be produced on or before the last of the days mentioned in any one year ending as aforesaid, the said account shall be closed, and all interest shall cease to accrue on the sums deposited from the Saturday of the year in which the said books should have been so produced, in the case of any depositor who shall have received notice to produce his said book, and of any depositor in a Savings Bank, the rules of which provide for the production of deposit book once in each year. Provided, nevertheless, that the Trustees or Managers shall have the power to re-open the said account, but only to allow interest thereon from the time when the same shall be re-opened, unless the Trustees shall be satisfied that such depositor has been prevented by some sufficient cause from producing the deposit book at the time so specified, and an extract of this provision shall be enrolled as one of the rules of every Savings Bank."

If these provisions, which are entirely new, be faithfully carried out by the auditor or auditors, co-operating with the Trustees or Managers, it will be impossible for any deficiency in the funds to arise of more than one year's growth, without the knowledge of the Commissioners of the National Debt, who have power, under the 7th sec. to close the account,

and to discontinue any further account with the Trustees. A power, similar to that contained in the last-mentioned section, is given to the Commissioners under the 46th sec. of the 9th Geo. 4, c. 92, but though from recent investigations into the affairs of the Savings Banks, the deficiency in the funds have been found annually to have increased, they did not think it necessary to exercise this power. We believe, however, that the appointment of auditors will guarantee to the Commissioners an accurate annual statement of accounts for the future, and so enable them to form a correct judgment as to the affairs of the Banks. The expense attending the appointment of these officers need not be considerable, as the Trustees have the power of agreeing with the Trustees of any other Savings Bank, as to the appointment of a common auditor. In point of fact, one or two individuals could perform all the duties required by the Act of Parliament, while the advantage to the depositors of having responsible officers to examine into the affairs of the Banks, would go far to restore, in the minds of the industrious classes, depositing their savings in these institutions, that confidence which has been so much shaken by the recent stoppages.

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The Act to facilitate the sale of Incumbered Estates in Ireland, with an Introduction, Commentary, Forms, and Index, by Hamilton Smythe, Esq.
The Act to facilitate the sale of Incumbered Estates in Ireland, with a copious Index, Second Edition, with Forms, by William Macartney M'Cay, Solicitor.

We agree with Mr. Smythe that no Act of Parliament since the 3 & 4 Vic. c. 105, has been passed of such importance to Ireland as the Act for the sale of incumbered estates; within three weeks after it became law, Mr. M'Cay had published his work, which has already seen a second edition, and which contains a careful analysis of the measure, and a good index. Mr. Smythe has successfully followed the plan which he adopted in his former publication on Mr. Pigott's act, and in his introduction has given a succinct epitome of the late statute. We gladly avail ourselves of the assistance of a member of each profession in considering this very important measure, which cannot yet be said to be fairly in operation, the Chancellor and Master of the Rolls not having as yet published their General Orders "for better carrying the Act into effect." It cannot be doubted that facilities for the transfer of incumbered estates were desirable, and their necessity was precipitated by the recent famine, and the consequent pressure of an ill-adjusted Poor Law, which cast the burden of supporting poverty upon the embarrassed landlord, whilst the incumbrancer was exempt from contribution to the ruinous taxation, which weighed so unequally upon his debtor.

From various causes springing from the distress of the country, land in abundance will be thrown into the market. Let us examine the process by which it will be brought to the judicial hammer.

1st by sale under the order of the Court. The owner of an incumbered estate may contract out of Court, and apply afterwards for its approval of the contract, or may apply to the Court in the first in-

stance for a sale; an incumbrancer cannot contract except under the direction of the Court.

The proceedings are to be by petition. This is a very important change in the practice of courts of Equity, bills, answers, replications, proofs, first hearing and decree to account, are all swept away, and we are free to confess that in ordinary cases where no discovery on oath is required, the change is a salutary one, the proceeding by petition will be more inexpensive and more rapid; we by no means undervalue the advantage of obtaining an admission on oath, nor the power which a plaintiff possesses of "laying naked the heart of the defendant," but in all friendly suits—and the numerous short causes which are set down term after term, may be cited as instances—every step preliminary to going to the Master's office was a useless expense.

We are aware in making this statement, that in cases where cause is shewn against making an order of reference on the petition, it will be inconvenient to try the question on affidavits, but the exceptional cases will not counterbalance the benefit generally conferred on the suitor. The seventh section directs that the petition shall set forth the interest of the petitioner, and the uses, limitations, and trusts to which the land stands limited, and the incumbrances affecting it, and shall be verified as the Court shall direct.

We know not whether the new General Orders will direct, that the affidavit to verify the petition should state that the uses and trusts, incumbrances and charges set forth in the petition are the only ones affecting the lands, but we think it desirable this should be so, because thus, before any step is taken, due examination of the title will have been made, and an accurate knowledge acquired of the state of the property, and on both these points the Court will have perfect information, and random litigation will be checked. It would prevent the springing up of a practice similar to that of putting an imperfect bill on the file, requiring extensive amendments afterwards. Two courses could have been adopted—either a short statement of the petitioner's estate, or of the incumbrance, as the case may be,—and of the lands desired to be sold; or a complete one, setting out every limitation and incumbrance; the former would not satisfy the requisitions of the statute, and the latter will probably be found the most economical in the end; one of the objects for which the Chancellor and Master of the Rolls are empowered to make General Orders being in order that the proceedings "may be done," (the language is that of the statute, not ours,) "with the least cost." These Orders are to be laid before the Houses of Parliament within a specified period, but from the time of their being made are for all purposes to be deemed a General Rule and Order of the Court; by this means their operation will not be suspended until the next Session, nor does there appear to be any necessity for laying them before Parliament at all, the only reason for doing so would be, that they would thus become incorporated with the Act, and incapable of variation, which would be a disadvantage, and not designed in this case, as by the next section there is a power given to rescind, or alter them. Great additional labour will be thrown on

the Chancellor in reading petitions, but we do believe that to prevent the same ground from being travelled over again in the Master's office, the petition should be full and accurately prepared from negative searches verified by affidavit; with that petition, fiat, searches, and affidavit, the Master could at once proceed to take the accounts, and direct service to be made on every person interested, as stated in the petition; without these he will be at sea, and the charge—or statement of his case in the Master's office—of the petitioner will be, in point of fact, a bill transferred to a worse tribunal, where slovenliness of statement, and inaccuracy of pleading may flourish unchecked.

We assume that the order of reference has been made, and the petitioner fairly launched in the Master's office, and we believe that the Legislature gave themselves a great deal of unnecessary trouble in preparing the 10th section. It endeavours to set out in detail the various particulars which an order of reference may direct. This was unnecessary, and would have been better done by a few general words. Having disposed of the reference, it proceeds to confer powers upon Master and Court, and contains the following provision, to which Mr. Smythe has called our attention: "And for any of the purposes of this Act the said Court shall have power to compel the production before the Master of all deeds and other writings relating to any property in question, provided always that no incumbrancer or other person being in possession of any title deeds or writings, of or relating to any property, (and showing right to hold the same, as a security for a debt or charge,) or lien shall be compellable to produce the same, unless or until it shall have been ascertained by the report of the Master, that *the money to be produced* by the sale of the property, and applicable to the payment of such debt or charge will be sufficient to pay the same, but such incumbrancer or other person shall, on the order of the Court, furnish copies or extracts of any such deeds or writings."

We should be glad to have a key to the meaning of the Legislature; the foregoing extract is, to our comprehension, so obscure as to be unintelligible. Assuming that the words "or lien" should be included in the parenthesis, we venture to ask, how can the Master, in those cases, where there has been no contract for sale, ascertain whether the money to be produced by a sale will be sufficient to pay the possessor of the title deeds? it can only be a matter of speculation, and even supposing that he could, is there to be a separate report as to that fact by the Master before the production of title deeds can be compelled? and it is observable that it could not be even approximately ascertained until all the incumbrances were proved, and their priorities known, so that for no practical purpose could the deeds be obtained, except to hand over to the purchaser. Neither does this unfortunate section confer on the holder of the deeds, the benefit it was intended, for the Court has the power to compel the incumbrancer to furnish copies or abstracts, and if he be thus obliged to disclose his title-deeds, their value becomes a negative quantity, the petitioner obtains all the information he requires, and a condition of sale that the purchaser shall only require compared copies,

will bring the estate into market, without any imperative necessity for the original deeds.

The section was prepared in England, where the law of lien is of much more importance than in this country. Here it has been decided, that the lien of a solicitor, cannot prevail against an incumbrance created prior to the costs, being incurred, for which the lien is claimed *Smith v. Chichester*, (2 Dru. and War. 393), and it would appear that where the production is once enforced, the benefit of a solicitor's lien is lost, even against incumbrances, subsequent to the lien, *Blunden v. Desart* (2 Dru. and War. 405).

We had hoped in this article to have conducted the petitioner safely through the Master's Office, but the progress both to the suitor and writer is slower than we did, or the former may anticipate; we must reserve further discussion to a future number.

Court Papers.

EQUITY SITTING.—MICHAELMAS TERM.

Chancery.

NOVEMBER 9TH.—The following gentlemen were this day admitted to the degree of Barrister;—Mathew O'Reilly Dease, William Allen Walsh, James Christopher Kenny, John William Ellison, George Casement, Patrick Joseph Murray, Samuel Powell Purser, Edward Sullivan, Augustus Fitzgerald Whitestone, Edward Parkyns Levinge, John Henry Dowling, Maslars John Brady, Francis Fitz-Richard Orpen, Richard John Eaton, Robert William Shekleton, Henry Fitzgibbon, Charles Macnamara.

LIST OF CAUSES.

Newton v. Brennan, P.P.	Bennett v. Bernard, Re-H.P. to order.
Beirne v. Cooney, Ap.R.O.	Bennett v. Sargent, do.
Hamilton v. West, P.P.	Segerson v. O'Sullivan, P.P.
Murray v. Richardson, R. Ex. M.	Smithwick v. Smithwick, P.P. order pro Con.
Woodroffe v. Hamilton R. Ex. M.	Seaver v. Fivey, P.P.
O'Brien v. Villiers, B.A.P.P. order pro Con.	Seaver v. Fivey, P.P. for Dis.
Kent v. Hackett, R.Ex.M.	Vaughan v. Magill, Ap.R.O.
Doyle v. Callow, P.P.	Delap v. Hall, and other causes P.P.
Freel v. Trant, R.M.	Aylward v. Aylward, P.P.
Ward v. Rogers, P.P. order pro Con.	Ellis v. Ellis, P.P.
Colvan v. Gregg, P.P.	M'Carthy v. M'Carthy H.L. Order
White v. Villiers, R. M.	Sugrue v. Molloy, P.P.B.A. order pro Con.
Molony v. O'Brien, P.P.	Hedges v. O'Sullivan, P.P.B. A. pro Con.
Hamilton v. Hamilton, P.P. B.A. order pro Con.	Hunter v. Earl of Limerick, P.P. order pro Con.
Williams v. Armstrong, R.M.	Guinness v. Darley, P.P.
Jessop v. Clarke, P.P.	King v. Daly, P.P.
Bunton v. Lowney, P.P.R.M. under order Ex. B.A.	Cooney v. Holland, P.P.
M'Alpine v. St. George, P.P.	Casement v. Taggart, P.P. order pro Con.
Coote v. Whaley, P.P.	Stewart v. Marquis of Donegal R.Ex.M.
Hogg v. Garrett, R.Ex.M.	Roe v. Scott, P.P.
Purcell v. Buckley, R.Ex.M.	Connell v. O'Donnell, P.P.
Killikelly v. Dillon, P.P. for Dis.	Callaghan v. Blake, P.P. order pro Con.
O'Dowda v. O'Dowda, R.M.	Dudgeon v. O'Connell, P.P.
Carroll v. Hackett, P.P. order pro Con.	
Stokes v. Bateman, R.M.	
Harrison v. Mason, P.P.	

Potts v. Turnley R. Jud. C.
 Archbishop of Dublin v.
 Trimbleston, P.P.
 De Montmorency v. Crosbie,
 B.A order pro Con.
 Jones v. Bateman, R.M.B.A.
 Same v. Same, do.
 Earl of Limerick v. Hunter,
 P.P.
 Tredennick v. Fearon, P.P.
 order pro Con.

Ross v. O'Ferrall, P.P.
 Galway v. Graydon, P.P.B.
 A. order pro Con.
 Thunder v. Chambers, P.P.
 order pro Con.
 Bell v. Ahearns, P.P.
 Beresford v. Beresford, P.P.
 Downes v. Rochford, P.P.
 Warren v. Stubber, P.P.
 Kirwan v. Woodhouse, R.M.
 Darley v. Guinness, P.P.

(Continued from page 6.)

sions, it shall and may be lawful for the said sessions, to give such work to the county surveyor, with power to expend a sum not exceeding the maximum so approved as aforesaid; who shall cause such work to be executed, and account for the execution thereof to the grand jury at the following assizes.

9. That such security so to be entered into by contractors and their sureties shall be a recognizance to Her Majesty, her heirs and successors, and of like force, as other recognizance made to the Queen's Majesty, and at such adjourned sessions any justice present is authorized to take such recognizance, and the secretary of the grand jury shall prepare and come provided with same, so as to prevent delay; and the expense of preparing same, not exceeding sixpence, shall be defrayed by the party entering thereinto; and such recognizances shall be preserved in custody of such secretary until the condition thereof shall have been fulfilled, and shall then be delivered up to the contractor therein named, or to any person by him duly authorized.

10. That the secretary of the grand jury shall have charge of all contracts, and shall provide a book in which he shall insert an abstract of all such contracts, setting out the names of the contractors, and the particulars of each contract, and all contracts so entered shall be numbered, and every book shall have an alphabetical index referring to the number of each contract; and such secretary shall, as soon as may be, prepare schedules of all reports and certificates for works so contracted for, approved of, and presented, and cause the same to be printed and distributed in the manner he is by the 6 & 7 W. 4. c. 116, required to do with respect to applications approved of at Presentment Sessions, and shall immediately deliver all such reports of works to the clerk of the crown for the county to which the same shall relate, who shall preserve the same, and within seven days deliver to the treasurer of such county, without fee or reward, a copy thereof, attested upon oath, and signed by himself; and such treasurer shall return the same to the foreman of the grand jury, when they shall be first empanelled at the ensuing Spring Assizes; and all the powers, authorities, or provisions given in the said last-mentioned act in relation to works, or the execution of the same, and the levying the expense of the same, shall, as far as not inconsistent with this act, be applied to the works under this act, and the several forms in the schedule to the said last-mentioned act shall be applied, or altered, as occasion may require, in the several proceedings under this act.

11. That the secretary of the grand jury for each county upon receiving the certificate of approval of the Lord Lieutenant of any public works presented for under this act, shall lay before the grand jury, at the next assizes or presenting term, such certificate with a schedule under his hand, attested upon oath, of the presentments for the works so approved, by the Lord Lieutenant, and contracted for or given in charge to the surveyor, and also specifying the sums under this act to be raised for such works within such barony or half barony and the number and amount of instalments, in which such sum is to be raised, with interest as aforesaid; and every such grand jury, are hereby required, to present the sum or instalments, mentioned in such certificate of approval and schedule in the manner therein approved, to be raised off the baronies or half baronies, within which such works shall be situate: provided that if the grand jury shall fail to present the sum, or the instal-

ment, specified in any such certificate and schedule, the treasurer of such county is hereby required to insert such sum, or such omitted part, or such instalment, in his warrant for raising the monies presented at the same assizes, as if same had been presented by such grand jury to be raised off such barony or half barony, and the sum or instalment shall be raised accordingly, and in the case of sums to be so raised by instalments such treasurer shall in like manner, and without further presentment or authority insert a like instalment or sum in his warrant for raising the sums presented at each succeeding assizes, until the whole sum payable for each such work shall, with interest, be levied as aforesaid, and the same shall be levied accordingly; and the provisions of the 6 & 7 W. 4. c. 116, with reference to the raising, apportionment, collection, levy, or recovery of grand jury cess, and the payment of the same by the treasurer, shall, apply to all such sums of money so inserted in such warrant.

12. That the treasurer of any county in which presentment shall have been made for the completion of any work under this act, and approved by the Lord Lieutenant may borrow, upon security of the presentment, any sum not exceeding the amount approved for the purpose of completing any such work, with such interest thereon as shall be stated in the presentment; and if any person shall agree with the treasurer to advance the amount of such presentment, or of any instalment thereof, and shall pay the same into the bank with which the said treasurer has his public account, to the credit of the said account, the said treasurer may give a draft upon the said bank for the amount so advanced and which draft shall be countersigned by the clerk of the crown of the county, and shall be made payable to the payee or his order, with interest as aforesaid, at the assizes at which the said presentment ought to be paid under this act; and any sum advanced as aforesaid shall be applied by the said treasurer in like manner as the said presentment or instalment is directed to be applied under this act.

13. That in cases where the cost of executing any work shall exceed twenty pounds the justices or justice and cess-payers, at any such sessions, may authorize the treasurer of the county, out of any funds under his control, to advance to the contractor or county surveyor to whom such work shall be given in charge and presented under this act, upon his application, any sum not exceeding three fourths of the costs of such work: provided that no such advances shall be made unless such application shall be accompanied by a certificate signed by the county surveyor, that more than the sum applied for has been honestly expended upon the work.

14. That any person who may have contracted for the execution of any work under this act may, on the completion of the work if within 1848, give notice thereof by post, addressed to the county surveyor at his office, who shall, by himself or his assistants, within fifteen days from the receipt of such notice, examine the work so completed, and in case he shall be fully satisfied of the execution of such work, shall grant his certificate of approval to such contractor, which shall set forth the amount to be paid, and description and number of the contract on account of which payment is to be made.

15. That the treasurer of such county, upon the production of such certificate, shall give to the person entitled to such payment a draft for the amount which draft shall contain a specification of the purposes for which the same shall have been drawn, and of the person to whom payable, and when so signed it shall be the authority for the bankers in whose bank the county funds may be deposited to pay the amount thereof, any thing in the 1 & 2 Vict. c. 53, intituled *an act to amend an act of the last session of parliament, for providing more effectual means to account for public monies, and to secure the same to the contrary notwithstanding*, and such draft shall be as valid as any draft for the payment of money given under the said last-mentioned act; provided that after the expiration of 1848 the contractors shall make application for and receive payment subject to the provisions of the acts relating to the presentment of public monies by grand juries in Ireland.

16. 'And whereas it may be expedient to complete public works in certain baronies and half baronies in Ireland

'commenced under the said first-recited act, and which remain unfinished, although the amount authorised to be applied to the execution of such works by the commissioners of Her Majesty's treasury under the said act shall have been expended, or shall not be sufficient to complete such work;' the secretary of the grand jury of any county in *Ireland* in any barony or half barony of which a special presentment sessions shall have been held under this act, is hereby required, by notice to be posted at the usual places of posting public notices, to convene a special sessions for the county, to be holden in the county court house, for the purposes of this act, at the time specified in such notice, not being sooner than seven days from the posting such notice nor later than six weeks, after the first special presentment sessions shall have been held for any barony or half barony within such county under this act.

17. That every Justice for such county, not being a stipendiary magistrate, may attend and are hereby required to assemble, and with the cess-payers associated, as herein-after appointed, to hold such special sessions for the purposes of this act, at the said county court house, at the time specified in the said notice; and the secretary of the grand jury shall attend; and the said justices and cess-payers present shall constitute a special sessions for the purposes of this act; and the several provisions contained in the said act of the 6 & 7 W.4, c.116 relating to the selection of a chairman, and the powers, duties and authorities of such chairman and of justices and cess-payers at county presentment sessions, and relating to adjourned sessions for opening tenders and the making of contracts thereat, and relating to the declarations by the justices and cess-payers who shall act at any county presentment session, and also relating to the powers, duties, and authorities of the secretaries of grand juries, county surveyors, clerks of the crown, clerks of the peace, and all other officers shall, as amended by 7 W. 4 & 1 Vict. c. 2, as far as the same are applicable, or necessary for carrying out this act, and not inconsistent with such provisions, extend to all proceedings at the special sessions to be held under this act, as if the same were herein repeated and enacted, unless where other provisions are hereby substituted; provided that in any declaration by any such justice or cess-payer the title of this act shall be inserted together with the title of 6 & 7 W.4 c. 116.

18. That the justices and cess payers associated at each special presentment sessions for any barony or half barony under this act shall select one of the said cess-payers for every barony or half barony to be associated with the justices of the county as a member of the said special sessions, and the secretary of the grand jury shall make out a list of the persons so chosen at such special sessions and shall forthwith notify the same, and the day appointed for such special sessions, to them, and shall read out the list previous to the appointment of the chairman for the said sessions; and the secretary of the grand jury shall place before such sessions the reports made by the county surveyor to the special sessions held for any barony or half barony, or baronies or half baronies, within the county, as the same shall have been endorsed by the chairman thereof under this act; and the justices and cess-payers associated in the said special sessions shall take such reports into consideration as far as the same shall relate to works in respect of which no residue shall remain unexpended of the amount authorised by Her Majesty's treasury to be applied to the execution of the same, under the said first-recited act, or in respect of which the residue shall not be sufficient to complete such works, and shall decide with a majority of voices, on the merits of each of such works, and whether the same ought to be completed, and whether wholly or in part, or conditionally in the event of the expense thereof not exceeding a certain sum, and what modification thereof, may be proper and in case of their approval of the completion of any modification thereof, shall give directions respecting the forms of tender for the same; and all the powers, authorities, or provisions given or contained in this act in relation to works approved of wholly or in part at special sessions held for any barony or half barony, and the execution of the same and the approval of the same by the Lord Lieutenant, and in relation to presenting monies or raising or levying

monies presented for the execution of such works, and borrowing money on the security of such presentment, and making advances to contractors in respect of the same, and otherwise relating to such monies or such works, shall extend, as far as the same are applicable, to all works approved of wholly or in part at any such special presentment sessions held under this act.

19. And whereas by 1 Vic c. 54, it was enacted, that 'every treasurer then in office, shall have and receive the interest due on exchequer bills purchased from any balance standing to the credit of such treasurer's account, so that such interest does not exceed one half of the salary appertaining to his office; and whereas it is just that such treasurer, and that the bank which the grand jury shall have appointed for receiving the public monies of such county should be allowed interest on sums paid or advanced by such treasurer or bank under this act;' be it, &c. that the officer whom the Lord Lieutenant has authorized or may hereafter authorize to audit and declare the accounts of the treasurers of counties in *Ireland* under the last-mentioned act may and he is hereby required on being applied to by any treasurer entitled to receive interest under this said act, or if any bank having made any advance above the balance at the credit of such county, to ascertain the amount of interest at the rate of five per cent. which would be due to such treasurer or bank on the amount so advanced under Act, remaining unpaid, from the time which such money shall have been paid by the treasurer of such county or such bank until the same shall have been discharged, or until the first day of the assizes next succeeding such application, and to certify the same to the secretary of the grand jury, and it shall be lawful for any grand jury and they are hereby required to present to the said treasurer or bank such interest so due, which interest shall be paid to such treasurer or bank out of any balance in hand, and shall be raised and levied off the barony or half barony liable to pay such sums.

20. And be it enacted, that the word "county" shall include county of a city or county of a town; and that all the provisions of this act may extend and be applied to any county of a city or county of a town in *Ireland*.

21. And be it enacted, that the word "treasurer" shall, as to the county of *Dublin*, mean and include the "finance Committee," and the word "assizes" shall, as to the said county of *Dublin*, mean and include the "presenting term," and the word "county surveyor" shall, as to the said county of *Dublin*, mean and include the "district surveyor;" and that an act passed in the 7 & 8 Vict.c.106, shall, with reference to the raising applotting, levying, or recovering of grand jury cess, and to the powers for the execution of works, apply, as to the said county of *Dublin*, to sums of money to be presented, and the works to be executed under this act.

22. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. II.

1. Provisions of this Act to apply to any Part of *Ireland* specified in Proclamation issued by Lord Lieutenant, &c. and published in the *Dublin Gazette*. Power to Lord Lieutenant, &c. to revoke any Proclamation as to the whole or Part of the District named.
2. Copies of Proclamations and of abstract of this Act to be posted in proclaimed Districts.
3. Power to Lord Lieutenant to increase the Constabulary Force in proclaimed Districts, and to withdraw them from Time to Time.
4. Provisions of 6 & 7 W.4. c. 13, &c. to apply to the Constables appointed under this Act.
5. Power to Lord Lieutenant, &c., further to increase the Reserve Constabulary Force.
6. Expenses of Constables absent on Duty from their Residences under the Authority of this Act to be advanced out of the Consolidated Fund under Regulations of the Treasury.
7. Such advances to be repaid by the district in such proportions as the Lord Lieutenant shall direct.

8. Lord Lieutenant, &c. to cause estimates of expenses to be made from time to time, and to issue warrants to collectors acting under 6 & 7 W.4. c. 116. requiring them to collect the same. When proclamation shall have ceased to be in force, an account shall be made up by receiver as the Lord Lieutenant shall direct.
9. Penalty for unlawfully carrying arms within proclaimed districts.
10. Power to apprehend persons unlawfully carrying arms. Power to Justices, Constables, &c. to search persons suspected of carrying arms, and take away the same.
11. Power to Lord Lieutenant, by notice published in the Dublin Gazette, to require persons having arms in proclaimed districts to deposit them in a place named in such notice. Persons carrying arms to deposit them not deemed to be acting contrary to the provisions of this Act.
12. Punishment of persons knowingly having arms within proclaimed districts, after notice.
13. Power to Lord Lieutenant to issue warrant to search for and seize arms in proclaimed districts.
14. Powers of persons acting under such warrant.
15. Power to Lord Lieutenant to appoint persons to grant licences to carry or have Arms within proclaimed districts.
16. Power to justices and constables to call upon persons within proclaimed district to join in pursuit after offenders. Punishment of persons refusing.
17. Not necessary to prove the district to be in an insurrectionary state.
18. Accessories after the fact to any murder committed may be tried and punished, although the principals may not have been convicted or taken. No Person to be tried twice for the same offence.
19. Prisoners under sentence may be removed from one prison to another by order of the Lord Lieutenant.
20. No traverse of indictment allowed.
21. Production of Dublin Gazette to be evidence.
22. Duration of Act.
23. Act may be amended, &c.

An Act for the better prevention of crime and outrage in certain parts of Ireland until the 1st day of December 1849 and to the end of the then next session of parliament.

[30th December 1847.]

‘Whereas, in consequence of the prevalence of crime in parts of Ireland, it is necessary to make provision for the prevention thereof: be it enacted by the Queen’s, &c. that whenever, the Lord Lieutenant of Ireland shall deem it necessary, to prevent crime and outrage, it shall be lawful to and for the Lord Lieutenant to declare by proclamation, to be published in the “Dublin Gazette,” that from and after a day to be named in such proclamation this act shall apply to any county, county of a city, or county of a town, or any barony or baronies, half barony or half baronies, in any county at large, or any district of less extent than any barony or half barony, in Ireland: provided that it shall be lawful for the Lord Lieutenant to revoke any proclamation under this act, as to the whole or part of the district named in any such proclamation; and thereupon the original proclamation shall, from and after a day to be named in such new proclamation be revoked so far as such new proclamation shall purport to revoke the same.

2. That copies of every proclamation of this act shall be posted on the doors of all places of worship and of every police station within the district named in such proclamation, and at the foot of every such first mentioned proclamation so posted as aforesaid an abstract of this act shall be printed, for the information of all persons affected by the enactments herein contained.

3. That from the day named in any such first-mentioned proclamation it shall be lawful for the Lord Lieutenant during the period for which such proclamation shall be in force, to appoint so many additional sub-inspectors, head constables and other constables, and sub-constables, as he shall think proper, for any county, &c. provided that it shall be lawful for the Lord Lieutenant if he shall think proper, at

any time during the continuance of any proclamation, to withdraw the said sub-inspectors &c. so appointed from the district for which they shall have been so appointed.

4. That all and every the powers in the 6 & 7 W. 4. c. 13 shall extend and apply to the sub-inspectors, &c. appointed under this act.

5. That in addition to the number of sub-inspectors, &c. which by any former act the Lord Lieutenant is empowered to appoint a reserve force, it shall be lawful for the Lord Lieutenant to appoint two sub-inspectors, four head constables, and any number not exceeding two hundred additional constables and sub-constables, who shall be deemed to be a part of the said force, and shall be subject to all and every the provisions applicable to the said force under any act now in force.

6. That it shall and may be lawful to and for the lord high treasurer, or the commissioners of Her Majesty’s treasury, or any three or more of them, for the time being, to order that any such sum as he or they shall think proper shall from time to time be advanced out of the produce of the consolidated fund of the United Kingdom of Great Britain and Ireland, for the payment of the several salaries and allowances, and the purchase of arms, accoutrements, bridles, saddles, appointments, houses, outhouses, furniture, and accommodations, proper for the use of the constabulary to be appointed under this act, and also for all rents and taxes payable for such houses and for repairing all such houses and for the forage of such horses and for the expenses of Sub-inspectors, &c. when they shall be absent from their residences, under the authority of this act, and for all necessary costs, incurred in the execution of this act; and all money so issued shall be paid to the receiver of the constabulary force of Ireland, with such securities and under such rules as the said Lord High Treasurer, or Her Majesty’s Treasury, shall from time to time direct.

7. That whenever the Lord Lieutenant &c. shall appoint any such additional sub-inspectors, &c. for any County, &c. under this act such monies advanced out of the consolidated fund as shall be declared by the Lord Lieutenant to relate to such county &c. shall be levied and collected in the manner herein-after mentioned.

8. That whenever the Lord Lieutenant shall appoint any such additional sub-inspector, &c. for any county, &c. under this act, he shall cause an estimate to be made for the three months next after such appointment, and so from time to time for every successive three months during which such sub-inspector, &c. shall remain in such county, &c. of the expenses of such sub-inspector, &c. and the proportion thereof to be paid by each barony, &c. and when any such estimate shall have been made the Lord Lieutenant may issue his warrant, directed to the collectors appointed under the 6 & 7 W.4. c. 116. relating to the Grand Juries in Ireland, requiring such collectors to levy within their districts the sums mentioned in such warrants together with such fees as to the said Lord Lieutenant shall seem proper, not exceeding ninepence in the pound upon the sum to be levied; and every such collector is hereby required forthwith to levy the sums mentioned in his warrant in the manner mentioned in the said last recited act, and to pay over same to the receiver for the constabulary force of Ireland, to be by him applied as the lord high treasurer, or the commissioners of Her Majesty’s Treasury or any three of them, shall appoint; and every such warrant shall be in full force for two years after the date thereof, notwithstanding the death, resignation, or removal of the person to whom it was originally directed, unless the sums mentioned therein shall have been sooner levied and shall be put in execution by the collector appointing under the said last-recited act for the district mentioned in such warrant; and any security given by any collector or his securities for the execution of his duties under the said recited act shall extend to the provisions of this act: provided that whenever any proclamation shall cease to be in force an account shall be made up by the receiver for the constabulary of Ireland, of the expenses of such sub-inspector, &c. and if such expenses shall exceed the amount of the estimates such excess shall be raised by presentment off the county, &c. for which such estimate shall have been made, the amount being ascer-

tained and certified as directed by the 6&7.W.4 and if such expenses be less than the estimates all monies paid over to the receiver beyond the amount of such expenses, shall be repaid by him to the treasurer of the county to be retained to the credit of such district, and the amount shall be deducted from the next collection required 6 & 7 W.4.

9. And be it enacted, that from the day named in any proclamation, and during the time same shall be in force, it shall not be lawful for any person whomsoever (except justices of peace, persons in Her Majesty's naval or military service or in the coast guard, or revenue, or in the constabulary force of special constables, or persons licensed to kill game, or persons licensed under this act, to carry or have within the district specified in such proclamation, elsewhere than in his or her own dwelling house, any gun, pistol, &c. or any part of any gun, pistol, &c. or any sword, &c. or ammunition; and every person carrying or having any gun, or ammunition contrary to the provisions of this act, shall be guilty of a misdemeanor, and liable to be imprisoned with or without hard labour, for any term not exceeding two years.

10. That any person whomsoever may apprehend any person found carrying any gun, or part of any gun, pistol, &c. or ammunition, contrary to this act, and to deliver such person into the custody of a constable or peace officer, and it shall be lawful for any justice of the peace, constable, or peace officer to search any person whom he may suspect to be carrying or having any arms or ammunition, contrary to this Act, and to take same from such person for the use of Her Majesty.

11. That from the day named in any such proclamation it shall be lawful for the Lord Lieutenant by notice published in the "*Dublin Gazette*," and posted to require all persons not being justices of the peace (except justices of the peace, persons in Her Majesty's naval or military service in the coast guard or revenue, or in the constabulary force, or special constables, or persons licensed to kill game, or persons licensed under this act), within any county, &c. or other district named in any proclamation, on or before a day to be named in such notice to leave at a place therein named or at the nearest police station or barrack any arms, or ammunition, in his, her, or their possession; and all arms, and ammunition, left as aforesaid, shall be kept in safe custody until the Lord Lieutenant shall otherwise order, or such proclamation shall cease to be then restored to the owner in such manner as the said Lord Lieutenant shall direct: provided that no person carrying any arms or any ammunition, for the purpose only of depositing same as herein-before mentioned, shall be deemed a person carrying or having arms or ammunition, contrary to this act.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, November 11th, 1848.

THE Irish Jurist

No. 3.—Vol. I.

NOVEMBER 18, 1848.

PRICE 9d.

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DUBLIN, NOVEMBER 18, 1848.

THERE is no subject more vitally interesting to the Irish public, than the Irish poor laws. The cottier—separated by an almost infinitesimal distinction from the pauper, for whose support he is taxed—and the lord of the soil, alike feel heavily their burthen. The deliberate opinion of the select committee of the House of Lords appointed to inquire into their operation—so far as related to the rating of immediate lessors—that those laws called for a more extensive enquiry, warrants the expectation that they will undergo a revision during the next session of parliament; and meantime it is of great importance that public opinion should be directed to their defects. To assist in this desirable object, we shall investigate, seriatim, the working of the poor law, pointing out its defects, as well as the means by which (in our judgment) they might be remedied.

In this investigation we shall adopt the following order. We shall consider the working of the poor law—in the striking—in the levying—and in the spending of the rate; other important subjects—the area of taxation—the species of property exempt—and the inequalities in its pressure, will be discussed afterwards.

For the striking of a rate, there is requisite the valuation of the rateable property, and the construction of the rate books; under this head we shall also notice the subject of appeals.

Under the first poor law act, the occupying tenant was, in every instance, primarily liable, and hence in the original valuation, the holding of each occupying tenant was valued separately. This valuation (though the act provides for its being done satisfactorily) was made in a loose and inaccurate manner—the valuator arriving at the extent and value of each holding, either by estimation, or from the account obtained from the occupying tenants themselves; and upon this valuation

the original rate books were framed, and which were in the following form:—First, there was a column containing the common numerals, from one to the number of occupying tenants in the townland, frequently beyond 100; in another column were set down, opposite the numbers, the names of the occupying tenants; in a third, that of the immediate lessor; in another, the supposed acreable extent of each tenant's holding; and in another its supposed value. When the law was altered, by which the immediate lessor became primarily liable for all holdings where their value did not exceed £4, the rate books were altered by omitting the names of the occupying tenants for those small holdings, and generally all names for which owners could not be found—thus rendering the immediate lessors liable in all these cases; and this (except that some few alterations have been made from time to time on appeal) is the present state of the rate books.

The books thus framed are open, at specified times, to the inspection of all persons concerned; and here the ratepayer may learn that he is liable in a certain townland to certain numbers (51, or 87, or 100) in the rate book, as the case may be; but what particular holdings these numbers refer to, he has no means of ascertaining.

The rate payer, if he believes himself overcharged, may appeal. To effect this he must give fourteen days notice to the clerk of the Guardians, and to every other person concerned in the event of the appeal—those will be the immediate lessor or lessors, whoever they may be, and all the occupying tenants of the townland. He must besides enter into personal recognizances that he will prosecute the appeal at the next Quarter Sessions. It must be observed that his time for appeal is very limited, for if a Quarter Session take place one month after the striking of the rate, he must then appeal or not at all; and, considering that the rate books are not exhibited for inspection for some time after the rate is struck, and that the appellant must give

fourteen days notice to a great variety of parties, he will find it very difficult to comply with the requisites; besides, the justices and assistant-barrister are precluded from inquiring into any cases, or with respect to any person or persons other than those mentioned and specified in the notice, so that this notice must be very special; and in a thickly tenanted townland, or one in which the rights of property are complicated, (as where properties are held in common or in coparcenery), may be very voluminous.

But the appellant has still further difficulties to contend with from the loose way in which the rate books are constructed. As before observed, he can only learn from the rate book that he is chargeable for certain numbers in a townland, but he cannot learn from it what particular portion of the townland that number refers to. In the case of an occupying tenant, he may be able to satisfy the Assistant Barrister that he does not hold more than a certain quantity of land, and that it is not of more than a certain value; but in the case of an immediate lessor, he has nothing tangible—all he knows is, that he is held liable for particular numbers in the rate book, and the rate collector, or any other officer, can give him no information as to what particular holdings those numbers refer; he can only adopt a sort of exhausting process, fixing as many of the occupying tenants as he can with liability, and to a certain amount; and thus establishing that he is liable only to the balance of the rate due on the whole townland. This process in appealing clearly imposes on the Assistant Barrister and justices the duties which should have been discharged by a valuator.

There is another considerable inconvenience to the appellant, arising from the fact that Quarter Sessions are not held four times a year in all Quarter Sessions towns. Strange as it sounds, in some Quarter Sessions towns they are only held once in a year, and hence the appellant is frequently obliged to attend, with his witnesses, at a distant place, and of course, at a considerable expense;—when the great size of some of the Quarter Sessions districts is remembered, this will be admitted to be no small grievance. To attend the next Quarter Sessions, as required by the act, an appellant would sometimes be obliged to undertake a journey of 60 miles, which, with waiting his turn, and returning 60 miles, would detain him, and perhaps several witnesses a week or ten days from home.

It seems monstrously absurd, that in the same country two land-taxes should be based on separate and independant valuations, the one (for the county-tax, and which is far the lighter,) conducted with the most mathematical accuracy as to extent, and scientific investigation as to value; the other, (for the poor-rate,) conducted in a loose and slovenly manner, and admittedly most unsatisfactory. The townland sheets of the ordnance survey and their valuation by the same department, afford the most complete and beautiful basis for a system of taxation that can be conceived; and if the valutors under the poor-law only annexed the townland sheets of the ordnance-survey to the rate-books, exhibiting on each townland the several holdings into which

it is divided, having each holding numbered, and having corresponding numbers in the rate-books, and submitted the townland sheets, so divided and numbered, with the rate-books, for the inspection of the rate-payers—most of the difficulty adverted to would be got rid of at once, all disputes as to the valuation of holdings would be settled by a valuator, and if an appeal were still necessary, much of the difficulty would be removed, both as to the evidence, which should be produced, and as to the parties who should be noticed.

By giving the appeal to the next Quarter Sessions which might take place in the town nearest to the appellant, provided it were not within two months of the striking of the rate, waiving the necessity of recognizances to prosecute the appeal, guarding against those that were frivolous, by giving costs against the appellant, and attaching the townland sheets of the ordnance survey, exhibiting the separate holdings, numbered as above—to the rate-books, and submitting them together to the inspection of the rate-payers, would present nothing objectionable in this department of the poor-law—extending the time for appealing could not injure the guardians, as they could levy the tax notwithstanding the appeal.

WE this week continue our examination of the act for the sale of encumbered estates, and proceed to the discussion of the provisions for the practical working of the measure in the Master's office. The 11th section directs that the proceedings now in force in suits for foreclosure, or for sale of estates for payment of incumbrances, shall apply, where applicable, to proceedings under this act, and enacts that all persons who shall become parties to proceedings even "by attending before the Master in the course of such proceedings, or by otherwise concurring in any such proceedings," and their representatives shall be subject to the jurisdiction of the court and Master.

It would seem that appearing before the Master is considered concurring in the proceedings, at least we collect this from the use of the words "attending before the Master, or otherwise concurring;" so that the object of the party appearing is immaterial, his attendance will be sufficient to bind him; where this result is apprehended, the safer course will be to lodge a caveat with the registrar, as directed by the 17th sec. by which means the caveator will have notice of every proceeding, and yet not be bound by voluntary submission to the Master. The 12th section provides for taking objections to the Master's report, and contains the following important paragraph, "that proceedings shall not abate, nor be suspended by any death, transmission, or change of interest, except so far as it shall be deemed necessary for carrying on of any such proceedings that any person not before the court shall have notice of, or be required to attend such proceedings." The object of this section is to dispense with the necessity for bills of revivor in case of death, and bills of supplement in case of transmission of interest, but the act leaves undefined the mode by which the

proceedings are to be continued. There must be some machinery to bring such parties before the court. Let us take for example the instance of a petitioner becoming bankrupt before a report of the Master, how are the proceedings to be continued? The 32d section of the 5 & 6 W. 4, c. 55, s. 32, familiarly known as the sheriff's act, directed that no proceeding in the matter of any petition (under which a receiver had been appointed) should determine by the death of any of the parties in such matter, but that the court might make an order for continuing such proceedings; and, in such cases where the respondent, the judgment debtor—who is not mere tenant for life, in which instance the court stands neuter, and allows the remainderman to enter without an order discharging the receiver—dies, it becomes necessary to obtain an order of the court to continue the proceedings, by serving his executor and heir at law, *Brady v. Fitzgibbon*, (7 I. E. R. 1); *Cloncurry v. Piars*, (9 I. E. R. 407); but in proceedings under the act, the subject of our consideration, a mere order or notice will not be sufficient, there must in most cases be some pleading to bring the new parties properly before the court, either in the shape of a supplemental or amended petition; and, until this proceeding take place, we do not well understand how the petition can be proceeded with. We presume some provision will be made for all cases of abatement by the general orders, for the 13th section, which gives the court power to make an order on the application of any person interested in carrying on the proceedings—though analogous to the provision we have cited from the 5 & 6 W. 4—does not remove the difficulty in practice, more especially where the abatement is occasioned by the death of the petitioner, and it is the interest of the opposite parties that the proceedings should be dismissed.

The 14th and 15th sections regulate the number and nature of advertisements, and guard against the proceedings being vitiated by any error in any advertisement, except the court shall so direct.

The 16th is an important section. It provides that the Master, before proceeding with the inquiries directed by any reference, and from time to time, under such reference, shall cause notice to be given to all persons who shall appear to him to have any interest in any of the subjects of inquiry; and, that all notices may be served out of the jurisdiction of the court, and that the court may have the power to direct substitution of service, and further, that the court, in the case of any person who shall be served and shall not appear, may, by motion of course, make an order that such incumbrancer or person shall be bound by the proceedings as if he had been a party thereto, provided that he shall not be excluded from sharing in the proceeds of the sale.

We can hardly forbear a murmur of regret, when we reflect upon the numerous motions of course which thus will be lost to the Junior bar and their heirs for ever by this section; and we certainly claim credit for our disinterestedness in praising this measure. We had seen with comparative composure, the extinction of bills, and friendly answers, but it requires the full exercise of our patriotism and philosophy to see "motions of course"

swept away; they were associated, in our mind, with no trouble, on the contrary, they are dear to most of our early bar recollections, as connected with our first rising at the Rolls, they were provocative of the first sounds our legal lips were heard to utter, they are entwined with the memory of our first fees, as the friendly solicitor puts the guinea and the brief into our hand. "Motion to serve party out of jurisdiction, suit relating to lands."

Supremam lachrymam da, memoremque mei.

It will be seen, this section gives extensive powers to the Master, and transfers almost the entire conduct of the proceedings under this act to his office; under the old system, and the 115th general order, we believe it was the practice of the Masters to serve motions on parties in cause or matter out of the jurisdiction, but in those instances, the parties were previously before the court; the 10th and 16th sections of the late act for the first time gives them power to have notices served in any part of the world, on persons not previously before the court. We presume the general orders will direct in ordinary cases who are to be served, for example, where the father tenant for life files the petition, the first tenant in tail being an infant, some one in his behalf should have notice and be his guardian, *ad litem*, the 35th section applies, only to sales out of court, in which case the father is empowered to apply to the court, which may direct notice to be served on some person to act for the infant, but no provision is made for sales under the order of the court, except that by the 64th section, the court is empowered to, in certain cases, appoint a guardian for an infant, for the purpose of any proceeding under the act.

The 21st section involves a new and rather dangerous principle, that when any incumbrance shall be subject to any limitations of estate or interest, or shall be held upon any trusts, the first person entitled to the income of such incumbrance, or the trustee, or other person whom the court may think fit, shall be the person to make any application, or give any consent under this act in respect of such incumbrance. In the case of consents, unless the court impose some strong checks upon the tenant for life, the interests of those in remainder, where an incumbrance is the subject of settlements are not sufficiently protected.

We have in a former article expressed our approval of the 22nd section, which enables persons entitled to unredeemable charges, to accept a gross sum, by way of compensation, and enables the Master to sell the lands discharged of those charges, or, with the consent of parties interested in part not desired to be sold, to approve of that part being exclusively charged with such incumbrance in exoneration of the rest, or, with such consent as aforesaid, to approve of such incumbrance being apportioned between sold and unsold portions, and either of these latter measures the Master is empowered to take without the consent of the party entitled to the unredeemable charge. This section also gives power to the court, on special application, to direct a sale before all the accounts are taken, or incumbrances ascertained.

The 23rd section, regulates the manner of filing reports and other proceedings, and limits the time for

taking objections to the former, and enacts that the court may upon the application of any person interested, and without the attendance of counsel, unless the court shall see fit to direct such attendance, confirm the report and direct a sale. Mr. Smythe remarks justly, that "the latter part of this section exhibits a want of meaning and jealousy of lawyers equally worthy of a lack learning parliament." The order of the court must be made on *application*, if by petition, that proceeding will be more expensive than by motion made by counsel. Either the report should stand confirmed without further order, or if application be necessary, as the act has made it, such application should be made by counsel, who stand, as it were, between the court and the suitor. They possess the confidence of the former, and are entrusted with the interest of the latter. Thus public business can be despatched with speed and safety; the judge, relying on the statement of counsel, can dispose of fifty reports in a day, whereas if he be obliged to make flats on the several petitions, and read the reports of the Master, there will be an enormously increased amount of labour unnecessarily thrown upon him, and without any saving to the suitor.

The 27th section demands our most anxious consideration. It enacts that the form of assurance shall be such as the Master shall direct—whose execution alone shall be necessary for its validity—and directs that it shall be effectual to pass the land thereby expressed to be conveyed discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever, of her Majesty her heirs and successors, and of all other persons whomsoever. The exceptions are: the rights of any lessee, tenant, or occupier in possession, and the rights of any lessee, or under-lessee at a rent, to whose lease or under-lease the incumbrance or owner was subject—right of common—right of way, or other easement—rent-charge—crown rent and quit rent.

Does, then, the court of Chancery warrant title? Has the purchaser nothing more to do than pay his money and get the Master's signature to the deed of conveyance? Has the transfer of real estate become so simplified that no abstract and no searches will be required by a purchaser?

These are grave questions.

Mr. Smythe is of opinion, and we concur with him, that the saving "of the rights of any lessee or under-lessee subject to whose lease or under-lease the petitioning owner or incumbrancer shall be an owner or incumbrancer," will render abstracts of title and registry searches necessary, because the purchaser must know, and can only know by a registry search, what leases are in existence; and from this follows, as a necessary corollary, that he must know who were the lessors, and their title to make leases. The main question, however, still remains as to title and incumbrances; must the former be deduced, or the latter be shewn to be discharged? or can the purchaser, with the assurance under the act, executed by the Master, and without another document, acquire an indefeasible estate against the whole world? Can he rely upon this charter deed for all purposes whatsoever, both of attack and defence? With this single weapon can he

maintain or defend an ejectment, and will the court of Chancery relieve him even from the necessity of seeing that the proceedings under the act are regular? If this statute will do this, every lawyer will concede that it has effected the greatest revolution in the law of real property of modern times.

A new terminus, from which titles to the lands of this country can start, will be established without a clog, without a speck; and the title to ten thousand a year may be comprised in a deed not a skin of parchment long.

We feel this to be a question of extreme difficulty, and whether our opinion arises from caution, or that the change comes upon us in too startling a shape, we know not, but we incline to think that the court does not warrant title.

The act nowhere expressly exempts a purchaser from seeing to the regularity of the proceedings; and, if he is obliged to do that—as he would be, under the present system of judicial sales—he must have an abstract, and must see that every one having a claim is bound. Yet, though the court does not warrant title, it confers one that will be good against the world, provided the requisitions of the act have been complied with, but it throws the burden of inquiry upon the buyer.

We have dwelt—with perhaps too tedious minuteness—upon the sections of the act which relate to sales under the order of the court of Chancery; we have done so because we believe that this portion of it only will come into practical operation. We view the measure through neither an exaggerated nor a diminished medium. The legislature has done much; it has lessened the expense of judicial sales, and given an owner of a limited estate the power to procure them; but a great deal of the utility and efficiency of the statute will depend on the General Orders, which both professions are expecting with anxiety.

(Continued from page 16.)

12. That every person who, after the day named in such last-mentioned notice shall knowingly have in his possession any arms or ammunition, contrary to this act, shall be guilty of a misdemeanor, and liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

13. That from the day named in any such notice the Lord Lieutenant may by warrant direct a search to be made in any county, &c. named in any such notice or in any house or place within the same at any time whilst such proclamation shall be in force, for any arms or ammunition which any person shall have contrary to this act; and all arms and ammunition found, shall be forfeited for the use of Her Majesty.

14. That any county or sub-inspector to whom any such warrant shall be directed, and all constables, &c. acting in their aid may within twenty-one days after the date of such warrant, including the day of the date thereof, enter into any house or place at any time between sunrise and sunset, to execute such warrant and in case admittance be refused or shall not be obtained within a reasonable time after demanded, enter by force into such house or place to execute such warrant.

15. That the Lord Lieutenant may appoint persons to grant, at their discretion, &c. licences in the form (A.) in the schedule to this act contained, to any persons to have in his own dwelling house only or licences in the form (B.) in the schedule to this act contained to carry and have with-

in the district named in any such, &c. or ammunition; provided that the said Lord Lieutenant, by order, may at any time revoke any licence and after the publication of such order in the "*Dublin Gazette*" the Licence therein mentioned shall cease and a copy of every such order shall, within four days after the making thereof, be delivered to or left at the place of abode of every person whose licence shall be revoked thereby.

16. That from the day named in any such proclamation, if there shall be any murder or any attempt to murder, or if any justice of the peace or any constable or peace officer shall have reasonable ground for believing that any murder has been committed, or any attempt to commit murder, in any county, &c. named in any such proclamation, any justice of the peace, constable, &c. may give notice to any male person between the ages of sixteen and sixty, residing or being within such county, &c. that search and pursuit is to be made to apprehend the offenders and may call upon, and thereupon it shall be the duty of every such person to join in such search and pursuit, and to assist in apprehending such offender; and every such person refusing, shall be guilty of a misdemeanor, and be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

17. That whilst any Proclamation shall be in force, and upon any trial or proceeding under the said last-recited Acts or this Act, it shall not be necessary to prove that the district in which any offence against the said last-recited Acts, or this Act, was committed, was at the time of commission thereof in a state of general disturbance or insurrectionary movement, or that any such offence or the circumstances attending the same, was of an insurrectionary character.

18. And from the day named in any such Proclamation every accessory after the fact to any murder or attempt to murder in any proclaimed district, may be indicted and convicted together with, or after the principal offender, or may be indicted and convicted of a substantive felony, whether the principal offender shall or not have been previously convicted, or shall or not be amenable to justice, and may, howsoever indicted, be punished in the same manner as any accessory after the fact to the same offence may be punished: provided that no such person who shall be once duly tried, as an accessory after the fact or for a substantive felony, shall be again tried for the same offence.

19. That from the day named in and during all the time any such proclamation shall be in force, the Lord Lieutenant may direct that any person imprisoned in any gaol, &c. in any district proclaimed, under sentence of transportation or imprisonment, may be removed to such other gaol, &c. in Ireland as to the said Lord Lieutenant shall seem fit, to remain till he be transported, or shall have served the term of imprisonment, or be otherwise discharged by due course of law; and every person so removed, shall be considered in the proper legal custody during the time of such removal, and while in the place to which he shall be so removed, in like manner if he had continued in his original place of confinement; and the maintenance of such prisoners in the place to which they shall be so removed shall be paid by the county from which they shall be so removed, as same were paid before such removal; and the expenses of such removal shall be charged on the county, &c. from which such persons shall have been removed, and shall be paid for as provided by 1 and 2 Vict. c. 6.

20. That any person prosecuted by indictment for any offence against this Act committed within such proclaimed district shall plead to such indictment, and the trial shall proceed, at any special commission, assizes, or sessions of the peace for the county wherein such offence shall have been committed next after such person shall have been committed for trial or held to bail, or if such offence be committed after the commencement of such special commission, assizes, &c., then at the same special commission, assizes, &c., unless the court shall otherwise direct.

21. That the production of the "*Dublin Gazette*," purporting to be printed by the Queen's printers, containing the publication of any proclamation, warrant, or notice under this act, shall be conclusive evidence, in all courts of

justice in Ireland, of all facts necessary to authorize the issuing of any such proclamation, warrant, order, or notice; and every such proclamation, &c., shall be deemed to have been issued in conformity with this act.

22. That this act shall be in force until the thirty-first day of December one thousand eight hundred and forty-nine, and from thence until the end of the then next session of parliament.

23. That this Act may be amended or repealed by any act to be passed in this session of parliament.

SCHEDULE to which the foregoing Act refers.

(A.)

Form of licence to have Arms, &c. in a dwelling house only.

I A.B., having been duly appointed in that behalf under an Act passed in the eleventh year of the reign of her Majesty Queen Victoria, intituled "An Act for the better prevention of crime and outrage in certain parts of Ireland until the first day of December, one thousand eight hundred and forty-nine, and to the end of the then next session of parliament," do hereby grant to C.D. of [here insert the name, description, and place of residence,] a licence to have in his [or her] dwelling house, situate at and not elsewhere, one gun [or other Arm or Arms or ammunition, as the case may be]. Dated this day of 184

(Signed) A. B.

(B.)

Form of licence to carry and have Arms, &c. in proclaimed districts.

I A.B., having been duly appointed in that behalf under an act passed in the eleventh year of the reign of her majesty Queen Victoria, intituled "An act for the better prevention of crime and outrage in certain parts of Ireland until the first day of December one thousand eight hundred and forty-nine, and to the end of the then next session of parliament," do hereby grant to C.D. of [here insert the name, description, and place of residence,] a licence to carry and have one gun [or other arm or arms or ammunition, as the case may be,] within the county [county of the city, county of the town, barony, half barony or other district, as the case may be,] of Dated this day of 184

(Signed) A. B.

CAP. III.

An act to give further time for making certain railways.
[20th December, 1847.]

- Sec. 1. *Railway Companies may apply to Commissioners of Railways for extension of time for purchase of lands, &c.*
2. *Commissioners may require Company to give notice of application by advertisement in the Gazette.*
3. *Commissioners of railways, by warrant under their seal, may, upon proof that notice has been given, enlarge the time for the completion of purchases and works.*
4. *Acts mentioned or referred to in such warrants to be construed with reference to the same.*
5. *Not to revive expired powers. Existing contracts and notices to take lands to be construed as if this Act had not passed.*
6. *Notices of warrants being granted to be published in the Gazette.*
7. *Parties aggrieved by extension of time being granted may have compensation for additional damage.*
8. *Contracts for new works not to be entered into for a limited period, except in certain cases.*
9. *Mode of ascertaining consent of Shareholders to the making of contracts for new works.*
10. *Certificate of the Chairman of Company, countersigned by the Secretary, to be evidence of consent.*
11. *Act may be amended, &c.*

'Whereas acts of parliament have been passed for making railways, and in them periods of time are limited within which only the powers granted for making the railways, or for the compulsory purchase of the lands re-

'ferred to, can be lawfully exercised. And whereas it is expedient that in certain cases further time be granted for the purposes aforesaid; that if any railway company, or person authorised by any act, to construct a railway, &c. or to purchase lands for such purpose, may, at any time within two months after the passing of this act, make application, in writing, to the commissioners of railways, setting forth what extension of time is desired, and to what part of the railway, or the works or lands connected therewith, the same is to apply, and the grounds of such application.

2. That if it appear to the said commissioners that there are sufficient grounds for such application, they shall require the company, or person making the same, to give notice of such application having been made, by advertisement, in form approved of by the said commissioners, once in the *London, Edinburgh, or Dublin Gazette*, accordingly as such railway or works or lands are in *England, Scotland, or Ireland*, and once in each of three successive weeks in some newspaper published or circulating in each county in which any part of such railway or works or lands is situated, and affixed for three successive *Sundays* on the principal outer door of the church of every parish in which same is situated; and such notice shall set forth within what time and in what manner any person aggrieved by any such extension of time, and who desires to object, may bring such objections before the commissioners.

3. That upon proof that such notice has been duly given, and after the time appointed for bringing objections before the commissioners, and after considering same, if any brought before them, the commissioners may, by warrant under their seal, and signed by two or more of them, extend the period allowed by any act, for the completion of such railway or works, or for the compulsory purchase of lands for such further time as they think fit, not exceeding two years from the periods allowed by such act, either as to the whole of such railway or works, and the lands required for same, or as to so much as shall be specified thereof in such warrant.

4. That when any warrant is granted by the commissioners, the act authorising the construction of the railway, &c. referred to, shall be construed as if the extended period had been the period within which the powers of such act might be exercised, for the construction of such railway, &c., instead of the periods mentioned in such act.

5. That this act shall not revive powers expired before such application, and shall not affect any contract or agreement entered into before the passing of this act; and this act, or any warrant thereunder, shall not authorise any extension of the time allowed for the purchase of the lands comprised or mentioned in such contract or notice; and same shall be construed and take effect as if this act had not passed.

6. That within one month after the day any warrant is granted by the said commissioners, they shall cause notice thereof to be inserted in the *London, Edinburgh, or Dublin Gazette*, accordingly as the railway, &c. mentioned therein, is in *England, Scotland, or Ireland*.

7. That whenever any such warrant shall have been granted by the justices, arbitrators, &c. who under the provisions of such act shall award the compensation to be made to the owners or occupiers, &c. of lands taken for the purposes of such railway, shall make compensation for the additional damage (if any) sustained by such extension of time.

8. That no railway company who had not before the 27th November, 1847, executed or entered into any contract for the execution of any part of the works authorized by the act of such company, shall within twelve months after the passing of this act enter into any contract for the execution of any works for the first time authorized by such Act, except contracts for the construction of part of any railway substituted by way of deviation, or in lieu of other works authorized by some previous Act, and also contracts for the construction of such works as shall be authorized by consent of the holders of three-fifths of the shares of such company, signified within the time and in the manner hereinafter mentioned, or authorized by an order of the Commissioners of railways published in the *London, Edinburgh, or Dublin*

Gazette, according as the works are situated in *England, Scotland, or Ireland*; and all contracts entered into in contravention of this enactment shall be void.

9. That to ascertain such consent, a general meeting of the shareholders of such company shall be held within six weeks after the passing of this Act, of which notice shall be given as adopted for advertising the extraordinary general meetings of such company; and a circular letter shall be sent by post to each of the shareholders to his known address, describing the portion or line of works proposed to be executed, and stating that a meeting of the shareholders will be held as mentioned in such circular, to determine whether a contract for executing such works shall be entered into within the twelve months next after the passing of this Act, and requesting such shareholder to signify his assent or dissent from same, according to a form contained in such letter, to the effect set forth in the schedule hereto; and shall request such shareholder to return such form, signed or to attend such meeting and deliver same to the chairman; and at the meeting the chairman shall cast up the number of shares held by shareholders assenting to such contract, and dissenting therefrom, and shall publicly announce the number of shares of the shareholders assenting to such contract, and those dissenting, and state whether the holders of three-fifths of such shares consent to such contract: and in computing the number of shares of shareholders assenting or dissenting no share shall be taken into account the holder whereof shall not have paid all the calls then due upon the shares held by him.

10. That a certificate under the hand of the chairman, and countersigned by the secretary of the company, stating that such meeting has been duly held, and such letter sent, and such consent given, shall, within one week after such meeting, be deposited in the office of the Commissioners of Railways; and such certificate, or a copy thereof, certified under the seal of the Commissioners shall be evidence in all courts, and before all justices and others, that such consent was duly given within the time aforesaid.

11. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this session of Parliament.

SCHEDULE referred to by the foregoing Act.

(1) Name of Railway.	(1) Name of Shareholder.	(1) No. of Shares or Amount of Stock held by him.	(1) Works pro- posed to be constructed for.	(2) Whether assenting or dissenting.

(1) The Secretary will insert these particulars.

(2) In this column the Shareholder will write the word "assenting" or "dissenting," as the case may be, and sign his name thereunder.

CAP. IV.

An act to apply the sum of eight millions out of the Consolidated Fund to the service of the year one thousand eight hundred and forty-eight.

[7th March, 1848.]

CAP. V.

An act to suspend for five years the operation of certain parts of an act of the tenth year of her present Majesty, for making further provision for the government of the New Zealand Islands; and to make other provision in lieu thereof.

[7th March, 1848.]

CAP. VI.

An act to make further provision for one year, and to the end of the then next session of Parliament, for the carriage of passengers by sea to North America.

[28th March, 1848.]

1. No ship carrying passengers allowed to take more than a limited number, according to space and tonnage.
2. Two children under a certain age to be computed as one passenger.
3. No ship carrying a certain number of passengers to proceed on her voyage without a ship's cook.

4. *Ships carrying passengers to have a duly qualified surgeon on board, else number to be limited.*
5. *When limited, how children to be calculated.*
6. *Qualification of Surgeon.*
7. *No ship to proceed, until the Medicine Chest and Passengers have been inspected by a Medical Practitioner. Remuneration of medical practitioner. If no medical practitioner can be obtained, ship may proceed by permission of emigration officer.*
8. *Passengers affected with diseases may be re-landed. Penalty on Master wilfully proceeding on voyage with diseased persons on board.*
9. *Passengers so re-landed entitled to recover passage money by summary process before two justices.*
10. *Her Majesty may issue orders in council prescribing rules, &c. for preserving order, &c. on board vessels. Evidence of orders, &c.*
11. *Surgeon or Master to exact obedience to rules and regulations.*
12. *Penalty for refusing to observe rules and regulations.*
13. *Colonial Land and Emigration Commissioners to prepare an abstract of acts and orders in council. Such abstract to be posted up in each ship. Penalty on Master for neglect; and on person defacing abstract.*
14. *How penalties to be recovered.*
15. *Bond required by first recited act to be security for observance of provisions of secondly recited act and this act.*
16. *Duties of Emigration officer may be performed by his assistant.*
17. *Interpretation of act.*
18. *Exemption of ships carrying less than one passenger to 25 tons. In certain actions as to ships carrying passengers, burden of proof to lie on defendant.*
19. *Short title of act.*
20. *Continuance of act.*
21. *Act may be amended, &c.*

Whereas it is expedient to alter certain provisions of the 5 & 6 Vic. c. 107, intituled *An Act for regulating the Carriage of Passengers in Merchant Vessels*, and of 10 & 11 Vic. c. 103, intituled *An Act to amend the Passengers Act, and to make further provision for the Carriage of Passengers by Sea*: Be it therefore enacted, That no ship carrying passengers from any place in the United Kingdom, or in the Islands of Guernsey, Jersey, Alderney, Sark, or Man, to any place on the Eastern Coast of North America, or in the islands adjacent, or in the Gulf of Mexico, shall carry more passengers than in the proportion of one passenger to every two tons of the registered tonnage of such ship; and that no such ship shall carry more passengers on board than one passenger for every twelve clear superficial feet, or on the orlop deck, one passenger for every thirty superficial feet; and if any ship shall carry any person beyond such proportions, the master of the ship shall, in respect of every person constituting such excess, be liable to a penalty not exceeding five pounds sterling.

2. That in computing the proportions, two children, under the age of fourteen years, shall be computed as one person, and children under the age of one year shall not be included.

3. That no ship carrying one hundred passengers, shall proceed on her voyage without a cook approved by the emigration officer at the port of clearance, nor unless a convenient place shall have been set apart, and apparatus provided for cooking to the satisfaction of the said officer: and if any ship shall proceed on her voyage without same, the master shall be liable to a penalty not exceeding fifty pounds.

4. That any such ship shall have on board a surgeon duly qualified, or such ship shall not carry more passengers on the deck upon which the passengers live than in the proportion of one passenger to every fourteen superficial feet.

5. That in the calculation of such proportion every child above the age of one year shall be computed as one passenger.

6. That every such surgeon shall be duly qualified to practice in the United Kingdom as physician, surgeon or apothecary, and not to be objected to by the said emigration officer.

7. That, except as hereinafter provided, no ship shall

proceed on any such voyage, until the surgeon or some medical practitioner, appointed by the said emigration officer, shall have inspected the medicine chest of the ship, and the passengers, and shall certify to the said officer that the ship contains a sufficient supply of medicines, instruments, and other things requisite for the medical treatment of the passengers during the voyage, and that none of the passengers appear likely, by reason of any disease, to endanger the health of the persons on board: provided that the master, owner, &c. of every ship so inspected shall pay to such practitioner a sum not exceeding twenty shillings for every hundred passengers: provided that in case it shall be impossible to obtain the attendance of such medical practitioner, the master may proceed, on receiving from the said officer written permission.

8. That in case any such surgeon or medical Practitioner shall notify to the Emigration officer at the original port of Clearance, or any other port in the United Kingdom into which the vessel may subsequently put, or in case the said officer shall be otherwise satisfied, that any person likely to endanger the health of the other persons on board, such officer may re-land such person, and his family, and the Master who shall wilfully proceed with any such person on board shall be liable to a penalty not exceeding fifty pounds.

9. That any person so re-landed, or the emigration officer on his behalf may recover by process, before two Justices of the peace, as in the said first-recited act is provided in the cases of monies thereby made recoverable, the whole of the monies which shall have been paid by him or them, or on his or their account, for his or their passage in such ship, from the party to whom the same may have been paid, or from the owner, Charterer, or Master of such ship.

10. That Her Majesty, by any order or orders in council may prescribe such rules and regulations as may seem fit for preserving order, and for securing cleanliness and ventilation, on board British ships proceeding on such voyage, and the said rules and regulations in like manner may alter, amend, and revoke; and that such order in council in the *London Gazette*, or printed by the Queen's printer, shall be received in all legal proceedings as sufficient evidence of the making and contents of such order.

11. That in every British ship the surgeon, or in ships not having a surgeon on board, the master may exact obedience to all such rules and regulations as aforesaid; under the penalties herein-after provided.

12. That any person who shall neglect or refuse to obey any such rule or regulation, or who shall obstruct the Master or surgeon of such ship in the execution of any duty imposed upon him by such rule or regulation, shall pay a penalty not exceeding two pounds sterling; and the Justices of the peace in any part of her majesty's dominions, before whom any person shall be convicted of such obstruction or resistance as aforesaid, may order such person, in addition to the penalty before mentioned, to be confined for any period not exceeding one month.

13. That the said Colonial Land and Emigration commissioners shall prepare an abstract of the whole or part of this and of the recited acts, and of any order in council made as aforesaid; and that six copies of the abstract, with two copies of this and of the said acts, shall be delivered by the Collector or Comptroller of the Customs of the port of Clearance to the master of every ship carrying passengers on such voyage; and that such master shall, so long as any passenger be entitled to remain in the ship, keep posted, in two places between the decks of the said ship, copies of such abstract, and shall be liable to a penalty not exceeding forty shillings sterling for every day such abstract shall fail to be so posted; and any person defacing such abstract shall be liable to a penalty not exceeding forty shillings sterling.

14. That penalties imposed by this act shall be recovered in such manner, as in the said first-recited act.

15. That the bond required by the said first-recited act, to be given to Her Majesty in respect of ships carrying more than fifty passengers shall be a security, not only for the matters and payments in the said act, but also for the observance of the provisions as well of the said secondly-recited act, as of this act, and of any regulations prescribed

by any order in council, and for the due payment by the Master of such vessel of all penalties adjudged by virtue of the said secondly-recited act, or of this act.

16. That all powers and duties imposed upon the Emigration officer before mentioned, may be performed by his assistant, or, at ports where there shall be no such officer, by the officer of the Customs whose duty it may be to grant a clearance to such ship.

17. That term "passenger" shall not include passengers commonly known by the name of cabin passengers; and the term "ship" shall include every sea-going vessel; and the term "Master" shall include any person being in command of such vessel; and that, unless there be something in the subject matter, or context repugnant to such construction, every word importing the singular number, or the masculine gender only shall be construed to include several persons, matters, or things, as well as one person, matter, or thing, and females as well as males.

18. Provided always, that nothing in this act shall apply to any ship in which the number of passengers shall not bear to the registered tonnage a greater proportion than one to every twenty-five tons: provided also, that if in any action, prosecution, or other legal proceeding under this act, any question shall arise whether any ship carrying passengers, did or did not carry a greater number of passengers than aforesaid in proportion to the tonnage, the burden of proving that the number of passengers in proportion to the tonnage was not greater than that of one person to every twenty-five tons shall lie upon the person against whom any such action, prosecution, or other legal proceeding may be brought; and, failing such proof, it shall, for any such purpose as aforesaid, be taken and adjudged that the number of passengers so carried did exceed that proportion.

19. That in all proceedings it shall be sufficient to cite this act by the title of "The North American passengers Act."

20. That this act shall remain in force for one year from the passing, and from thence to the end of the then next session of Parliament.

21. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

(To be continued.)

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The First Meeting of the Members of this Society will be held in their Rooms, No. 45, MOLESWORTH STREET, on SATURDAY NEXT, the 25th inst. Chair to be taken at Eight o'Clock precisely.

SUBJECT FOR DEBATE.

Will a Writ of Error lie upon a judgment entered up under Section 1 of "the Interpleader Act," (1st and 2nd Wm. 4, cap. 56), on a feigned issue directed under that act?

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JOHN NORWOOD, Esq. 11, Nelson Street.

IN CHANCERY.

John Squire and others, Plaintiffs, }
Pursuant to the decree in this cause, bearing date the 3rd day of July, Charles Blake & others, Defendants, I hereby require all persons having charges and incumbrances affecting the estates of the defendant, Charles Blake, situate in the counties of Mayo and Galway, and county of the town of Galway, in the pleadings in this cause mentioned, to come in before me, at my chambers on the Inn's Quay, in the city of Dublin, on or before Thursday, the 1st day of February next, and prove the same, otherwise they will be precluded from the benefit of the said decree.—Dated this 1st day of November, 1842.

EDWARD LITTON, Dwyer and McKay, Plaintiffs' Solicitors, 5, Kildare-street, Dublin.

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TERMS OF SUBSCRIPTION.—(payable in advance):

Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, November 18th, 1842.

THE Irish Jurist

No. 4.—Vol. I.

NOVEMBER 25, 1848.

Price {Per Annum, £1 10s.
Sin. le Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, NOVEMBER 25, 1848.

THE cases of Boddington and Langford, and Kelly and Bonyng, (1 Ir. Jur. 3.) lay down the principle broadly, that, under no circumstances whatsoever, can a receiver purchase an interest, present or future, vested or contingent, in the estate over which he has been appointed. And if the former case—which goes further than any ever yet reported—be law, his purchase will be set aside at the instance of a creditor not a party in the suit at the time the purchase was made.

The principle could not by possibility be tested more favourably for the purchasers than in the cases cited, for in both there was neither fraud, suppression, nor concealment. Vendor and vendee dealt at arm's length; there was no evidence of undervalue, they were simply instances of bargains, which, on the doctrine of chances, might or might not turn out to be good.

Boddington v. Langford has not been reported, but we are enabled to give the facts correctly.

The property of the late Lord Langford, being the subject of several Chancery suits, and much embarrassed; shortly after his death Lady Langford—who derived no income from her jointure, the rents of the estate being absorbed in the payment of the interest of prior incumbrances—sold it, and the arrears of an annuity to which she was entitled, during the life of her husband, to the receiver for an annuity, payable quarterly, with a condition that if any gale were unpaid thirty days after the appointed time, she should have the power to rescind the sale, and resume her original rights against the estate. There was no proof, that, at the time of the purchase Mr. Boddington—an incumbrancer *puisse* to the jointure—was a party in any one of the causes in which the receiver had been appointed. In the year 1840 the bill was filed by Boddington, and subsequently revived by his executors, for a general administration of Lord Lang-

ford's real and personal estate, and prayed that the receiver might only be declared entitled to such sums as he had actually advanced. The fairness of the transaction was never questioned. When the cause came to a hearing, the Chancellor, Sir Edward Sugden, felt the difficulty of making a decree at the instance of a third party, and the cause stood over to give Lady Langford the option of setting aside the purchase, if so advised; this she declined to do—an excellent test of her being satisfied with her contract—and in the following term the purchase was set aside, the plaintiff undertaking to take the place of the receiver in paying Lady Langford, and to indemnify him against any demand by her, and of course on the further terms of the receiver being paid the amount actually advanced by him.

The estates have not yet been sold, nor has one shilling ever been received out of the rents in respect of the jointure.

Thus, if ever there was a case in which more than justice was done to the creditor, and less than justice to the receiver, it was that which we have stated; and, if that decision be followed, it is not possible to conceive any instance in which a purchase by a receiver can stand; and the rule will be inflexibly established, with even more strictness than that which exists between trustee and *cestui que trust*, for though the rule is absolute whilst that relationship subsists, yet it is open to the *cestui que trust*, and to him only, to set aside a purchase by the trustee. In the case under consideration, Lady Langford did not seek relief, nor did the inheritor, but it was granted to a third party, between whom and the receiver no fiduciary character existed, and who thus acquired an advantage for which he never contracted, inasmuch as he lent his money subject to the jointure. Its being extinguished, and the value of the estate thereby enhanced, was an accident which could never have been matter of his legitimate calculation. In every previous case that we have met, such purchases

have been set aside at the instance of those with whom the confidential character had been created, or who had a direct interest in the subject matter of sale. For example, where creditors had a lien upon the subject of sale, here there was none; there they were to be paid out of the fund to be realized by the estate on which they were incumbrancers, the value of which was undetermined, and might fluctuate according to the efforts made to depreciate it, here into whosoever hands the jointure passed, the value of the estate on which it was charged remained unaltered.

Kelly and Bonyng stands on plainer, and, to our judgment, on more solid grounds; there the application was made by the inheritor, and it is quite right that if an agent during his employment—and, as must be presumed from the facilities afforded by his office—makes a beneficial purchase, the benefit ought to redound to the principal. Whether the purchase be of a vested or contingent, present or remote interest, and even though the receiver runs all the risk, and the moment the speculation turns out to be profitable—as in the case of a reversionary interest, which, by death, soon falls into possession—the principal demands and procures the benefit.

We may, however, conclude that the later authorities have now established that a receiver, as a public officer, as well as on other grounds, is disqualified, without leave of the court, from buying any interest in the property over which he has been appointed, and that this rule scarcely admits of an exception. The purchase can always be set aside on the terms of repaying the amount advanced with interest, provided the application be made in time. And this principle applies to purchases by solicitors, agents, or counsel, so long as the relation subsists, whether the purchase be either of incumbrances affecting the estate of their employer, or of the estate itself, the client not being the vendor. *Austin v. Chambers*, (6 Cl. & Fin. 1); *Carter & Palmer*, (8 Ib. 657). In either of the instances put they might enter into competition with the owner; but it is not a little singular that a counsel or solicitor is not debarred from dealing directly with a client, even whilst the connection subsists. Purchases in all such cases are looked upon with the utmost jealousy, and, if there be a tinge of fraud, will be set aside; but they are not as strongly prohibited as in the case of trustee and *cestui que trust*, *Champion v. Rigby*, (9 Law Journal, N. S. 211, Ch.) There is no incapacity to contract, but the rule, as stated by Sir E. Sugden, is, that the "relation must be in some way dissolved, or, if not, the parties must be put so much at arm's length that they agree to take the character of purchaser and vendor, and you must examine whether all the duties of those characters have been performed." The result being that you can purchase an estate from a client, but you cannot purchase the estate of a client who is not the vendor.

We have been favoured by Mr. Napier with a copy of his judgment in the case of *Pilsworth v. Grand Canal Company*, and it contains an elaborate disquisition on an important branch of the law, we give it our readers.

In this case I am of opinion that the plaintiff is entitled to compensation from the defendants, for the damage sustained by the sinking of his boat in the Canal Harbour of Moyvalley. The material facts of the case, as I understand them, and as I consider them established on the evidence, are these. On the night in question the plaintiff's boat had arrived at the harbour of Moyvalley, shortly before the arrival of the packet boat; and after touching at the Moyvalley side, so as to give facility to one of the persons on board to hand out oats for the purpose of feeding the horses engaged in drawing the boat, the persons on board pushed the boat with poles across towards the opposite side of the canal, within a few yards of another boat, which was moored close to the opposite bank, in which position the plaintiff's boat was, when the packet boat entered the harbour or station. It appears that the plaintiff's boat had no light, nor was there a horn on board, which might have been sounded. Between the plaintiff's boat and the Moyvalley side of the harbour, an open space of nearly 30 feet was left—the whole breadth at this place being about 67 feet; the packet boat was making for the centre of the arch of the bridge below Moyvalley, and so was moving nearly in the middle of the canal. The night appears to have been dark or foggy, and the packet boat had approached very close to the plaintiff's boat, before the latter was observed; the driver of the horses of the packet boat first observed the boat of the plaintiff, and called out "mind your hand," which, it appears, is the customary signal when any boat is seen in advance at night, and is a notification to the steersman of the packet boat that the course of the packet boat is to be changed. About the same time it would appear the captain of the packet boat called out to the steersman "starboard," which order it was his duty to obey; but the steersman being at the time on the starboard side of the tiller, put the helm the opposite way, by which the course of the packet boat, instead of being averted from, was directed towards the plaintiff's boat; a collision took place, and the plaintiff's boat went down. According to strict propriety, the plaintiff's boat should either have been moored close at the opposite bank, or at least provided with a light, and a horn to sound; and the packet boat should have kept near to the track line bank, that side being the proper side for the packet to stop at, or to pass along, in the event of overtaking any other boat on the canal.

The strict rule seems to have been frequently departed from, as well by the packet boat as by carrier boats; and on the occasion in question it seems to me that both boats were out of place, and neither properly managed; for the plaintiff's boat should (if not moored) have been provided with a light and horn, and the packet boat, on entering the harbour, should have kept near to the bank on the Moyvalley side, and the person at the helm should have been ready to obey, and have promptly obeyed any order of the captain. The disobedience of the order given by the captain was a breach of duty, and it was plainly so considered by the captain, as well as by the defendants, who have since dismissed the steersman. I, therefore, think



the liability of the defendants for the loss occasioned by the breach of duty on the part of their servant, has been established, unless it can be successfully contended that the plaintiff has disentitled himself to recover, by reason of his servants having improperly had his boat in the centre of the canal, without light or horn, and so contributed to the consequence which has resulted from the collision.

It is to be observed that the injury is not the result of any act of the plaintiff or his servants *immediately producing it*, but, on the contrary, the act of the servant of the defendants has *directly* occasioned the collision. And this is important to notice, because I think that it will be found, on examining the decisions on the subject, that the *onus* is cast on the party by whose act the loss *directly* happens, to establish satisfactorily that the damage so occasioned by his act, could not, by the exercise of ordinary care and prudence on his part, have been prevented. In this case, I think, the *onus* of proof lay on the defendants, as in the case *Cotterill v. Starkey*, (8 Car. & P. 691); and I do not find that there is any of the servants of the Company, who were present at the time of the collision, who has ventured to depose on his oath that the collision would not have been avoided, if the captain's order had been obeyed. All, but the captain, admit, that in their opinion it would, in that case, have been avoided—the captain will not say it would not; and unless possibility is to be substituted for moral certainty, I do not see how I can decide against the claim of the plaintiff.

Upon a careful examination of the cases on this subject, it appears to me, that if from default, or want of proper care or caution, on the part of the injured party, he has substantially contributed to the *immediate and proximate* cause of the injury, he must be taken to be the author of his own wrong, which he shall not be allowed to apportion for his own benefit and advantage; but if his negligence or default has merely facilitated the infliction of the injury, without directly contributing to the immediate cause of it, I think it is no bar to compensation for a loss occasioned by the want of due and proper care on the part of the defendant, and which loss, in reference to its immediate and proximate cause, is to be considered as the wrong of the defendant, and not of the plaintiff. But in this latter case, the negligence or default of the injured party *may perhaps* be an element in considering the damages which the plaintiff may be entitled to recover.

It is not, at first sight, easy to reconcile the opinions and *dicta* to be found in the cases which have been cited. The case of *Flower v. Adam*, (2 Taunton, 314), is an authority to shew that the immediate and proximate cause of the injury is what is to be considered in fixing liability, and this case furnishes an explanation which reconciles most of the decisions on the subject. That a person sustaining injury, when on the wrong side of the road, has a right of action, is fully established by *Clay v. Wood*, (5 Espinasse, 44), where Lord Ellenborough held "that the circumstance of the person being on the wrong side of the road, was not sufficient to discharge the defendant; for though a person might be on his wrong side of the road, if the road was

of sufficient breadth, so that there was full and ample room for the party to pass, he was of opinion he was bound to take that course which would carry him clear of the person who was on his wrong side, and that if any injury happened, by running against such person, he would be answerable."

The case of *Lynch v. Durdin*, (4 Perry & Davison, 672), is also a strong authority to shew that it does not necessarily constitute a defence, to establish that the plaintiff by his own improvidence or misconduct, has, to some extent, occasioned the loss of which he complains. The rule appears correctly stated by Lord Abinger, in the case of *Davies v. Mann*, (10 Meeson & Welsby, 548), in which a plaintiff recovered damages for an injury done to a donkey, which he had improperly left fettered on a public road, but which was run over by the defendant, from want of proper care on his part, in going along the road with a waggon. These authorities establish that it is material, first to consider the act which *immediately* causes the injury. If that act is the result of the defendant's want of caution, and to be attributed to his default, he is liable; but if the party injured has, by any default on his part, at the time, made himself a participator in the *very act* which *directly* causes the injury, he cannot recover; such participation, however, is distinct from, and not to be confounded with mere culpable neglect or impropriety, in being in a position which may expose the party to injury, and which may conduce to the loss he suffers, though it does not directly occasion that loss, or justify the act of the defendant, by which it is occasioned, to the extent of affording him a complete defence.

This view of the law is fully sustained by considering how the defence would be available in an action of trespass. Where a defendant pleads specially to justify the trespass, as occasioned by inevitable accident, he must shew himself to be wholly free from blame, Com. Dig. Battery A. (2 vol. Ham. Ed. 272); *Wakeman v. Robinson*, (8 B. Moore, 63.) But if the defence be founded on the alleged wrongful conduct of the plaintiff, I apprehend such can only be available where it has rendered the trespass unavoidable, by due and reasonable precaution on the part of the defendant, or has formed such an *integral* part of the *injurious act*, as to make it impracticable to ascribe the damage which has resulted, to the conduct of the one party more than to that of the other. The plaintiff, in such a case, as Baron Parke observes, is the author of his own wrong—at least he cannot say with certainty that he is not, but another is; and such I hold to be the true result of the several decided cases, when considered with reference to those fixed principles which are never to be merged in casual dicta arising out of peculiar facts.

Some *Nisi Prius* cases have been referred to, which I do not feel it incumbent to notice in detail, nor do I conceive that in any one of them, when considered in reference to its material facts, would there be found a real conflict with the conclusion at which I have arrived.

That conclusion is the result of a careful consideration of the evidence given, and a strict analysis of the decided cases, bearing on the question of liability; and although I feel a real distrust of my

own opinion, when I find it opposed to the conclusion at which Mr. Fitzgibbon and Mr. Sproule have arrived, I am not the less bound to state that opinion explicitly.

I have signed the award, considering myself formally bound to act on the opinion of the majority; but the above reasons satisfied my own mind that the plaintiff had a right to recover.

N.B.—The difference between the arbitrators, was on the inference to be deduced from the evidence—namely, whether obedience to the order of the captain would have saved the collision. Mr. Sproule agreed with the view of the law which I took, but differed on the question of fact.

The case was argued before us by Mr. Henn and Mr. F. Fitzgerald.

Court Papers.

Queen's Bench.

10th November, 1848.—It is ordered that from and after this day, no order be given for liberty to lodge money in court to the credit of the cause, after plea pleaded, without the special order of the Court, or a Judge, upon application for that purpose.

(Continued from page 24.)

CAP. VII.

An Act to amend an act for consolidating the Queen's Bench, Fleet, and Marshalsea prison, and for regulating the Queen's prison. [28th March, 1848.]

CAP. VIII.

An Act to continue for Three Years the Duties on Profits arising from Property, Professions, Trades and Offices. [13th April, 1848.]

CAP. IX.

An Act to continue for Three Years the Stamp Duties granted by an Act of the Fifth and Sixth Years of Her present Majesty, to assimilate the Stamp Duties in Great Britain and Ireland, and to make regulations for collecting and managing the same. [13th April, 1848.]

CAP. X.

An Act for empowering certain Officers of the High Court of Chancery to administer Oaths and take Declarations and Affirmations. [13th April, 1848.]

CAP. XI.

An Act for punishing Mutiny and Desertion, and for the better payment of the Army and their Quarters. [22d April, 1848.]

CAP. XII.

An act for the better security of the crown and government of the united kingdom. [22d April, 1848.]

Sec. 1. *After passing of this act, provisions of 36 Geo. 3, c. 7, and 57 Geo. 3, c. 6, repealed, except as to offences against the person of the Sovereign.*

2. *So much of 36 Geo. 3, c. 7, made perpetual by 57 Geo. 3, c. 6, as is not repealed, extended to Ireland.*

3. *Offences declared felonies by this Act to be punishable by Transportation or Imprisonment.*

4. *Time within which prosecution shall be commenced, Warrant issued, &c.*

5. *In Indictments more than one overt act may be charged.*

6. *Nothing herein to affect provisions of 25 Ed. 3, c. 2.*

7. *Indictments for Felony under this Act valid, though the Facts may amount to Treason.*

8. *As to the punishment of Accessories before and after the Fact.*

9. *Felonies under this Act in Scotland not bailable, except as provided by 5 & 6 W. 4, c. 73. Trial to take place in Terms of Act of Scottish Parliament of 1701.*

10. *No Costs allowed in Prosecutions under this Act.*

11. *Act may be amended, &c.*

Whereas by an act passed in the 36 G. 3, c. 7. an Act for the safety and preservation of his Majesty's person and government against treasonable and seditious practices, it was enacted, that if any person, after the passing of that act, during the life of his said Majesty, and until the end of the next session of parliament after the demise of the crown, should, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of his said Majesty, or to deprive or depose him from the style, honour, or kingly name of the imperial crown of this realm or of any other of his said Majesty's dominions or countries, or to levy war against his said Majesty, within this realm, in order, by force or constraint, to compel him or them to change his measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe either house of parliament, or to move or stir any foreigner or stranger with force to invade this realm or any other of his said Majesty's dominions and such compassings, imaginations, inventions, devices, or intentions, or any of them, should express, utter, or declare, by publishing any printing or writing, or by any overt act or deed being convicted upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law, then every such person or persons so offending should be deemed, and declared to be a traitor and suffer death, and forfeit as in high treason: and whereas by and act of parliament passed in the 57 G. 3 c. 6, all the before recited provisions of the said act which relate to the heirs and successors of his said Majesty, were made perpetual: and whereas it is doubtful whether the last-recited act extended to Ireland: and it is expedient to repeal all the provisions made perpetual by the last act as do not relate to offences against the person of the Sovereign, and to enact other provisions instead applicable to all parts of the united kingdom, and to extend to Ireland such of the provisions of the said acts as are not hereby repealed; be it enacted by the Queen, &c. by and with the advice, &c. that from the passing of this act, the 36 G. 3, c. 7, made perpetual by the 57 G. 3, c. 6, and all the provisions of the last act save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the heirs and successors of his said Majesty king George the third, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them, are hereby repealed.

2. That such of the said provisions made perpetual by the 57 G. 3, c. 6, as are not hereby repealed shall extend to and be in force in that part of the united kingdom called Ireland.

3. That if any person shall, within the united kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, from the style, honour, or royal name of the imperial crown of the united kingdom, or of any of her Majesty's dominions or to levy war against her Majesty, within any part of the united kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate either house of parliament, or to move or stir any foreigner or stranger with force to invade the united kingdom or any other her Majesty's dominions or countries, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted shall be liable, to be transported for the term of his natural life, or for not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

4. That no person shall be prosecuted for any felony in respect of such compassings, imaginations, inventions, devices, or intentions as far as the same are expressed, by speaking only, unless information of such compassings, &c. and of the words by which the same were expressed, uttered, or declared, shall be given upon oath to a justice of the peace, or to any sheriff or steward, or sheriff substitute or steward substitute, in *Scotland*, within six days after such words shall have been spoken, unless a warrant for the apprehension of the person by whom such words shall have been spoken shall be issued within ten days next after such information shall have been given, and unless such warrant shall be issued within two years next after the passing of this act; and that no person shall be convicted of any such compassings, &c. in so far as the same are expressed, uttered, or declared by open or advised speaking as aforesaid, except upon his own confession, or unless the words so spoken shall be proved by two credible witnesses.

5. That in any indictment for felony under this act, to charge against the offender any number of the matters, acts, or deeds by which such compassings, &c. or any of them, shall have been expressed, uttered, or declared.

6. That nothing herein shall lessen the force of or in any manner affect any thing enacted by the 25 Edw. 3. c. 2.

7. That if the facts or matters in an indictment for felony under this act shall amount to treason, such indictment shall not be deemed void, or defective; and if the facts or matters proved on the trial shall amount in law to treason, such person shall not be entitled to be acquitted of such felony; but no person tried for such felony shall be prosecuted for treason upon the same facts.

8. That in every felony under this act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree, and every accessory after the fact shall on conviction be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

9. Provided, that no person committed in *Scotland* for any offence under this act shall insist on liberation on bail, unless with consent of the public prosecutor, or by warrant of the high court or circuit court of justiciary, in such manner and to the same effect as is provided by 5 & 6 W. 4. c. 73, *An act to provide that persons accused of forgery in Scotland shall not be entitled to bail*, but the trial of any person so committed, and whether liberated on bail or not, shall be proceeded with under the like certification and conditions as if intimation to fix a diet for trial had been made to the public prosecutor in terms of the Scottish act of 1701.

10. That it shall not be lawful for any court before which any person shall be prosecuted or tried for any felony under this act to order payment to the prosecutor or the witnesses of any costs which shall be incurred in preferring or prosecuting any such indictment.

11. That this act may be amended, &c.

CAP. XIII.

An Act for amending the law for the Leasing of Mines in Ireland. [22d April, 1848.]

Sec. 1. *So much of the recited Acts as specifies a minimum Rent upon Leases of Mines, or limits the Term of such Leases to thirty-one years, repealed; and Leases of Mines authorized by the said Acts may be made for forty-one years, so as the best improved rent that can be reasonably gotten be reserved, &c.*

2. *Trustees, &c. of any Freehold Estate in Mines may make Leases for forty-one years upon like terms as herein-before provided.*

3. *Leases under recited Act may be surrendered, and again granted under this act.*

4. *Act may be amended, &c.*

Whereas by an act passed in the 10 G. 1, c. 1, *An act for the further encouragement of finding and working mines and minerals, in this kingdom*, it is that all archbishops and bishops, deans, deans and chapters, archdeacons, prebendaries, and other dignitaries ecclesiastical, parsons, rectors, vicars, and to and for all bodies politic and corporate, colleges, cathedral or collegiate churches, and hospitals, and to and for all and every person or persons whatsoever

who now are or at any time hereafter shall be tenant or tenants for life, with an immediate remainder to his or her first and every other son in tail male, and also to and for every person who now are or at any time hereafter shall be tenant in dower or by courtesy, with the consent of such person as shall be seised in reversion or remainder of an estate of inheritance in any mines immediately expectant upon the death of such tenant in dower or by the courtesy, or in case of nonage, idiotcy, or the lunacy of such person so seised in reversion or remainder, then with and by the consent of the guardian of such minor, or the committee of such idiot or lunatic, by and with the approbation of the Lord Chancellor, by indentures under their respective hands and seals, may make and grant leases not exceeding the term of thirty-one years, of all mines and minerals which are already or may hereafter be found and discovered within their respective manors, glebes, or lands, so as the same be made to commence in possession, without any fine, or other consideration than the yearly rent in such lease reserved and so as the most improved rent be reserved upon every such lease, and that such rent be not less than one tenth part of the ore to be dug out of such mines, without any regard had to the expenses in digging, and laying the same on the bank, and so as such rent shall be reserved and made payable in and by such leases to such lessor or such person as should from time to time during the continuance of such lease have been entitled by the laws of this kingdom to the benefit of such mines in case this act had not been made: and whereas by 15 G. 2, (I.) *An act for explaining and amending an act, intituled 'an act for the further encouragement of finding and working mines and minerals in this kingdom'*, the provisions of the said act 10 G. 1, were extended to coal mines: and whereas by the 23 G. 2, (I.) *An act for amending an act, intituled 'an act for the further encouragement of finding and working mines and minerals within this kingdom'*, the said act of the 10 G. 1, extended, and the parties therein mentioned are empowered to make leases of coal mines for any term of years not exceeding forty-one in possession, and not in reversion, at any rent not less than two-pence for every ton of coals which shall be raised and laid upon the bank, without fine or other consideration than the yearly rent reserved: and whereas certain of the said acts were amended by 48 G. 3, c. 71, *An act to amend several acts for the encouragement of working mines and minerals in Ireland*; and it is expedient to amend the provisions of the said acts, in relation to the duration of the term and the rent to be reserved on leases therein provided for: be it enacted, that so much of the 10 G. 1, and of the said acts amending the same, as limits the term of such leases to thirty-one years, and as requires that the rent be not less than one tenth part of the ore to be dug and raised out of such mines, without regard to the expenses in digging and raising and laying the same on the bank, and so much of the 23 G. 2, or of any act amending the same, as provides that the rent reserved in any such leases of coal mines as in the said act mentioned shall not be less than two-pence for every ton of coals which shall be raised and laid upon the bank, is repealed; and it shall be lawful for every person or bodies politic or corporate, empowered to make leases by the said acts are hereby empowered, as in the said acts mentioned, to grant for any term of years not exceeding forty-one, any lease as is authorized by the said recited acts to be made for a term not exceeding thirty-one years, or any term therein mentioned, so as every such lease be made to commence in possession, without any fine or other consideration than the yearly rent or other return in the nature of rent in such lease reserved and so as the best and most improved rent, whether in money or in kind, be reserved upon such lease, and so as such rent shall be reserved and payable in and by every such lease to such lessor or such other person as should during the continuance of such lease have been entitled by law to the benefit of such mines in case the said acts and this act had not been passed, and so as in every such lease there be condition for re-entry on nonpayment of the rent to be thereby reserved, and so as every lessee do execute a counterpart of his lease; and the several provisions of the said recited acts in force, and not hereby altered

or repealed, shall, be construed to extend to such leases as are hereby authorized.

2. That it shall be lawful for any trustee, or feoffee, for charitable or other purposes or feme covert or infant, any freehold estate in any such mines, or of any estate therein (other than a lease at rack rent), created for a term of years not exceeding fifty years, or determinable upon the fall of any life or lives, or upon the execution of any trusts mentioned in any deed creating such term, and also for any trustee of any such estate in the actual possession of such mines, or the rents and profits thereof, on behalf of their respective cestuique trusts or such feme covert or infant as aforesaid, to make any lease of the same, and of lands contiguous thereto, as in the said acts specified, for any term of years not exceeding forty-one years, upon like conditions as herein-before provided as to the leases hereby authorized.

3. That it shall be lawful for any of the said respective persons herein-before mentioned, to accept a surrender or surrenders of any existing lease made under the authority of the said recited acts, and to make and grant a lease of the same mines under the provisions of this act.

4. That this act may be amended or repealed in this present session of Parliament.

CAP. XIV.

An Act for authorizing a Borough Police Superannuation Fund. [22d April, 1848.]

CAP. XV.

An Act for the Regulation of Her Majesty's Royal Marine Forces while on shore. [22d April, 1848.]

CAP. XVI.

An Act for raising the sum of seventeen millions nine hundred and forty-six thousand five hundred pounds by Exchequer bills, for the service of the year one thousand eight hundred and forty-eight. [22d April, 1848.]

CAP. XVII.

An act to amend the act of the present session to facilitate the completion of public works in Ireland. [22nd April 1848.]

Sec. 1. *Proceedings which under the recited Act might be done at the Spring Assizes, may be done in like manner at the Summer Assizes of this year.*

2. *Time for holding Presentment Sessions for the County extended.*

3. *As to Adjournment of Sessions held under recited Act and this Act.*

4. *Recited Act and this construed as one.*

b. *Act may be amended, &c.*

'Whereas by an act passed in the present session to facilitate the completion, in certain cases, of public works in Ireland, returns are directed to be made at the ensuing spring assizes, and under the said act and the acts incorporated therewith certain presentments are to be made at the same assizes: And it is expedient that the time for proceedings under the said act be extended.' Be it enacted that the returns, special sessions, presentments, and proceedings which, under the said recited act, should be made, held, or taken previous to or at the spring assizes, 1848, may be made, held, and taken at the summer assizes of the same year, notwithstanding any special sessions or proceedings that may have been held or taken under the said act; and that the provisions of the said act shall apply to the said summer assizes, and to any grand jury empanelled thereat, and to the returns, presentments, &c. made thereat, or previously or subsequently thereto, as fully as to the said spring assizes, or to any Grand Jury empanelled thereat, or to the returns, presentments, matters, and things to be made or done thereat, or previously or subsequently thereto.

2. 'And whereas it is by the said act enacted, that the secretary of the Grand Jury shall, by notice convene a special sessions for the county, to be holden at the time specified in such notice, not being sooner than seven days from the time of posting, nor later than six weeks after the first special sessions shall have been held for any barony within such county under the said act; be it enacted, that such sessions for the county shall, as in the

said act provided for the holding of such sessions, be convened by the secretary of the Grand Jury by notice, to be holden in the county court house, for the purposes of the said act and this act, at the time specified, not being sooner than seven days from the time of posting such notice, nor later than six weeks after the first special sessions held after the passing of this act for any barony, for the purposes of the said act and this act.

3. That any sessions holden under the said act and this act may be continued from day to day, or be adjourned, as shall be found expedient: provided, that within thirty days from the termination of such adjourned or continued sessions, the adjourned sessions for the opening of tenders and proposals, as in the said act mentioned.

4. That the said recited act and this act shall be construed together as one act.

5. That this Act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. XVIII.

An Act to remove certain doubts as to the law for the trial of controverted Elections. [8th May, 1848.]

CAP. XIX.

An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively until the twenty-fifth day of March one thousand eight hundred and forty-nine. [9th June, 1848.]

CAP. XX.

An Act to authorize for one year, and to the end of the then next session of parliament, the removal of aliens from the realm. [9th June, 1848.]

CAP. XXI.

An Act to consolidate and amend the laws relating to insolvent debtors in India. [9th June, 1848.]

CAP. XXII.

An Act for granting Relief to the Island of Tobago, and for aiding the Colonies of British Guiana and Trinidad, in raising money for the promotion of Immigration of free Labourers. [9th June, 1848.]

CAP. XXIII.

An Act to alter and amend an Act passed in the third year of the reign of His Majesty King George the Fourth, intituled *An Act to incorporate the Contributors for the Erection of a National Monument in Scotland to commemorate the Naval and Military Victories obtained during the late War.* [9th June, 1848.]

CAP. XXIV.

An Act for disfranchising the Freemen of the Borough of Great Yarmouth. [30th June, 1848.]

CAP. XXV.

An Act to extend the powers given by former acts for purchasing or hiring Land in connexion with or for the use of Workhouses in Ireland; and for providing for the Burial of the Poor. [30th June, 1848.]

Sec. 1. *Boards of Guardians may memorialize Commissioners to purchase or hire additional Land, who may with consent of Lord Lieutenant purchase or hire the same; not to exceed 25 statute acres.*

2. *So much of recited act 10 & 11 Vict. c. 31, as extends certain provisions as to Schools in the North and South Dublin Unions to other parts of Ireland repealed; and other provisions enacted in lieu thereof.*

3. *Boards of Guardians may provide coffins for burial of persons who at the time of death were receiving out-door relief.*

4. *Former acts and this act to be construed as one.*

5. *Act may be amended, &c.*

'Whereas by the 1 & 2 Vict. c. 56, power was given to the poor law commissioners to purchase or hire land, not exceeding twelve acres imperial measure, for the purpose of building a workhouse thereon, or to be occupied there-with: and whereas by the 10 & 11 Vict. c. 31, further power was given to purchase or hire land not exceeding

three statute acres, in addition for the site of a fever ward, or for a cemetery, and it is desirable that the powers of the commissioners to hire or purchase land should be extended, that a greater quantity may be cultivated for the employment and instruction of children in an improved system of the cultivation of land: be it therefore enacted, that the majority of the guardians of any union may memorialize the commissioners to hire or purchase the quantity of land necessary and the commissioners may with the approval of the Lord Lieutenant may hire or purchase the quantity of land not exceeding twenty-five statute acres in addition to the quantity heretofore authorized by law to be used solely for the purposes above stated.

2. That so much of the 10 & 11 Vict. c. 31, as extends to other parts of *Ireland* provisions relating to the establishment of schools in the *North* and *South Dublin* Unions, and authorizes the poor law commissioners to combine unions in school districts be repealed; and the commissioners may combine any two or more Unions for the maintenance and education of children not above the age of fifteen years, inmates of the workhouses of such unions; and the provisions of the said act which relate to the hiring and purchasing of land in the *North* and *South Dublin* unions, the erection of a school there on the cost thereof, the maintenance of the children the numbers thereof from each union, the board of management, the officers for the superintendence thereof, and all other provisions relating to such school for the use of the *North* and *South Dublin* unions, shall apply to every combination of two or more unions under this act.

3. That the guardians of any union may provide a coffin for the burial of any person who at the time of his death was receiving relief out of the workhouse, or was at the time of his death dependent on any person receiving relief, and charge the cost of providing such coffin to the union at large or electoral division, as the case may be.

4. That the acts now in force for the relief of the destitute poor in *Ireland* and this act shall be construed as one act, except so far as any one may repeal any previous act.

5. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. XXVI.

An act to remove difficulties in the appointment of collectors of Grand Jury cess in *Ireland* in certain cases, and to remove doubts as to the jurisdiction of the divisional justices of the police district of *Dublin* metropolis relating to the recovery of poor rates, and other cases.

[30th June 1848.]

Sec. 1. *Whenever a Grand Jury at the Assizes shall not have appointed Collectors of Cess for each barony &c., or when the persons appointed shall not have given Security at the Assizes, the Quarter Sessions may appoint Collectors, or take the Security.*

2. *Personal Representatives of deceased High Constable or Collector to deliver last warrants to the Treasurer of the County, together with the Applotments made.*

3. *When Monies collected have been duly paid over by personal representative, Grand Jury may allow Poundage on the amount to such personal Representative.*

4. *Grand Jury may present increased poundage where difficulties occur in the collection.*

5. *Bonds &c. deemed good against Sureties as well as against High Constables or Collectors.*

6. *The Divisional Justices of Dublin to have like Jurisdiction relating to the recovery of Poor rates as other Justices of the County. Such Justices to have power to act at their respective Offices in all cases as Justices at Petty Sessions.*

7. *Powers for the recovery of Grand Jury Cess in Dublin.*

8. *Divisional Justices in Dublin to have the same Powers to collect Grand Jury cess as other Justices in Ireland.*

9. *Act may be amended, &c.*

Whereas by the 6 & 7 W. 4, c. 116, the Grand Jury of each county in *Ireland* shall at each assizes appoint a high

constable and collector for each barony in such county, to collect all monies presented; and if any high constable or collector shall die before he shall have collected the whole of the money presented, or if any vacancy occur, the justices of the peace at any general quarter sessions, or adjournment thereof, may appoint another high constable or collector *pro tempore* until a high constable or collector shall be appointed by the Grand Jury; and no person shall act as high constable or collector unless he shall have given security as therein mentioned; and the Grand Jury may present nine pence in the pound on the amount of the collection to be paid to such high constable or collector for his trouble therein: and sometimes properly qualified persons could not be duly appointed at the assizes to act as high constables or collectors, a vacancy in the office of high constable or collector may occur in the interval between the general quarter sessions next before the assizes and the first day of such assizes, whereby the public cess then unpaid cannot be collected on or before such ensuing assizes, and it is expedient to enable the Grand Jury to increase the amount of poundage, Be it therefore enacted that in every case in which any Grand Jury shall not have at assizes appointed a high constable or collector of cess for each barony, or if any vacancy shall occur after the assizes and before the first ensuing general quarter sessions, or in the interval between the first general quarter sessions and the first day of the then next ensuing assizes, the justices of the peace of the said county, &c. at any general quarter sessions, or in case of a vacancy between the first general quarter sessions and the first day of the ensuing assizes, then at a special sessions called by the clerk of the peace in two days after the written requisition of the treasurer, at the county or assize town, or sessions town, of the division in which such barony is situate (giving six days notice thereof to such justices resident in such division) may appoint a high constable or collector of cess; and such person is to give security as directed by the said recited act; and in case any person appointed by the Grand Jury at assizes shall not have given the security by the said act required, such person so appointed may give security before the justices of the peace at the next general or quarter sessions for the division of the county in which such barony is situate; or in default thereof such justices may appoint some other high constable or collector in lieu of the person so appointed by the Grand Jury; and the person so appointed may give security before such justices as if the same were given at the assizes; and all the provisions of the said recited act, or any act amending same, or relating to any high constables or collectors of cess, shall apply to any high constable or collector of cess appointed under this act.

2. That if any vacancy occur by the death of the high constable or collector, his personal representatives shall, previous to such general or special sessions, deliver to the treasurer of the county the warrants issued to said collector, with all applotments made of the sums specified in said warrant; and the deputies are required to attend at such sessions, and deliver to the said justices accounts of the sums received by them, specifying the sum paid by each person named in such applotments, and the sum due, and by whom; and each deputy shall make an affidavit before the said justices, (who are authorized to take the same) of the truth of such accounts, which accounts and affidavits the justices shall transmit to the Treasurer of the county; and in case any such personal representative, or any such deputy shall neglect to deliver over said warrants and applotments, and any money received by them, or refuse to make the affidavit, by this act they shall forfeit the sum of fifty pounds, to be recovered, in the name of the Treasurer of the county, by civil bill, before the assistant barrister of such county, for the use of such county.

3. That such personal representatives paying the sum collected, into the county Bank on or before the first day of the next assizes, and producing to the Grand Jury the Treasurer's certificate of such sum having been paid, the Grand Jury without application to presentment sessions, may present poundage on the amount so paid, to be paid to such personal representatives.

4. And whereas in certain baronies there is now con-

'siderable difficulty in the collection of the public money, and nine-pence in the pound has been found not sufficient remuneration for collecting same;' be it therefore enacted, that the Grand Jury at any assizes after the passing of this act, and before the end of 1849, may without application to presentment sessions, present a sum not exceeding one shilling in the pound, to be paid to any such high constable or collector.

5. That any bond and warrant of attorney to confess judgment of any high constable or collector, and any judgment entered up on same, shall be valid, whether given at the assizes before the Grand Jury by whom he shall have been appointed, or before the justices of the peace at any general quarter sessions, or special sessions, and whether such high constable or collector shall have been appointed by the Grand Jury at any assizes, or at any quarter sessions, or adjournment, and shall have subsequently qualified and given security at a subsequent quarter sessions, or adjournment, or at special sessions.

6. 'And whereas by the 6 and 7, W. 4. c. 116, every person duly authorized to collect Grand Jury cess, in default of payment may prefer a complaint to any justice of the peace of the county in which such party may reside; who may summon such party, and direct payment to such collector, or issue his warrant for the levy of the sum due, by distress and sale of the goods of the party complained against. And whereas by the 1 & 2 Vict. c. 56. for the relief of the destitute poor in Ireland, every rate made under the authority of the said act, may be sued for and recovered by the same means as the Grand Jury cess; and whereas by the 6 & 7 Vict. c. 92., for the further amendment of said act, the collector may prefer a complaint to any Justice of the peace of the county in which any lessor resides, who may summon such lessor before him in

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, November 23th, 1848.

THE Irish Jurist

No. 5.—VOL. I.

DECEMBER 2, 1848.

Price { Per Annum, £1 10s.
Single Number, 4d.

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Equity Exchequer.....	CHARLES HARR HEMPHILL, Esq., and	Exchequer of Pleas, including Manor Court and Registry Appeals.	CHAS. H. HEMPHILL, Esq., and
	WILLIAM HICKSON, Esq., Barristers-at-Law.		WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	ROBERT LONG, Esq., Barrister-at-Law.

DUBLIN, DECEMBER 2, 1848.

WITHOUT expressing any opinion of our own, we think it due to the importance of the questions involved, the interest excited by them, and the conspicuous ability with which they were urged, to lay before our readers a brief statement of the errors assigned, and arguments used, in the cases of William Smith O'Brien and others *v.* the Queen in error.

Several errors were assigned by each of the prisoners as appearing on the records of their respective convictions for high treason, at the late Special Commission for Clonmel, all of which were elaborately argued in the course of last week before the Court of Queen's Bench sitting in Banc. In this present article we shall confine our observations to a statement of the question involved in one only (apparently the most important) of the alleged errors, namely, the one conversant with what is commonly known as the "ten day point."

The question (stripped of all collateral considerations respecting the applicability of a plea to the state of facts in the case, or the form of the particular plea which raises the question,) is; whether the prisoners were entitled to be furnished with a copy of the indictment, a list of the witnesses for the crown, and of the names of the jurors ten days before the trial. The Crown asserts the negative, the prisoners the affirmative.

The question was raised in the following manner. When the prisoners were called upon in the Court below to plead guilty or not guilty, their counsel moved for a postponement of the trial on the ground that the indictment, the list of the witnesses for the crown, and of the jurors' names, had not been (as it was insisted they ought to have been) furnished ten days previously. The Crown successfully resisted this application, whereupon the prisoners put in a plea in suspension or a declinatory

plea, which embodied the statement on which the previous motion to postpone the trial had been grounded. To this plea the Crown demurred, and judgment was given in its favour.

Before stating the substance of the enactments upon the construction of which the decision of the point at issue depends, it is necessary to premise that the indictment in each case contains six counts almost similarly worded, that the five first counts charge the prisoners with the treason of levying war against the Queen, and that the sixth count charges the treason to be a compassing of the Queen's death, and alleges, as one of the overt acts in support of such charge, a conspiracy to put the Queen to death.

The statutes applicable to this branch of the case are three; first, the 36 Geo. 3, c. 7, ss. 1 & 5, (English); secondly, the 57 Geo. 3, c. 6, s. 1; thirdly, the 11 Vic. c. 12, ss. 1 & 2.

The first section of the 36th Geo. 3, c. 7, enacts, among other matters, that "if any person shall, during the life of his Majesty, the then king, and until the end of the next session of parliament after a demise of the crown, compass the death of the king, his heirs or successors, and such compassing shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, every such person, upon conviction, shall be adjudged a traitor, and suffer death, and lose and forfeit as in cases of high treason." And the fifth section provides, "that every person that shall be indicted for any offence, made or declared treason by this act, shall be entitled to the benefit of the act of 7th Wm. 3rd, chap. 3, and also of the act of the 7th of Anne, chap. 11."

No point in the argument turned upon the act of Wm. 3rd. The 7th of Anne, chap. 11, sec. 11, enacts, "that when any person is indicted for high treason, a list of the witnesses that shall be produced at the trial, for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be

also given, at the same time that the copy of the indictment is given to the party indicted, and that copies of the indictment, for all the offences aforesaid, with such lists shall be delivered to the party indicted *ten days before the trial*, and in the presence of two or more credible witnesses."

The first section of the 57th Geo. 3d. c. 6, after reciting the first section of the said 36th Geo. 3, and further reciting, that "it is necessary and expedient *that such of the provisions of the said act, (viz. 36th Geo. 3), as would expire at the end of the next session of parliament, after the demise of the crown, should be further continued and made perpetual,*" enacts, "that all and every the herein before recited provisions which relate to the *heirs and successors* of His Majesty shall be perpetual."

One important question which arose in the course of the argument was, to what extent the last stated enactment perpetuated the 36th Geo. 3. The counsel for the Crown insisted that the first section of that act, namely—the section which made or declared what should be deemed treason within its provisions—was alone thereby perpetuated, and that the fifth section of that act, namely—the one which conferred the privilege on the accused, previous to trial,—was unaffected, and they rested their view of the case upon the words in the 1st section of the 57th Geo. 3, "hereinbefore recited provisions." The counsel for the prisoners on the other hand contended, that the first section of the 57th Geo. 3 not only perpetuated the first, but also the fifth section of the 36th Geo. 3, and they rested their arguments, not only on the words of the first section of the 57th Geo. 3, which recited, that "it was expedient to perpetuate such of the provisions of the act of 36th Geo. 3, *as would expire at the end of the next session of parliament, after the demise of the crown,*" (under which description, both the first and fifth sections were included, and thereby as they contended, brought expressly within the words "hereinbefore recited provisions" used in the enacting part of the first section of the 57th Geo. 3,) but also they contended that even if the enacting part of the first section of the 57th Geo. 3, did not, in express terms, extend to the fifth section of the 36th Geo. 3, it did so by implication: for that in perpetuating the section, which made, or declared what should be treason, it also necessarily perpetuated the section which regulated the mode of trial of that treason, as an incident or accessory thereto.

The provisions of the several statutes hitherto detailed were (as contended for by the crown, and but faintly denied by the prisoners' counsel,) at their passing, inapplicable to Ireland, and we now proceed to the consideration of the third statute mentioned above, namely, the 11th Vic. c. 12, commonly called the Crown and government security act, which, according to the argument for the prisoners, extended to Ireland those provisions contained in the first and fifth sections of the 36th Geo. 3, which we have previously set out in full. The first section of the 11th Vic. after reciting the first section of the said act of the 36th Geo. 3, and the first section of the said act of the 57th Geo. 3, and that doubts were entertained, whether the *provisions made perpetual* by the said act of the 57th

Geo. 3, were, by the said last mentioned act extended to Ireland, and that it was expedient to repeal all such of the provisions so made perpetual, as did not relate to offences, against the person of the sovereign, *and to extend to Ireland, such of the provisions of the said acts as are not thereby repealed,* enacts, "that from the passing of this act, the provisions of the said act of the 36th Geo. 3, made perpetual by the act of the 57th of the same reign, and all the provisions of the said last mentioned act in relation thereto, save such of the same respectively, as relate to the *compassing or imagining the death or destruction of the heirs and successors of His said Majesty, King Geo. 3,* and the expressing, uttering, or declaring of such compassing or imaginings, shall be, and the same are hereby repealed:" and the second section enacts, "that such of the said *recited* provisions made perpetual by the said act of the 57th of Geo. 3, as are not thereby repealed, shall extend to, and be in force, in that part of the united kingdom called Ireland."

Such being the enactment confessedly applicable to Ireland, the counsel for the crown contended, that only such part of the first section of the 36th Geo. 3, as we have previously stated in full, was by the 2nd section of the 11th Vic. extended to Ireland, and therefore, that the prisoners were not entitled to the benefits conferred by the fifth section of the 36th Geo. 3 upon the accused. On the other hand, the counsel for the prisoners contended that the said second section of the 11th Vic. extended to this country not only the first but also the fifth section of the 36th Geo. 3, that the said second section of the 11th Vic. extended "such of the said *recited* provisions made perpetual by the 57th Geo. 3;" that the provisions recited were "such of the provisions of the 36th Geo. 3, made perpetual by the 57th Geo. 3," as related to the compassing the Queen's death, that upon reference to the 57th Geo. 3, it appears that "such of the provisions of the 36th Geo. 3, were thereby made perpetual, as would expire after the first session of parliament following a demise of the crown;" and, that upon reference to the 36th Geo. 3, it appears that the provisions which would so expire were the first section declaratory of treason, and the fifth section regulating the mode of trial for the treason so declared.

The foregoing is a brief epitome of the arguments upon one of the many points raised and discussed. It refers indeed to only one view of the statutes we have above quoted. A different view from that presented was taken by some of the counsel on both sides, grounded upon the allegation that *all but the first section of the 57th Geo. 3* extended to this country. We shall on a future occasion state the arguments upon the form of the plea—upon the question whether the subject matter of the plea was at all pleadable—and upon the effect of the verdict of acquittal upon the sixth count, as well as on some of the other grounds of error relied on.

We give elsewhere the only two decisions yet made on the act for the sale of incumbered estates. We

may deduce from them first, that all parties shall have notice; secondly, that no technical objection shall, if possible, be allowed to impede the working of the measure. There have as yet been but few petitions presented, and they are not likely to be numerous until the General Orders have been promulgated, the undue acceleration of which is not desirable, as on them will depend the acceptance which the public and the professions will give to the statute in its complete form. There will be some difficulty—the necessary attendant of every measure which effects important changes—in dealing with those cases in which foreclosure suits are already in existence. We have little doubt that existing rights will be dealt with justly, and that they will not be displaced by giving to the statute a harsh retrospective operation.



THE legislature have ventured on the bold experiment of extending the provisions of the English Small Debts Act,* with some improvement in the preparation of the measure, to this country. An abridgment of the statute will be found elsewhere in our columns of this week. The period for its introduction was a trying one; individual and national probity are never very prominent when individual and national distress are very severe; and neither amongst the upper nor lower classes of our countrymen have honesty and prudence been striking characteristics. We were always predisposed to the contrary, and our national propensities do not lie in abeyance in times of wide-spread calamity. These causes produce effects; tradesmen trust only when their remedy is stringent, and in periods of distress—as the chances of payment are less—their confidence becomes more circumscribed.

The marked distinction of doing away with arrest of the person on mesne process—that is, before the debt is proved to be due, and doing it away after it has been established by due course of law—is obvious. To the justice of the former we subscribe; the expediency of the latter has been much debated, more especially when considered with reference to the upper classes. Rank, position, liberty, are not too heavy forfeits for extravagance and dishonesty. Payment of demands justly due cannot be enforced with too strong a sanction. Goods, lands, person, have hitherto been the creditor's pledge for payment; the last, as the most severe, should be the most tardily resorted to, and the scope of legislation for many years past has been to give facilities to recover debts from the two former, and to make the creditor only avail himself of the last as his ultimate resort. The debtor, down to the year 1840, was little favoured in this country, for here executions against both goods and person could—we are sorry to say can—be issued in any order the debtor pleases. *Brien v. Brien*, (1 Hud. & Bro. 300); *Barton v. Seymour*, (ib. 304). First, an execution against the goods, then the person, and then again the goods, the creditor lying all the time in gaol.

The 3 & 4 Vic. c. 105, s. 25, enacted, that if any judgment creditor should have obtained a charge, or be entitled to the benefit of any security whatsoever under the powers of the act, and should afterwards, and before the property so charged or secured should have been converted into money or realized, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then, and in such case, such judgment creditor should be deemed to have relinquished all right and title to the benefit of such charge or security, and should forfeit the same accordingly.

This was legislating in the proper spirit, the act gave great facilities to judgment creditors to realize their demands out of the debtor's property, but imposed these reasonable terms, that if creditors adopted the aids given by the statute, they should suspend the enforcement of their rights against the person, until they abandoned the statutable remedy. The operation of the measure is, however, limited to those cases in which creditors adopt the benefit of its provisions, and it is still in their power to arrest a defendant, and, if he remain in prison, subsequently issue execution against his goods, and only in the event of satisfaction being obtained by their sale, can he apply for his discharge. By the common law of England an arrest of the person was of itself a discharge of the debt, and in Ireland the common law was the same, but the 35 of Geo. 3, c. 30, Irish, conferred upon the creditor the power of first arresting the debtor, and then seizing his goods. In our judgment the process should be statutablely reversed, and the act we have alluded to repealed.

But whatever may be the policy of abolishing arrest of the person in all cases, unquestionably the experiment may be most safely tested in those where the amount of the debt is small, and the debtor in an humble class of life. The liabilities of the working classes are more generally the result of necessity than of extravagance, and arrest, as a means of procuring payment, is generally inefficient. *Cui bono* to the creditor the transfer of a semi-starved pauper from a cabin to a gaol, where he will be maintained at the public expense, whilst his wife and children are thrown on the union? He is deprived of the only capital he possesses—his labour—and his creditor gains nothing. The poor have few immunities, and we grudge them no boon which humane legislation can confer; in the present instance its value will be diminished by the restriction imposed upon credit.

Having said so much on the principle of the act, let us examine what it proposes to effect.

To abolish arrest of the person in all cases for debts under ten pounds.

The exceptions being, where they have been incurred fraudulently, or without probable means of paying them, or where the liabilities are the result of verdicts against defendants in actions for malicious prosecution, deceit, libel, slander, criminal conversation, seduction, or breach of promise of marriage.

The first section exempts defendants from arrest on judgments, decrees, or orders of the superior courts of law, or of any inferior courts when the sum, exclusive of the costs, shall not exceed ten

* The Act to Amend the Law of Imprisonment for Debt, with Commentary, Notes, Forms, and Index. By William Gernon, Esq., Barrister-at-Law. Dublin, Milliken.

pounds, and exempts from arrest the body of any plaintiff, defendant, or other person, in any action or suit founded on any judgment, decree, or order, for the recovery of costs only, when such costs shall not exceed ten pounds.

In the English act, 7 & 8 Vic. c. 96, s. 57, the case of a plaintiff was not expressly provided for, the words being:—"no person shall be taken or charged in execution upon any judgment obtained in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of £20, exclusive of the costs recovered by such judgment." And, in the event of his being non-suited, or otherwise defeated, it has been made a question whether he was protected by the act. *See Newton v. Ld. Albert Conyngham*, (12 Jur. 356). Mr. Gernon, who loses no opportunity of pointing out the merits of the statute, has not sufficiently adverted to this distinction. It is observable that in all our law reforms where acts limited to England have pioneered the way, we have gained by the delay; having had the experience and the pattern to guide us. We do not, however, affirm that the benefit is very manifest of shielding from arrest a litigious plaintiff who fails either in point of law or merits. The branch of the section which saves defendants from arrest will be a very good guide to juries as to the amount of damages in what are called "dirty actions," pauper plaintiffs suing in actions of trespass, or trespass on the case. Juries have it in their power to deprive such litigants of one means of recovering their damages, by limiting the verdict to £10.

Whilst the act shields the debtor in the first instance, it does not profess to do so altogether. If his goods do not realize sufficient to pay the debt, he can be summoned before the assistant-barrister of the district to shew cause why he should not be arrested; and, if it shall appear that the defendant, or any one in trust for him, had property which ought to be administered under the insolvent acts, or that the defendant is of sufficient ability to pay the debt, the assistant-barrister is empowered to have him arrested, or, in the case of fraud, or incurring the debt under false pretences, or without having had a reasonable expectation of being able to pay it, or, in case of fraudulent transfer, he may be committed for three months to the common gaol, or house of correction—there ought to have been the addenda, with or without hard labour—all remedies against the property being saved. These are excellent provisions, and are a great protection to the creditor.

The 4th and 5th sections apply to cases where the goods have been found insufficient after decree. The 6th gives the barrister jurisdiction, in the first instance, to commit the defendant, provided the plaintiff shall have annexed to, or indorsed on the civil bill process, a notice of his intention to proceed under the act.

Mr. Gernon remarks that "it will probably be a question of some nicety for the consideration of plaintiffs to determine in what cases they will resort to the notice or indorsement prescribed by this section," and having marked in the margin, p. 33, "Safe rule for proceeding submitted," he observes with much *nécessité*, "It will therefore be a

matter entirely for the discretion of a plaintiff, or his attorney, to determine whether he will, in the first instance, run the risk of failure in proving fraud, and subjecting himself to the payment of costs; but perhaps the safest rule to guide a party will be, that where there exists a reasonable suspicion of fraud, &c., and a reasonable expectation of being able to prove its existence at the hearing; in such a case it will be prudent to resort to the civil bill with notice or indorsement under this section." The promise in the margin of a "safe rule," and the non-fulfilment in the text, are strikingly opposed.

Our author, we are sure, will excuse us, if we mingle a little playfulness with the dry matter which our pages must generally contain.

There is one part of the statute which we consider highly objectionable. The inquiry as to fraud, improvidence, and fraudulent transfer of the debtor's property—questions of great nicety—is left entirely to the Assistant barrister, from whom there is to be no appeal! Whilst we do not question the integrity, we are constrained to demur to the universal competency of these local judges, considering not only the fallibility of human judgment, but also that they owe their elevation to political connection, independently of, and not unfrequently in contradistinction to, professional capacity. We cannot have confidence in the unerring correctness of their decisions, and yet the liberty of the subject is involved in them. Our whole judicial system is one of salutary checks, grade over grade, judge over judge; on general, very obvious, and well-understood constitutional grounds, we protest against conferring more irresponsible power than is requisite for the effective administration of justice, and lament the increasing tendency of modern legislation to vest uncontrolled power in a single person whose decision is irreversible, and in abrogation of the ancient system of trial by jury.

The 7th section gives power to any court, in cases to which the act relates, to arrest a defendant about to leave Ireland, either on the hearing of the case in the first instance, or after decree upon *ex parte* application. In the latter instance a defendant may apply to be discharged on shewing cause.

Mr. Gernon discusses with much force the difficulties that will arise under this section. Can the Assistant-barrister adjudicate otherwise than in open court? Before whom can a defendant, who has been arrested after decree, shew cause for his discharge, where the barrister has concluded his sessions, and left his jurisdiction? These are defects that require amendment. The powers conferred upon the Assistant-barrister to take affidavits in any part of Ireland—which applies to all cases—and to compel the attendance of witnesses not resident within his jurisdiction will be found very useful; we regret that the latter power has been limited to cases falling within the provisions of the act under consideration.

The power of summarily evicting tenants residing in towns, who hold for not more than a month, and at a rent not exceeding £1 per month, is a boon to the landlords of such very undesirable tenants.

In parting with Mr. Gernon's book, we wish to speak kindly, yet impartially, and we think the arrangement of his subject unhappy. The Act afforded too slender materials for a series of comments, placed under each section, the commentary, sometimes, being a repetition of the text. This arrangement may pass uncensured when adopted with reference to acts of parliament spread over a large space, and comprising detached subjects, but is not suited to a short statute. Our author does himself and his subject injustice, who thus splits into fragments, matter that connected together would have formed a neat treatise. We do not wish, however, to detract from the practical utility of the work, it will be found a useful compendium of the statute in a convenient form, and the legal propositions are in our judgment correct.

(Continued from page 32.)

petty sessions; and direct payment of such money to such collector, and in default may issue his warrant for the levy thereof; and every rate made under the authority of the said act, or the first-recited act, and any money directed to be levied in the county or the county of the city of Dublin, may be levied, by the same means, as the grand jury cess, and whereas doubts exist whether the divisional justices so as to exercise jurisdiction for the hearing of complaints as to nonpayment of poor rates or for the recovery of poor rates within the said police districts, and doubts exist whether the police offices at which such justices preside be petty sessions within the meaning of the said 'last-recited act or acts,' for the removal of such doubts be it enacted, that the several divisional justices of the police district of Dublin metropolis shall for the purposes of the said acts and every other act heretofore made or hereafter to be made with respect to the raising, levying, or enforcing payment of any poor rate in Ireland, have the same powers, and jurisdiction within the police districts of Dublin metropolis as any justice has within his county in respect to poor rates made or to be made in Ireland; and wherever, any proceeding, is or shall be authorized or directed by a justice of the peace at petty sessions, or by justices of the peace of any county, &c., the said divisional justices of Dublin metropolis, or any one or more of them, shall have all such powers and jurisdictions at the divisional police offices within such police district of Dublin metropolis at which they shall preside as any justice at petty sessions.

7. That after the passing of this act the collectors of grand jury cess in the county of the city of Dublin, may collect, sue for, and recover the grand jury cess of such county of the city of Dublin, by all the ways and means, may be collected and levied in any other county in Ireland.

8. That the divisional justices of the police district of Dublin metropolis shall, for the purposes of every act made or to be made with respect to the raising, or enforcing payment of grand jury cess in the county of the city of Dublin, have the same powers and jurisdiction within the police district of Dublin metropolis, as any justice of any county in Ireland has within his respective county with respect to grand jury cess to be raised within the same.

9. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. XXVII.

An Act to authorize the inclosure of certain lands, in pursuance of the third and also of a special report of the inclosure commissioners for England and Wales.

[22d July, 1848.]

CAP. XXVIII.

An Act to amend the Law of Imprisonment for Debt in Ireland, and to improve the remedies for the recovery of debts and of the possession of tenements situate in cities and towns, in certain cases.

[22d July, 1848.]

Sec. 1. After commencement of this act, no writ or process

for arrest shall issue from certain courts in Ireland for debts or sums not exceeding £10., save as herein excepted.

2. Such writs, &c. for sums not exceeding £10 issued before commencement of act, but not executed, shall not be executed against the person, save as herein excepted.
3. Persons in custody on or after the commencement of the act under any such writs, &c. for sums not exceeding £10, shall be discharged on application to the Sheriff, &c. Judgment, &c. to remain in force notwithstanding the discharge of the debtor.
4. When a defendant, &c. is exempted from arrest or discharged from custody by virtue of this act, the plaintiff may serve a Civil Bill Process, requiring the defendant to show cause why process of arrest or committal should not issue. Civil Bill Process to be according to Form (A) in Schedule.
5. If Assistant Barrister shall find that defendant has property fit to be administered under the Insolvent Act, he may direct a process of arrest to issue, or if debt contracted fraudulently may commit him. In default of defendant's appearance, decree may be made.
6. Power to examine or commit at the original hearing of a Civil Bill in certain cases.
7. Upon affidavit that a defendant is about to quit Ireland, he may by a special order be taken in execution.
8. Nothing herein to extend to proceedings relating to revenue of Excise, &c.
9. Tools and actual necessities of judgment debtors not to be seized in execution.
10. Power to the Clerk of the Peace to issue summonses to witnesses.
11. Affidavits to Civil Bill proceedings may be taken by Assistant Barristers out of their counties.
12. Office copies of Wills to be evidence of the contents thereof in Civil Bill Courts.
13. Official copy of Judgment to be evidence.
14. Service of Process in Civil Bill.
15. Affidavits, when required to be made in Great Britain, may be made before Extraordinary Commissioners of the Court of Chancery in Ireland. 3 & 4 Vict. c. 105.
16. Possession of small tenements may be recovered by summons before Justices of the Peace.
17. The manner in which such summons shall be served.
18. Interpretation of Act.
19. To extend to Ireland only.
20. Commencement of Act.
21. Act may be amended, &c.

Whereas it is expedient to limit the present power of arrest for debts, damages, demands, or costs, under process from courts of law or equity or inferior courts in Ireland: be it enacted, that from the commencement of this act no writ, process, or warrant to arrest the body of any defendant in any action or suit, (actions for malicious prosecution, deceit, libel, slander, criminal conversation, seduction, or breach of promise of marriage, only excepted,) shall be issued in Ireland, founded on a judgment, decree, or order of any of the superior or inferior courts in Ireland, when the sum to be paid under such judgment, decree, or order, exclusive of the costs, if any, thereby recovered, shall not exceed the sum of ten pounds; nor shall any process, or warrant to arrest the body of any plaintiff, defendant, or other person in any action or suit be issued, founded on any judgment, decree, or order for costs only, when such costs due shall not exceed ten pounds; nor founded on any decree or order of any court of equity, ecclesiastical court, or court of admiralty in Ireland, for the payment of money, whether wholly or partly costs when the sum due shall not exceed ten pounds.

2. That in case any such writ, process, or warrant to arrest the person (save as before excepted) founded on any judgment, &c. when the sum due shall not exceed the sums before mentioned and shall not have been executed before the day of the commencement of this act, same shall not,

after said day, be executed against the person of the party against whom issued.

3. That in any case in which any person shall, before the commencement of this act, be in custody by virtue of any such process, &c. founded on any such judgment, &c. (save as excepted,) when the sum shall not exceed the sums before mentioned, the sheriff or officer in whose custody such person shall be detained, is required, on his application, to discharge him forthwith as to such execution, &c. without prejudice to any other lawful right to detain such person in custody provided that the judgment, &c. whereupon such party was taken in execution or arrested shall remain in force to the intent that the creditor, &c. may have remedy and execution thereupon against the property of such party in such manner as otherwise he could have done in case such party had never been taken in execution upon such judgment, &c. or order, and provided, that in the cases before mentioned, whenever before this act process against the person of any debtor for such sum not exceeding ten pounds is now the only process issued out of any court such court after the passing of this act, may instead of such process against the person issue a process in the nature of an execution, &c. against the goods of the debtor, for the seizure and sale of same as heretofore issued in such cases.

4. That in all cases in which any judgment, &c. for any such sum, shall be had, under and by virtue of which the defendant might if this act had not been passed be arrested, or whenever any defendant shall be discharged from custody by virtue of this act, and the plaintiff shall not have recovered his demand out of the goods of such defendant the plaintiff may cause a civil bill process to be issued against the defendant requiring him to appear before the Assistant Barrister for the county at the general quarter sessions for the division in which such defendant shall reside, and show cause why execution should not issue against his person in respect of such judgment, &c. and such process shall be according to the form (A.) in the schedule to this act, or as near thereto as the nature of the case will admit; and the Assistant Barristers shall have power to determine such civil bill; and the service and proceedings relating thereto, and the costs shall be subject to like regulations, as any civil bill in cases of debt or assumpsit, save as herein otherwise provided.

5. That at the hearing of such civil bill the Assistant Barrister may cause the plaintiff and defendant, or either of them, to be examined on oath, and investigate the amount of the demands due by the defendant, and the nature and amount of any property he or any one in trust for him is, was, or may be possessed of or entitled to, and the circumstances under which the debt due to the plaintiff was incurred, and the means and expectation of payment thereof; and if the defendant or any one in trust for him is possessed of property which, regard being had to the nature thereof, and to the debts due by the defendant, and to the security of his creditors, ought, in the opinion of the Assistant Barrister, to be administered under insolvent acts, or that the defendant is able to discharge the plaintiff's debt, then the Assistant Barrister may issue a decree, to take in execution the body of the defendant to satisfy the plaintiff's demand and costs, with stay of execution, which decree may be according to the form (B.) to this act annexed, or as the case may require; and under such decree the defendant may be arrested and detained in custody, but if at such hearing it shall appear to such Assistant Barrister that there is not property of the defendant which ought to be administered under the said acts or that the defendant is not able to discharge the plaintiff's debt, but that he has obtained credit from the plaintiff under false pretences, or by fraud or breach of trust, or has contracted such debt without a reasonable expectation of being able to pay same, or shall have made any gift, or transfer of property, or charged, or concealed same, with intent to defraud his creditors, the Assistant Barrister may by a decree according to the form (B.) to this act annexed, or as the case may require, order such defendant to be committed to the gaol or house of correction of the county, or place in which the defendant is resident, for any period not exceeding three months, unless the plaintiff be sooner paid, without prejudice to any remedies for the re-

covery of the plaintiff's demand out of the property of the defendant: provided that the plaintiff need not appear in person at the hearing of such civil bill: also, there shall be no appeal from any such decision of the Assistant Barrister; and in case of a dismissal the costs shall be paid by the plaintiff or set off against his demand, and if the defendant shall not personally appear at such hearing the Assistant Barrister may proceed to the hearing in his absence, and make such decree as he shall think fit.

6. That in any civil bill where the power of arrest would otherwise be taken away under this act, the Assistant Barrister at the original hearing of the cause, may examine the defendant and the plaintiff, and grant a decree against the person of the defendant, or commit him to prison, as if the plaintiff had proceeded specially by a civil bill for such purpose, as in the last preceding provision mentioned, provided that the plaintiff shall cause a notice to be annexed to or endorsed on the civil bill process, stating that he will proceed under the powers and provisions of this act, inserting the title thereof.

7. That in any action in any court for such sums as aforesaid, when a judgment, &c. for such sums shall be obtained, where the defendant might be arrested, if this act had not been passed, if the plaintiff show, to the satisfaction of the court in which such action shall be brought, or such judgment, &c. obtained, that there is probable cause for believing that the defendant, or one of them, is about to quit *Ireland* unless he be arrested, any such court may, upon the hearing of the case, in the first instance grant an execution, &c. against the person of the defendant, or (in the case of an execution, &c. theretofore obtained) direct such defendant to be arrested under such judgment, &c.; and plaintiff may arrest the defendant, as if this act had not passed: provided that in the case of any such order for arrest in respect of a judgment, &c. theretofore obtained, the person so arrested may apply to the court in which such judgment, &c. shall have been obtained, for a rule on the plaintiff to show cause why he should not be discharged, and the court may make such order thereon as shall seem fit, or direct the costs of the application to be paid by either party, not exceeding in any civil bill court the costs of a decree; but if the party arrested shall be discharged, it shall be without prejudice to any remedies for the recovery of the plaintiff's demand out of the property of the defendant, and the execution, &c. against the person may be changed to an execution, &c. against such property.

8. Provided, that nothing in the preceding enactments contained shall affect any informations or other proceedings under any of the statutes relating to Her Majesty's revenue of Excise, or Customs, Stamps, Taxes, or Post Office.

9. And whereas it is expedient to protect the tools and 'actual necessities belonging to judgment debtors from 'being seized in execution;' be it enacted, that from the passing of this act the wearing apparel and bedding of any debtor under a judgment, &c. or of his family, and the implements of his trade, the value of same not exceeding in the whole five pounds, shall not be liable to seizure under any execution, &c. against his goods.

10. That for the purposes of this act the clerks of the peace may issue a summons in the nature of a subpoena ad testificandum or duces tecum to any person in *Ireland* requiring him to appear and give evidence before the Assistant Barrister; and in case he shall not attend, the Assistant Barrister may upon proof of service six days before the day of appearance, and that the expenses of such person had been paid or tendered at the time of service, award such penalty against such person not exceeding five pounds, as he shall deem fit, causing to be filed of record in his court an affidavit of the time, place, and manner of such service and of the tender of expenses, to be made by the person proving same; which penalty shall be paid to the party at whose instance the summons shall have issued; and which together with expenses paid to such witness, shall be recoverable in the civil bill court of the place where awarded, or where such witness resides: and the certificate of the clerk of the peace of such county, signed by him, of such penalty having been awarded, shall be *prima facie* evidence thereof: and the Assistant Barrister may award such sum for the expen-

of witnesses as he may deem proper, not exceeding five pounds in the case of any one witness; to be recoverable in addition to the sum ordered to be paid in such decree or order, and when payable by a plaintiff in like manner as before provided as to the cost of a dismissal.

11. That every Assistant Barrister, although he shall not be at the time within his county may take any affidavit concerning any action or proceeding in his court, and administer the necessary oath and same shall be of the same force, and the penalty for false swearing shall be the same, and the same fees shall be payable thereon, as if same was taken by the Assistant Barrister in the civil bill court within his county: provided that every such affidavit shall, within six days after same shall be made, be delivered to the clerk of the peace of such county, or at his office, to be filed in said court, otherwise same to be void.

12. That in every proceeding before any Assistant Barrister, an office copy of any original will or other testamentary document lodged in any ecclesiastical court in *Ireland*, or in the registry thereof, and which shall appear by such copy to have been duly proved, and probate or letters of administration thereof granted, shall, upon proof of the signature of the proper officer of such ecclesiastical court certifying same to be a true copy, be admitted as *prima facie* evidence of the contents of such original will; and the proper officer of such ecclesiastical court is hereby required to make a memorandum in writing upon such copy of the time at which, and the person to whom such probate or administration was granted: providing, that the party producing such copy shall give notice to the adverse party in writing six days before producing same.

13. That in every such proceeding an office copy of any judgment, decree, or order, by any court of law or equity in *Ireland*, certified by the proper officer of such court, shall, upon proof of such officer's handwriting, be taken as *prima facie* evidence of such judgment, decree, or order.

14. That the service of any civil bill process on the defendant, or the wife, child, or servant of the defendant, at his shop, office, warehouse, or place of business, shall be as valid as service at the residence of the defendant: provided that no such process shall be served on *Good Friday* or *Christmas day*.

15. 'And doubts have arisen whether, under the 3 & 4 Vict. c. 105, the affidavits mentioned in the 8th section of said act can be made before the Extraordinary Commissioners of the Court of Chancery in *Ireland* for taking affidavits in *Great Britain*: and whereas it is expedient that the said commissioners should have the power to take such affidavits; same may be made before said commissioners, as same are now made before the Masters in ordinary and extraordinary of the said court in *Ireland*.

16. 'And certain tenements and parts of tenements are held in cities and towns in *Ireland*, at small monthly and weekly rents, and it is just that where the power to enforce the payment of such rents by arrest of the person is taken away, greater facility should be given for the recovery of the possession of such premises; be it enacted, that from the commencement of this act, when the term of the tenant of any house, or part of a house, in any county of a city, or county of a town, or borough, or market town, in *Ireland*, held for any term not exceeding one calendar month, at a rent not exceeding one pound sterling by the month, shall have ended, or been determined by a notice to quit, and such tenant, or any person by whom the premises or any part thereof shall be then occupied, shall refuse to quit and deliver up possession thereof the landlord or his known agent or receiver may cause such person to be served with a summons in writing, signed by a justice of the peace having jurisdiction in the place in which said premises are situate, to appear before any two or more justices at any court of petty sessions, &c., to show cause why possession of said premises should not be delivered up to such landlord or his agent, or receiver; and if the tenant shall not appear, or shall appear, and shall not, to the satisfaction of such justices, show cause why possession should not be given, and shall still refuse to deliver up the possession of said premises, the said landlord, or his agent, or receiver, may give proof of the holding, and of the determination of the

Tenancy, with the time and manner thereof, and where the title of the landlord hath accrued since the letting of the premises, the right by which he claims the possession, and such justice of the peace may issue a warrant to any constable of the district within which such premises shall be situate, requiring him, within not less than seven or more than ten clear days from the date thereof, to give possession of the premises to such landlord or agent; and same shall be a sufficient warrant to said constable to enter upon the premises, with such assistants as he shall deem necessary, and to give possession accordingly: provided that such entry shall not be made on a *Sunday*, *Good Friday*, or *Christmas day*, or at any time except between the hours of nine in the morning and four in the afternoon: provided, that nothing herein contained shall protect any person by whom such warrant shall be sued out, from any action by any such tenant or occupier in respect of such entry and taking possession, where such person had not, at the time of suing out the same as aforesaid, lawful right to the possession of the said premises.

17. That such summons may be served personally or by leaving same with some person in occupation of such house or part of a house, and where the tenant shall not reside therein, by serving same personally or by leaving same at his abode four clear days before the day for the hearing of the said summons: provided, that if the person so holding over cannot be found, and admission into the premises cannot be obtained, and the abode of such person shall either not be known or admission thereto cannot be obtained, the posting of the summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person.

18. That in construing this act and the schedule thereto, unless the context shall exclude such construction, words importing the singular number shall extend to several persons or things; and words importing the plural number, shall extend to one person or thing; and words importing the masculine gender only, shall extend to a female; and the expression "Assistant Barrister" shall include the Recorder of *Dublin*, and the chairman of the sessions of the peace for the county of *Dublin*, the Recorder of *Cork* or of *Derry*, or the Recorder of any other corporation acting and holding courts pursuant to the act for the regulation of municipal corporations in *Ireland*; and the word "decree" shall include a dismissal and a renewal of a civil bill decree; the word "plaintiff" shall include a petitioner; the word "defendant" shall include a respondent; and the words "action" or "suit" shall include a petition or matter.

19. That this act shall extend only to *Ireland*.

20. That this act shall commence and take effect on the first day of *November*, 1848.

21. That this act may be amended or repealed, &c.

Schedule to which the foregoing act refers.

FORM (A.)

Form of Civil Bill to be served pursuant to this act.
County of } By the Assistant Barrister at the sessions
division of } for the said county.

A. B of in the } The defendant[s] is [or are]
county of [Residence] } hereby required to appear be-
and addition of plaintiff[s] } fore the said assistant Barrister,
or complainant[s]. } at on day of

Plaintiff [or complainant]. } to answer the plaintiff's bill,
and to show cause why execu-
tion or process of arrest [or
C. D. of in the } a committal] should not issue
county of [Resi- } against the person of the de-
dence and addition, } fendant, under or in respect of

Defendant[s]. } a certain judgment [or decree, or order] of the court of
bearing date the day of had and obtained by
the said plaintiff[s] [or complainant[s]] against the said de-
fendant[s], for the payment of the sum of by the said
defendant[s], in a certain action [or suit], for [state the
former cause of action, or nature of the former action, or
that the claim is for costs, as the case may be]; and which
said sum of pounds the said plaintiff[s] has [or have]
been unable to recover from the said defendant, or out of
the goods and chattels of the defendant.

Or in default thereof the said Assistant Barrister will proceed as to justice shall appertain.

Dated this day of

Signed by [or on behalf of] the plaintiff [s].

FORM (B.)

Form of a Decree for Arrest or Execution against the person, or a Committal.

County of } By the Assistant Barrister at the seditious Division of } for the said County.
to wit. }

A. B. of in the County of [Residence and Addition of plaintiff [s] or Complainant[s], Plaintiff[s] [or Complainant[s].

C. D. of in the County of [Residence and Addition.] Defendant[s]

It appearing to the court that the plaintiff[s] caused a Civil Bill to be brought against the defendant[s], requiring him [or them] to show cause why execution or process of arrest [or a committal] should not issue against the person of the defendant[s], under and in respect of a certain judgment [or decree or order] of the court of bearing date the day of had and obtained by the said plaintiff[s] [or complainant[s], against the said defendant[s], for the payment of the sum of by the said defendant[s], in a certain action [or suit] for [state the former cause of action or claim], and which said sum of the said plaintiff[s] had been unable to recover from the said defendant[s] or out of the goods and chattels of the defendant[s].

And it appearing to the court that the said plaintiff[s] is [or are] entitled to the said execution [or decree or order] to be executed against the person of the defendant[s], [or to have the said defendant[s] committed for

It is therefore ordered and decreed by the court here, that the said plaintiff[s] have execution against the person of the said defendant[s] for the said sum of together with shillings and pence costs [or that the said defendant[s] be committed to the gaol of for the period of]; and the several sheriffs of the respective counties in this kingdom are hereby commanded, notwithstanding any liberty within their bailiwicks to enter the same, and take in execution the body [or bodies] of the defendant[s], to satisfy the said sum of pounds and costs, [or take the body [or bodies] of the said defendant[s], and commit the said defendant[s] to custody in the gaol of for the period of unless the said sum of and costs be sooner paid].

Dated at this day of £ s. d.

Debt or Demand,	.	.	.	.
Interest,	.	.	.	.
Cost,	.	.	.	0 8 6
Warrant,	.	.	.	0 1 1

E. F., Attorney for Plaintiff.

G. H., Attorney for Defendant.

I. K., Assistant Barrister for said County.

CAP. XXIX.

An Act to enable persons having a right to kill hares in England and Wales to do so, by themselves or persons authorized by them, without being required to take out a game certificate. [22d July, 1848.]

CAP. XXX.

An Act to enable all persons having at present a right to kill hares in Scotland to do so, by themselves or by persons authorized by them, without being required to take out a game certificate. [22d July, 1848.]

CAP. XXXI.

An Act to amend the procedure in respect of orders for the removal of the poor in England and Wales, and appeals therefrom. [22d July, 1848.]

(To be continued.)

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ESTABLISHED 1838.

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SUBJECT FOR DEBATE.

"Was the King of Prussia justified in his late dissolution of the Chamber of Deputies."

The next Meeting of the Society will be held on FRIDAY EVENING, the 8th inst.

SUBJECT FOR DEBATE.

"Will an action for Compensation lie on an agreement to let for a year certain, the premises being evicted by title paramount before the expiration of the year?"

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

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The new Act for the abolition of arrest for sums under ten pounds, and for the recovery of the possession of small tenements before Justices of the peace, with a full commentary, Index, notes and forms, adapted to the professional and trading classes.

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Portobello, March 31st.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No 46, FLEET-STREET, in the Parish of St Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, December 2nd, 1848.

THE Irish Jurist

No. 6.—Vol. I.

DECEMBER 9, 1848.

Price { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT W. OSBORNE, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.	Queen's Bench, including Civil Bill and Registry Appeals.....	{ JOHN T. BAGOT, Esq., and FLORENCE M'CARTHY, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARE HENPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.	Exchequer of Pleas, including Manor Court and Registry Appeals.	{ CHAS. H. HENPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	{ ROBERT LONG, Esq., Barrister-at-Law.

DUBLIN, DECEMBER 9, 1848.

THE imperfections, we have pointed out in the mode of valuation adopted under the poor law, and in the construction of the rate-books, introduce difficulties into the subsequent operations necessary for the collection of the rate; and, coupled with the principle that when the time allowed for appealing has elapsed, the rate-books are conclusive as to the liability of the rate-payer, have given rise to much vexatious and expensive litigation.

The easiest and cheapest mode of enforcing the payment of poor-rate, is by distress. However, it is clear, this mode cannot be adopted when the holding liable cannot be identified. Hence the collector is obliged to proceed in the Petit Session Courts, where he obtains a decree, as a matter of course, (the party summoned being concluded by the rate-book) for the amount charged, and costs, which latter item is not unfrequently the greater of the two. We have seen decrees issue for poor-rate and costs where the party decreed was admitted to have had no holding in the townland for which he was rated.

From immediate lessors, payment is enforced either by summons before a magistrate, by civil bill, or action in the superior courts; the two former modes are limited in their application, and the latter is encumbered with much technical difficulty, and attended with great expense. The necessity for these proceedings is to be referred, also, in most instances, to the imperfections already pointed out in the construction of the rate-books,—persons being set down as immediate lessors, who, in reality, are not so. A stranger may be set down as immediate lessor, who, as he could not suspect, would not be likely to examine the rate-books; and yet, if the stranger did not get his name removed by appeal, within the time limited for so doing, he would not only be liable,

but would be *the only party* liable to pay whatever might be charged against him, and neither the Guardians nor the Commissioners (though aware of the error) could remove the name thus improperly set down, or place the name of the person really liable in its room. If the guardians, instead of proceeding in such cases, could correct the rate-book, when the *party applied to for payment* could prove to their satisfaction that he was not the party liable; or if, under these circumstances, an appeal were given, much litigation might be avoided, the rate better collected, and the poor law rendered less unpopular.

The staff of the poor law is expensive, and necessarily so. Where there is much and widely-spread distress, it requires vigilant superintendence to administer relief to the really distressed, and to those only. If we could see that the tendency of the poor law was to relieve the country, by diminishing, either directly or indirectly, the amount of destitution, we would find no fault with a little expense on this head, though the country can ill afford any extravagant expenditure.

The persons relieved are classed as the infirm and able-bodied. The former are a very extensive class, and must be regarded, almost, as one of the permanent charges on the union, to be diminished only by the dying off of these unfortunates. However, even in this way, there is little chance of getting rid of this source of expense, as the gaps which are thus created are constantly filled up by paupers from the able-bodied class, numbers of whom, misery and disease—the consequence of want of sufficient food, of clothing, and frequently of shelter—are reducing to the infirm class; these, of course, as unfit for any kind of employment, are supported gratuitously at the expense of the union.

Not so the able-bodied; they, as a condition to their being supported, must place their labour entirely at the disposal of the guardians; when the workhouses afford sufficient accommodation, they

are employed in them; when they do not, an order for out-door relief is issued by the commissioners, and the able-bodied are employed in gangs, under overseers, in the neighbourhood of their villages.

Their employment generally is breaking stones, enormous heaps of which may be seen collected in fields, or along the public roads, every-where through the distressed districts; other occupations—provided they are entirely useless—are sometimes resorted to,—the principle of the poor law being, that the paupers should exert the maximum of labour in the production of the minimum of return.

So much for the valuation, the collection, and the application of the revenues under the poor law.

Whether the present system of raising the revenues, and applying them, has a tendency to diminish the amount of destitution—and, if not, why it fails to do so—must be sought for more in facts than in theory.

And what are the facts? Where almost whole towns are taken to supply additional workhouse accommodation, where the out-door relief-lists are counted by thousands, the country is a waste! Gangs of able-bodied paupers are employed at stone-breaking on roads traversing rich districts, where the thistle and the nettle take the place which should be occupied by the turnip and the oat; and, as a general rule, it may be stated that the greater the number of persons employed under the poor law in any union, the more land will be found uncultivated, and the greater the neglect of agriculture and of every industrial operation. That is, farmers who have still any capital left, instead of taking up a part of the pauper labour in the cultivation of their lands, are selling whatever property they possess, deserting their holdings, and flying from the country. The proprietary are generally allowing even the grass farms thrown on their hands to lie waste; and thus, as destitution is arriving at its maximum, the sources whence the funds for its relief are to be derived, are drying up.

We do not mean to advocate that the Poor-law Guardians should undertake the farming of the distressed districts—should employ the paupers in their cultivation, and support them out of the proceeds.

The healthful exercise of the inmates—the agricultural instruction afforded to the children, added to the profit which might be derived, would, in our opinion, justify the attaching a farm of convenient size to each workhouse. Even the old and the infirm could assist, and would delight in the occupation the culture of a garden would supply them; and it would be much better they should be so employed than spend their hours of recreation (as they are called) moping about cold day rooms, or seeking in some nook to enjoy the warmth of a beam of sunshine. However, though we thus approve of farming by pauper labour, to this small extent, we would not divert labour generally from its legitimate application—the profitable employment of the labourer for the benefit of the employer.

Whatever may be the ultimate—the proximate cause of the state of things now existing, and likely to continue in the distressed districts—is to be

found in *excessive local taxation*. Where the taxes amount, or where there is a prospect of their amounting, to the full value of the property, it is not the interest even of the proprietor himself to expend his capital—and there is very little likelihood of his engaging any other person to expend *his*—in giving employment. Actions for recovery of poor-rate, or proceedings by mortgagees to sell, are alike innocuous to property situated in this way. It is useless appointing a receiver over a waste, or bringing a valueless, or worse than valueless, property into the market. No contraction of the area of taxation, no rendering individual property liable for the support of its own poor, would meet the evil of a case like this. Interest, and interest alone, must be relied on, to urge men to exertion, and it is clear there can be no advantage in cultivating a country where the taxes are above 20s. in the £1.

If excessive local taxation be the real cause of the desertion of the farmer, and the ruin of the proprietary, in the distressed districts of Ireland, the remedy must be sought, not in contracting, but in extending the area of taxation. A tax for the relief of the poor—extending over the whole surface of Ireland, and affecting every species of property, would at first reduce the value of property in the more favoured portions of it, but by increasing its value in the distressed districts, and thus making it the interest of capitalists to purchase estates there, and give employment, would eventually conduce to the general benefit of the country.

A general tax of this kind, affecting every species of property, would, in all likelihood, be of small amount. The rate—as destitution in the distressed districts diminished—would decrease from year to year; while any system of taxation which increased the burthen on localities, exactly in proportion to their inability to bear them, (and which objection is applicable to all schemes having the diminution of the area of taxation for their base,) by virtually throwing out of cultivation large portions of the country, would have a tendency to increase, from year to year, that part of the taxation which affected the country at large. And—as large districts are unequal to the support of their own poor—on any system, a portion of the tax must be made general. In fact, were the tax a general one, the distressed districts would have a tendency to assist in the support of their own destitution—a tendency which would go on increasing from year to year; whilst, were the tax partly local and partly general, the distressed districts would have a contrary tendency, and throw the entire *onus* of their destitution on the more favoured portions of the country.

A serious obstacle to the improvement of the country, also exists in the number and extent of incumbrancers and incumbered estates. The taxation of mortgagees would perhaps have more effect in dissolving these compounds, than the operation of the Incumbered Estates Bill; whilst making the tax for relief general, would render valuable this species of property, which, if taxation remain confined to localities, will be altogether worthless in the distressed districts.

The effect also on the labour market would be beneficial. A proprietor, limited to the employ-

ment of a certain set of paupers chained to his estate, and whom, in any event, he must support, would have many difficulties to contend with in carrying out farming operations, while able-bodied paupers, willing to work, in an electoral division—where the proprietor either could not or would not give employment—must necessarily remain unprofitable to the community. Allowing the employer to seek for labourers where he pleased, and the labourer to find employment where he could, and wages in proportion to his worth, would be much more for the advantage of the employer and the employed.

In fine, there are numerous and extensive properties in the distressed districts whose proprietors can neither give employment, nor pay poor-rate; properties they cannot sell, as no one will purchase them, liable to the present excessive taxation. On these estates there are large populations, which, if the localities are not enabled to assist in supporting, must be supported entirely by a general tax, as the law will not allow them to die of starvation. To enable these properties to assist in the support of their own destitution, there is but the one means, namely, to reduce the taxation, which now deters every one from undertaking their profitable cultivation.



In our last number, we laid before our readers the substance of the "Declinatory Plea," the validity of which had been discussed in the cases of *Smith O'Brien and others v. the Queen in error*. We then stated some of the arguments for and against that plea upon the merits, and referred to the statutory enactments upon which it had been framed. We now propose to state shortly the objections in point of form (two in number) taken to the plea in question by the crown, as well as the replies to those objections given on the part of the prisoners. Before proceeding to do so, we shall, for the convenience of reference, transcribe the very words of the plea, as put in on behalf of Smith O'Brien, which, *mutatis mutandis*, was the same as that put in on the part of the other prisoners. They were as follows:—"He, the said William Smith O'Brien, protesting that he is not guilty thereof," (*i. e.* the treasons charged by the indictment) "or of any part thereof, nevertheless says that he ought not now to be compelled to answer the same, because he says that by the indictment aforesaid, he, the said W. S. O'Brien, is charged and indicted for, among other offences, compassing, imagining, and intending to put our lady the Queen to death, and that by the statutable enactments in that case made and provided, and now in force in this realm, every person indicted for compassing, imagining, and intending death or destruction to our lady the Queen, is entitled to have delivered to him before the trial, and in presence of two or more credible witnesses, a copy of the indictment, and at the same time a list of the witnesses to be produced on the trial for proving the said indictment, mentioning the names, professions, and place of abode of the witnesses, and also a copy of the panel of the jurors that are to try him on the said indictment; and the said Wm. S. O'Brien says, that on the indictment aforesaid

was found a true bill by the jurors aforesaid, on Thursday, the 21st day of September last, and that on the said Thursday, the 21st day of September last, a copy of the said indictment was delivered to him, the said Wm. S. O'Brien, in open court, but no copy of the panel of the jurors that are to try him on said indictment, nor any list of witnesses to be produced on the trial for proving the said indictment, was there or at any time delivered to him, the said W. S. O'Brien, and this the said W. S. O'Brien is ready to verify. Wherefore he prays judgment, and that he may not be *compelled to answer* the said indictment, and so forth." It is to be observed, that the foregoing plea was pleaded to an indictment which contained six counts, five whereof charged a treason—namely, that of levying war—on the trial for which,—if disconnected from the charge of treason, of compassing the death of the Queen,—the prisoners would admittedly have no claim to the privileges in question, and that it was only upon the insertion of the sixth count, charging such compassing, that the counsel for the prisoners rested the validity of the plea.

The two formal objections taken by the crown were, first, "That the facts stated therein were not proper subject matter of a plea, that they were matters properly belonging to the practice of the court where the trial was had, and that the only course open to the prisoners, whereby they could have advantage of the omissions (if omissions they were) was by motion to the Judges then presiding, to stay the trial until such omissions had been supplied, and that the decision of said Judges thereon should be final and conclusive."

Second. It was urged by the crown that the plea was informal, as purporting to be pleaded to the whole indictment, whereas it should have been confined to the sixth count, which alone charged the prisoners with compassing the death of the Queen.

To the first objection it was replied, that the rights claimed by the prisoner's plea were not like those resulting from the rules and practice of a court of justice, framed with a view to the regularity of its proceedings and the convenience of suitors,—that they were rights conferred by statute for the protection of the subject,—that the law which conferred the rights could not have intended that their enjoyment should depend on the decision (of necessity, often times hasty and ill-considered) of a motion by a Judge of assize, and that the prisoners were entitled to put the question at issue upon the record, by way of plea, in order to have it solemnly argued before a court of error, in case they were dissatisfied with the decision of the court below. The law of Scotland, where analagous privileges have been, by various statutes, conferred upon the accused, and where the denial of such privileges has been frequently pleaded, was cited as an authority in favour of the foregoing view, and Hume's Criminal Law of Scotland, 2nd vol. p. 247, was referred to.

To the second objection it was answered, that a party could not legally be called upon to answer at several times to different parts of the same indictment; that if a declinatory plea (that is a plea declining to answer) was good as to any one count,

it followed that it was good as to all; that if it were otherwise, the prisoner might be put on his trial on the same indictment at different times, as to five of the counts at one time, and as to the sixth so soon as the statutable requisitions had been complied with; a consequence, it was argued, which shewed, that if any part of the indictment was open to the declinatory plea, so must the whole. The plea in the present case was further likened to a plea stating a demand and refusal of oyer of a deed in a civil case, which, though the deed may have been set out in only one count of the declaration, is a good declinatory plea to all the counts, and the case of *Longuenille v. The Inhabitants of Thistleworth*, (2 Lord Raym. 969) was cited.

We shall conclude this article with a statement of the error assigned with reference to the caption of the indictment. As the argument on this point involved chiefly minute verbal criticism, we shall set out the caption in full, from a perusal of which, and a reference to the words in italics, our readers may at once apprehend the objection taken by the prisoners. The caption is as follows: "Be it remembered that at a special session of Oyer and Terminer, and general gaol delivery, holden in, and for the county of Tipperary, at Clonmel, in said county, on Thursday the 21st day of Sept., in the twelfth year of our sovereign lady Queen Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, and so forth, and in the year of our Lord, 1848, before the Rt. Hon. Francis Blackburne, Chief Justice of her Majesty's court of Chief Place in Ireland, the Rt. Hon. John Doherty, Chief Justice of her Majesty's Court of Common Pleas in Ireland, and the Rt. Hon. Richard Moore, fourth justice of her Majesty's Court of Chief Place in Ireland, and commissioners of our said lady the Queen of Oyer and Terminer, within her said county of Tipperary, nominated and appointed to hear and determine all and all manner of treasons, &c., by whomsoever done, committed, or perpetrated, in said county of Tipperary, as well against the peace and the common law of Ireland, as against the form and effect of any statute made, &c., and also nominated and appointed from time to time as need should be, to deliver the gaols of our said lady the Queen, by virtue of a commission under letters patent of our said lady the Queen, bearing date the 1st day of September, in the twelfth year of the reign of our said lady the Queen, to them, the said *F. Blackburne, J. Doherty, and R. Moore, and others*, in the said letters named *directed*, by the oaths of, &c., it is presented, &c."

The objection, founded on the foregoing caption, on the part of the prisoners was, that it appeared from the concluding words that the commission to try the prisoners was directed to *F. Blackburne, John Doherty, Richard Moore, and others*, that it does not appear that the three commissioners before whom the trial was had, formed a quorum, that as that authority appeared to be conferred on them jointly *with others*, they had no power to try prisoners in the absence of *those others*, and that therefore, as appeared from the caption, the trial was had coram non iudice,

The crown replied that the words *nominated and appointed*, which occur in the earlier part of the caption, meant, and with propriety of language, could be held only to mean, "with full authority, and in the absence of *all others*." That those words conveyed all that the quorum clause in ordinary commissions did, and that if the letters patent had conferred only a joint authority upon the said three commissioners and others, it would have been false in fact to have said that the said Francis Blackburne, John Doherty, and Richard Moore, had been nominated and appointed to hear and determine, &c.

Court Papers.

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CAP. XXXII.

An Act to facilitate the collection of County Cess in Ireland.
[22nd July, 1848.]

- Sec. 1. *In case Collectors cannot be procured for an entire Barony, Grand Jury at Summer Assizes of this year, or Magistrates at Special Sessions after them, may appoint Collectors for Districts.*
2. *When Grand Jury at Assizes shall not have appointed Collectors of Cess, Quarter Sessions or Special Sessions may appoint before the Spring Assizes. Persons appointed to give Security.*
3. *Collector shall pay his Collection monthly to the County Bank, or as soon as he has received 100l.*
4. *Act may be amended, &c.*

'Whereas by the 6 & 7 W. 4. c. 116, it is provided, that the grand jury of each county in Ireland shall, at each assizes, appoint a high constable and collector for each barony, to collect all monies presented on such barony, or a county of a city, or county of a town, in manner therein

'specified: and whereas, by the 11 & 12 Vict. c. 26, it is provided, that in case the grand jury at assizes shall not have appointed a high constable or collector of cess, or a vacancy shall have occurred in such office in certain cases, the justices of the peace of any county, at any general quarter sessions of the peace or adjournment thereof, or at a special sessions may appoint a collector of any barony: and whereas in some cases it may happen that a duly qualified person cannot be found to undertake the collection of a barony: be it therefore enacted, that in case it shall appear to the grand jury of any county assembled at the summer assizes of this present year, or to the magistrates assembled at a special sessions of the peace, as hereinafter directed, that a collector cannot be procured to collect for an entire barony, then such grand jury, or the magistrates at such special sessions may appoint persons for such districts as to them may seem fit, provided that such districts together comprise the whole barony.

2. That in every case in which any grand jury at such summer assizes shall not have appointed a high constable or collector of cess for any barony of such county, or if any vacancy shall occur or exist after such assizes and before the first day of the next ensuing assizes, the justices of the peace of the said county at any general quarter sessions of the peace or adjournment thereof, or at a special sessions of the peace to be called by the clerk of the peace in two days after the receipt of the written requisition of the treasurer, at the county assizes or sessions town of the division in which such barony is situate, (giving six days notice thereof to such justices resident in such division,) may appoint a collector of cess for any district of any barony of such county for which no such high constable or collector shall have been appointed at the assizes by the grand jury, or for which such vacancy shall occur or exist, as the case may be; and any such person so appointed may give such security as aforesaid before such justices in like manner as directed by the said recited acts or either of them; and in case any person appointed as aforesaid by the grand jury at the assizes shall not have given security before such grand jury as by the said first-recited act required, such person so appointed may give such security before the justices of the peace of such county at the next general or quarter sessions of the peace for the division of the county in which such barony is situate, or at any special sessions; or in default thereof such justices, at any general or quarter sessions of the peace or adjournment thereof for such county, or at such special sessions as aforesaid may appoint some other person collector for any district of such barony or place in lieu of the person so appointed by the grand jury; and the person so appointed by such justices may give security before such justices at such sessions as if the same were given at the assizes before the grand jury; and all the provisions of the said recited act, or any act amending the same, or of any other act relating to any such high constables or collectors of cess, shall be extended to any collector of cess appointed and giving security, or only giving security as aforesaid under this act, as fully as if he were a high constable or collector of cess appointed by and giving security before the grand jury at the assizes under the said recited act; and the warrant of the treasurer of such county issued to the collector of each such district (which warrant such treasurer is hereby authorized and required to issue) shall be of the same validity as if issued to a high constable or collector appointed under the said recited acts or either of them.

3. That any person authorized to collect the grand jury cess under this act shall, on or before the first day of every month, or so often as he shall receive one hundred pounds, pay into the county bank, to the credit of the treasurer of the county, the sums he may have received up to such period, and shall furnish to the treasurer of the county an account of the sums so received and paid in.

4. That this Act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. XXXIII.

An Act to apply the sum of three millions out of the consolidated fund, to the service of the year one thousand eight hundred and forty eight. [22nd July, 1848.]

CAP. XXXIV.

An Act to amend certain acts in force in *Ireland* in relation to appeals from decrees and dismissals on civil bills in the county of *Dublin* and county of the city of *Dublin*.

[23d July, 1848.]

Sec. 1. *Appeals from civil bill decrees and dismissals in the county and city of Dublin to be heard in the vacation after every term, with power of adjournment for special reasons. Notice of appeal.*

2. *Computation of time.*

3. *Interpretation of terms.*

4. *Act may be amended, &c.*

Whereas by certain acts of parliament in *Ireland* provision is made for enabling any person aggrieved by a decree or dismissal of the Recorder of *Dublin* upon any civil bill, or by a decree, dismissal, or order of the chairman of the county of *Dublin*, or by the decree of any seneschal or steward of any manor court within the county of *Dublin* or county of the city of *Dublin*, to appeal from such decree, dismissal, or order to the Chief Justice of the Queen's Bench or Common Pleas, or to the Chief Baron of the Exchequer in *Ireland*, or other justice of Nisi Prius, at their sittings at Nisi Prius for the city of *Dublin*, after the *Easter* or *Michaelmas* term next following the pronouncing of such decree, dismissal, or order, under certain regulations, one of which is that the party so appealing shall give twenty days previous notice in writing to the party obtaining such decree, dismissal, or order, or to his attorney, to which of the said judges such appeal is intended to be made: and whereas, in order as well to expedite such appeals as to distribute more equally among the vacations succeeding the law terms the business of hearing same, it is expedient to amend the said acts by making such provision in relation to the said appeals as herein-after mentioned: be it enacted, that after the passing of this act every appeal from any decree, dismissal, or order on any civil bill of the Recorder of *Dublin*, or of the chairman of the county of *Dublin*, or of any seneschal or steward of any manor court within the county of *Dublin* or county of the city of *Dublin*, or having jurisdiction within both the county of *Dublin* and county of the city of *Dublin*, shall be made to the Chief Justice of the Queen's Bench, or of the Common Pleas, or to the Chief Baron of the Court of Exchequer or other justice at Nisi Prius to try records issuing out of such court, in the vacation next following the term which shall end on or next after the expiration of fourteen days from the day of the making of such decree, &c. and such appeal may be heard by such Chief Justice, &c. at any time after the last day of such term, and before the first day of the next ensuing term, and either before or after the sittings at Nisi Prius in such vacation, with power to such Chief Justice, &c. to adjourn the hearing of any such appeal to any time in or after the subsequent term, if, for special reasons to be stated in the decree, &c. which shall be made upon such appeal, he shall deem it proper so to do; and instead of twenty days notice of appeal, now required by law, the party appealing shall give to the party who shall have obtained such decree, &c. or to his attorney, ten days (at the least) previous to the commencement of the vacation next following the term which shall so end on or next after the expiration of fourteen days from the day of the making or pronouncing of such decree, &c. notice in writing, apprising such party who shall have obtained such decree, &c. or his attorney, to which of the said judges such appeal is intended to be made; and such appeal, and all proceedings in relation thereto, shall be heard, conducted, and observed in every respect, save as otherwise provided by this act, in such manner, and subject to such rules, and regulations, as now required in case of appeal from any such decree, &c.

2. That in computing the periods of fourteen days and ten days the same shall be reckoned respectively inclusive of the day of the pronouncing of such decree, &c. and of the day of the giving of such notice, but exclusive of the day on which such vacation shall commence.

3. That in the construction of this act the word "party" shall include any corporation sole or aggregate; and that all words importing the singular number or masculine gender,

shall be construed to extend to and include many persons as well as one person, and females as well as males.

4. That this act may be amended or repealed by any act to be passed in this present session of Parliament.

CAP. XXXV.

An Act to empower the Lord Lieutenant or other chief governor or governors of *Ireland* to apprehend, and detain until the first day of *March* one thousand eight hundred and forty-nine, such persons as he or they shall suspect of conspiring against her Majesty's person and government.

[25th July, 1848.]

Sec. 1. *Persons imprisoned in Ireland for high treason, &c. may be detained till the 1st March 1849, and shall not be bailed or tried without an order from the privy council.*

2. *Persons to whom warrants of commitment are directed shall detain the persons so committed in safe custody. Persons charged with custody, as also place of detention, may be changed by warrant as herein mentioned.*

3. *Copies of warrants to be transmitted to the clerk of the crown for Dublin.*

Whereas a treasonable and rebellious spirit of insurrection now unfortunately exists in *Ireland*: therefore, for the better preservation of her Majesty's most sacred person, and for securing the peace, laws, and liberties of this kingdom, be it enacted, that every person who is, within prison in *Ireland* on the day this act shall receive her Majesty's royal assent, or after, by warrant of her Majesty's privy council of *Ireland*, signed by six of the said privy council, for high treason or treasonable practices, or suspicion of high treason or treasonable practices, or by a warrant signed by the Lord Lieutenant or his chief secretary, for such causes as aforesaid, may be detained in custody without bail or mainprize until the first day of *March*, 1849, and that no judge or justice of the peace shall bail or try any such person so committed without an order from her said Majesty's privy council until the first day of *March*, 1849, any law or statute to the contrary notwithstanding.

2. That in cases where any persons have been before the passing of this act, or shall be during the time this act shall continue in force, arrested, or detained in custody by warrants of her Majesty's privy council of *Ireland*, signed by six of the said privy council, for high treason or treasonable practices, or suspicion of high treason or treasonable practices, or by warrants signed by the Lord Lieutenant or his chief secretary, for such causes as aforesaid, any person to whom such warrant have been or shall be directed may detain such persons so arrested or committed in custody in any place whatever within *Ireland*, and such persons to whom such warrants have been or shall be directed shall be deemed to be lawfully authorized to detain in safe custody, and to be the lawful gaolers and keepers of such persons so arrested, and that such places where such persons so arrested, are or shall be detained in custody shall be deemed to be lawful prisons and gaols for the detention of such persons respectively; and the Lord Lieutenant, by warrant signed by him or the chief secretary of such Lord Lieutenant or by warrant signed by him, or her Majesty's privy council of *Ireland*, by warrant signed by six of the privy council, may from time to time, change the persons by whom and the place in which such persons shall be detained in safe custody.

3. Provided, that copies of such warrants shall be transmitted to the clerk of the crown in and for the county of the city of *Dublin*, and shall be filed by him in the public office of the Pleas of the crown in the city of *Dublin*.

CAP. XXXVI.

An Act for the amendment of the law of entail in *Scotland*

[14th August, 1848.]

CAP. XXXVII.

An Act to amend the law relative to the assignment of Ecclesiastical Districts.

[14th August, 1848.]

CAP. XXXVIII.

An Act to authorize the West India Relief Commissioners to grant further time for the repayment of monies advanced by them in certain cases.

[14th August, 1848.]

CAP. XXXIX.

An Act to facilitate the raising of Money by Corporate Bodies for building or repairing Prisons.

[14th August, 1848.]

Sec. 1. *Clauses in 10 & 11 Vict. c. 16, respecting Mortgages extended to this act.*

2. *Matters to be done by the Commissioners and their Clerk may be done by Council and Town Clerk.*
3. *Mortgagees may enforce payment of Arrears by Receivers.*
4. *10 & 11 Vict. c. 16, s. 84, as to Sinking Fund not to apply to this act.*
5. *Money raised to pay off prior Loans to be paid off within the original period of 30 years.*
6. *Sinking Fund to be provided.*
7. *Act may be amended, &c.*

Whereas by the 5 & 6 Vict. c. 98, intituled *An Act to amend the laws concerning Prisons*, the mayor, aldermen, and burgesses of boroughs in which there shall be a separate Court of Sessions of the Peace, are empowered by their councils to borrow money for building or enlarging any prison, court house, or other buildings used therewith, and to secure the repayment thereof: and greater facilities should be given for raising and repaying such monies: and 'The Commissioners Clauses Act, 1847,' contains clauses with respect to mortgages executed by the commissioners, and such clauses should apply to mortgages and bonds by councils of boroughs under the said act relating to prisons: Be it enacted, that the several clauses in the said 'Commissioners Clauses Act, 1847,' with respect to mortgages executed by the commissioners, save as to the provisions thereof inconsistent with this act, and save as hereinafter excepted, shall be incorporated with this act, and be applicable to all mortgages or bonds granted under the commission seal of any borough by virtue of the said recited act 'to amend the laws concerning Prisons.'

2. That every thing which by 'The Commissioners Clauses Act, 1847,' is provided or required, and all powers exercised by the commissioners respecting mortgages of rates or other property, may be lawfully done by the council of any such borough with respect to monies raised under the said recited act, 'to amend the laws respecting prisons:' and every thing by the said 'Commissioners Clauses Act, 1847,' required to be done in relation to the borrowing monies by the clerk to the commissioners, may be lawfully done by the town clerk of any such borough.

3. That the mortgagees or bondholders of the corporation may enforce payment of the arrears of interest, or principal and interest by a receiver, as directed by the said 'Commissioners Clauses Act, 1847.'

4. That the 84th clause in the said 'Commissioners Clauses Act, 1847,' which provides for the repayment of monies borrowed by a sinking fund shall not be incorporated with this act.

5. That if the council shall borrow any money at a lower rate of interest than by securities given by them and then in force shall bear, the money so borrowed shall be paid off within thirty years, from the time when the money paid off was originally borrowed.

6. That to discharge the principal money borrowed, which the said council are required to pay off within thirty years, the council shall every year set apart a sum equal to six pounds ten shillings *per centum* on the amount borrowed and apply same, after payment thereof of the interest, as a sinking fund in paying off principal monies, and shall invest same in the purchase of Exchequer bills or other government securities, to be increased by accumulation, until the same shall be sufficient to pay off the principal debts to which same shall be applicable, or some part thereof, when same or part thereof shall be applied in paying off such principal debts as mentioned in the said 'Commissioners Clauses Act, 1847.'

7. That this act may be amended or repealed.

CAP. XL.

An Act to alter the mode of assessing the funds leviable in the county of *Inverness*, for making and maintaining cer-

tain Roads and Bridges and other works in the Highlands of *Scotland*. [14th August, 1848.]

CAP. XLI.

An Act to amend the laws relating to the Ecclesiastical Unions and Divisions of Parishes in *Ireland*.

[14th August, 1848.]

Sec. 1. *So much of the recited acts as relates to or requires the consent of Patrons, repealed.*

2. *Plans of proposed Divisions or Unions of Parishes to be lodged in Privy Council Office, approved by Archbishop, &c., and copies to be served on Patrons; Lord Lieutenant and Council to consider such plans and the objections of Patrons, and may confirm or alter the proposed plans.*
3. *Churches may be erected within districts to be formed from portions of parishes in different dioceses.*
4. *Bounds of districts to be notified to Incumbents and to the Lord Lieutenant in Council.*
5. *Bishops to exercise jurisdiction over districts, Incumbents, &c. Nothing to render Incumbent subject to any other Bishop.*
6. *Providing for exchange of Glebe Lands of disunited Parishes.*
7. *Provisions of recited Acts applicable to districts formed under this Act.*
8. *Act may be amended, &c.*

Whereas by the 7 & 8 G. 4, c. 43, being *An Act to amend the laws in Ireland for divisions of parishes, and for uniting parts of parishes, and for erecting chapels of ease, and making perpetual cures*, it is enacted, "that the Lord Lieutenant of *Ireland*, with the assent of the major part of the privy council, six at least consenting, and with the approbation of the archbishop of the province and the bishop of the diocese, certified under their hands and seals, attested by two or more witnesses, to divide old parishes, or to separate any parish, and to unite parishes and to erect same into new parishes;" and whereas it is also enacted, "that when churches or parishes shall be united, having had distinct patrons, the Lord Lieutenant and council as aforesaid, with the approbation of the archbishop and bishop in whose province and diocese the churches were situate, shall divide the patronage among the patrons, according to the yearly value of the parish whereof they are patrons, the consent of each patron being first had and entered in the instrument for erecting the said union; and such settlement shall be final and binding to all patrons, and all parties for ever, reserving unto every archbishop and bishop, registrars and schoolmasters, their dues out of every parish so united: provided that when the King is entitled to the presentation of any churches so to be united, he shall, after such union, upon the first vacancy, have the first presentation to such united church, and afterwards, upon the next vacancy, the other patrons, as the Lord Lieutenant and council shall direct:" and whereas by the 8 & 9 Vict. c. 54, it is enacted, that where churches or parishes shall be united, the Lord Lieutenant may with the assent and advice and approbation aforesaid, certified as aforesaid with the consent of each patron, affected by the creation of such union, (first had and entered in the instrument for erecting the said union,) make such a settlement of the patronage of such union or parish, as in his opinion the case shall require; and same shall be final, reserving unto every archbishop and bishop, registrar and schoolmaster, their dues: provided, that when the consent of the Queen, is to be given to any such settlement, or to making any union, the consent of the Lord Lieutenant shall be as good and valid: and greater facilities should be afforded for the union and division of parishes in the settlement of the 'patronage:' be it enacted, that after the passing of this act so much of the before-recited acts as requires the consent of patrons is hereby repealed.

2. That after the passing of this act, when any such division or union, is to be effected, an instrument containing the plan for the division or union, marked and coloured on a sheet of the ordnance survey of *Ireland* in which such parish or part of a parish is situate, and annexed to such instrument, and also for the settlement of the patronage of

all the parishes and unions altered or created, and having endorsed upon same the approbation of the archbishop having jurisdiction in the provinces in which same are situate, and of every archbishop, bishop, or persons entitled to episcopal jurisdiction in the said parishes and unions, as dioceses thereof, certified as aforesaid, shall be lodged in the council office in *Dublin castle*, and a copy of same sent to each of the patrons, &c. whose consent is necessary to the proposed division or union, and with same a notice in writing shall be served upon the parties last aforesaid, calling upon them, within six weeks after the service of same, to lodge in the council office in *Dublin castle* a statement in writing of their objections, to the said instrument, or to the settlement of patronage; and at the expiration of six weeks from the service of the last notice, the Lord Lieutenant and privy council, (six of the said privy council at least consenting, of whom two at least shall be members of the judicial bench in *Ireland*;) may confirm said instrument, and the union or division, and the settlement of patronage therein made, and make an order reciting the said instrument as lodged in the council office, and confirming same; or if upon consideration, such Lord Lieutenant and privy council should be of opinion that the same ought to be altered such alteration may be made by them, and the instrument so altered shall be returned to the bishops or archbishops by whom it was approved; and if said instrument so altered be sent back to the council office, with their approbation endorsed thereon, such Lord Lieutenant and privy council, (as before, six at least consenting,) may make an order in council reciting the instrument as so altered by the Lord Lieutenant, and approved of by the bishops or archbishops as aforesaid and confirming same; and such order in council, whether confirming the original instrument or the instrument so altered shall be as valid as if the consent of such patrons, &c. had been given in the manner prescribed in the said recited acts, and the said union or division duly completed thereunder: provided, that at the meeting of the privy council for the consideration of the said instrument, and objections thereto, any of the parties objecting, on giving three days notice to the clerk of the privy council, may be heard before such privy council by their counsel or agents.

3. 'And whereas in the said first-recited act it was enacted that the several archbishops and bishops of *Ireland*, and their successors, within their dioceses, might erect new churches in districts to be formed from contiguous portions of adjoining parishes, as to said archbishops and bishops should seem proper: and whereas the said act did not provide for the forming of such districts from contiguous portions of adjoining parishes in different dioceses, for which 'it may be convenient to provide;' be it enacted, that any of the archbishops and bishops of *Ireland* and their successors, or persons having episcopal jurisdiction in contiguous dioceses, may erect new churches or chapels within districts to be formed from contiguous portions of two or more adjoining parishes in different dioceses, as to the said archbishops and bishops and their successor shall seem proper.

4. That the bounds for such districts shall be ascertained by writing under the hands and archiepiscopal and episcopal seals, of the archbishop and bishop or concurring in the formation of such districts; and such writing shall set out the bounds and several townlands comprised within any such district, and marked and coloured on a sheet of the ordnance survey of *Ireland*, and annexed to such instrument in like manner as herein-before mentioned, and shall be transmitted to the several incumbents and to the Lord Lieutenant in council for the purposes specified in the said act herein-before recited in respect to districts formed in the same diocese, and shall be entered in the registry of every diocese in which such newly created district shall be situated, and shall be enrolled in manner in said act set forth, upon payments to be made upon such entry and enrolment as therein mentioned.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
 Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by **THOMAS ISAAC WHITE**, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by **EDWARD JOHNSTON MILLIKEN**, residing at the same place, all being in the County of the City of Dublin. Saturday, December 9, 1846.

THE Irish Jurist

No. 7.—VOL. I.

DECEMBER 16, 1848.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, DECEMBER 16, 1848.

In preceding numbers, we gave an account of several of the operations of the present poor law, and pointed out imperfections, as well in the enactments themselves as in the machinery adopted for carrying them out,—errors in the valuation, which would disgrace the blotter of a common surveyor,—wholesale mistakes in the rate-books, which are, nevertheless, regarded as infallible,—difficulties, sometimes insurmountable, in appealing against the rate, and frequent injustice in the collection of it.

We pointed out, also, means by which these imperfections might be obviated,—by adopting the accurate valuation by the Ordinance, in place of the crude and unsatisfactory one under the poor law,—attaching the townland sheets of the Ordinance survey to the rate-books, the separate holdings being so distinguished and numbered as to admit of an easy reference from one to the other, and giving a right of appeal for a reasonable time after application for payment, and not, as at present, after the striking of the rate.

We have gone further—though, perhaps, in so doing we verged on the limits prescribed to this journal—we could not confine ourselves to the bare criticism of the wording of an act of Parliament,—to the mere detection of error in valuations, or mistakes in rate-books,—when we saw vital objections to the whole principle on which the taxation was founded. Irishmen are constantly taunted with finding faults, without suggesting remedies, and we, being compelled to find fault with the present system of local taxation, felt constrained to suggest a practical remedy. We have suggested one,—a general rate extending over all Ireland, and to every species of property, for the support of the poor; one which, in our opinion, would rescue the country from its present disastrous position.

Before entering into further proof of the necessity, practicability, and expediency of the means we have proposed, we cannot dismiss our discussion on the details of the present enactments, without noticing some remaining salient defects; and shall now apply ourselves to the inequality with which the rating under the poor law presses on different classes of property. The 79th sec. of the 1 & 2 Vict. c. 56, contains a proviso “that no deduction shall be made from any rent-charge granted by way of jointure, or any other rent-charge or annuity granted, limited, or devised, for a life or lives, in being only, or for years determinable on a life in being.”

The exemptions contained in this section, seem founded on no just principle; at least, we can see no valid reason why the landowner, who, in ninety-nine cases out of a hundred, is tenant for life, should be compelled to bear all the burden, when the life-annuitant is freed from it. The duration of both estates is the same, why not the liabilities? To test the hardship of imposing the whole tax on the proprietor, let us take the following example, which comes within our own knowledge. The owner in fee of a property producing £600 per annum, grants a perpetual rent-charge thereof of £400 per annum, limited to his eldest son for life, remainder to trustees to the use of that son's issue, and subsequently conveys the estate, subject to the second son. Then comes the poor law, taxing—during rent-charge, and a life-interest for himself, to his life the eldest son, who has two-thirds of the income—the remaining one-third, with the rate upon the whole. Now, here the quantity of the estates is the same, and the value of the son's interest—being a younger life—greater than that of his father, and yet the entire charge is cast on the shoulders of him least able to bear it. The effect of this distinction between these two life estates is in manifest contradiction to the intention of the family settlement, to justice, and to the principle on which the taxation under the poor-law is generally distributed.

It is, therefore, obvious, that for all cases similarly circumstanced, this proviso of the section cited should be repealed.

Again, mortgagees, and all other incumbrancers, including those in the section cited—the owners of perpetual unredeemable charges alone excepted—are exempt from any deduction for poor-rate. Now, when it is remembered to what an extent Irish property is incumbered, some idea may be formed of the vastness of this immunity from taxation, and the disproportionate burthen thrown on the landed proprietor. To say that three-fourths of the received rental of Ireland is absorbed in the payment of incumbrancers, would be to under estimate the amount so applied; and it seems impossible to give reasons to justify the exemption of this vast class—“*fruges consumeris nati*”—from contributing to the poor-rate.

Indeed it has not been attempted except in the case of redeemable charges, such as mortgages, in which, it is contended, that taxing these securities would throw an undue supply of land into the market, every creditor being anxious to call in his loan.

But, in the first place, this result would not follow, because, by taxing funded, and every other species of property, there would be no advantage gained by a transfer of capital from one taxed security to another; and secondly, if it did follow, it would be an advantage to the country at large, whose prosperity is retarded by nothing more than the existence of incumbered estates, which, with the powerful auxiliary supplied by the Incumbered Estates Act, would be brought into the market with a clear title, to be transferred from their embarrassed proprietors to a more solvent class.

Funded property is likewise exempted, and this, in all likelihood, arose from the difficulty of fixing the per centage it should bear for poor-rate under the present system of local taxation; but, as already adverted to, by rendering this species of property liable to poor-rate, the objection—if it be an objection—to taxing mortgagees and other creditors would be obviated, and there would be no difficulty in estimating the amount of contribution if the tax were a general one.

Nor should the enhanced value that land would acquire by the imposition of a general tax be overlooked; as it is obvious that the removal of a portion of the burden under which it is now sunk, would tend much to augment its value, and general taxation, by diminishing the desirableness of loans, would promote the investment of capital in land; in other words, sales, and not loans, would be promoted, and this is a national object of incalculable importance.

The foregoing observations manifest the inequality of the imposition of the tax, and exhibit the injustice of exempting the most solvent descriptions of property from contributing to it.

Burdening the income of a clergyman by double the ordinary rate, is an instance of an injustice of the opposite kind, and deserves especial notice, as the second rate, thus imposed, is not for the benefit of the poor, but of the proprietor liable to pay tithe rent-charge, and this double deduction is made on the gross income of the clergyman, which never

represents the true, being subject to large reductions, in the way of payment to the Ecclesiastical Commissioners, and to other charges.

It is observable also, that the machinery for the collection of the poor-rate would not be rendered in the least more complicated or expensive, by rendering the several charges on landed and other property liable to it; the primary liability might be left as at present, and an enactment enabling the person liable to any annual charge to deduct the rate from every pound in such annual charge, in the same way as a tenant deducts the landlord's proportion when paying his rent, would be sufficient in every case, except that of funded property, and here the tax could be deducted in the same way as the income tax now is.

The difficulty of adjusting the proportion the incumbrancer should pay, whilst the rate varied from place to place, even over different parts of the same property, may have hitherto been a reason for dispensing with deductions from these classes of income, but will be no longer applicable should a general rate be adopted.

The principle that land, and land only, should be chargeable with the support of destitution, implies that all poverty is rural, but this position is not sound, and, even if it were, now that the land, from an unforeseen and unaccountable visitation of Providence, has ceased to yield her strength, it seems in the highest degree inequitable to charge even the support of rural pauperism exclusively on land, and even that the present law does not do, but throws this support on the weakest portion of the population deriving a subsistence and an income from land.

Farmers, who are the producers, and landlords who, though nominally the proprietors, are frequently the ill-paid agents of their own estates, have been placed in the brunt of the battle, whilst incumbrancers—those hungry absorbents of the marrow of the soil—have escaped both the sight of destitution, and the legal necessity of contributing to its relief.

Assuming that we have proved our point—that the present imposition of poor-rate is unequal, and that the tax should be levied from every species of property, we proceed once more to enforce our views, that the best remedy for existing distress, and only safeguard against supervening calamity, will be the imposition of a general tax. We may go further, and say that it is the only remedy that Ireland can apply.

We have objected to local taxation, because, in the distressed districts, it would not supply sufficient means for relieving destitution, and because it tends to throw land out of cultivation.

Undoubtedly there is much weight in the argument, that a local tax makes it the direct interest of the locality to be vigilant in lessening expenditure in the relief of the poor, and stimulates landholders and landowners to give employment; but this argument pre-supposes that each locality can support its own poor, and in the existing condition of Ireland is wholly untenable, as nearly one-half of the country is admittedly unequal to the support of the destitute. They must either be fed from other sources, or be left to perish of want.

These are the alternatives.

What are those other sources?

1. The national treasury.
2. Local taxation, confined to individual properties, with a rate in aid.
3. An equal general tax, levied off the whole island.

It would be a delusion to expect that Irish poverty is to be perennially fed with supplies from imperial sources. Except in periods of intense distress, such as the late famine, we must struggle on with our own resources. This source of supply may be considered as cut off, and the question of selection rests between the other two, and the last only can be depended upon; for, let us ask, over what extent is the rate in aid to be levied? Let us take, for instance, the province of Connaught; is there a large proprietor in that immense province who can say, give me my own poor, including infirm and able-bodied, and I will support them, and pay my proportion of the workhouse and union expenses. Suppose, there would be—and the supposition is a strong one—will that proprietor be able to bear a rate in aid for the support of his poorer neighbours? It is obvious that he could not, and that his property must sink into the general mass of destitution. If all Connaught cannot feed its own poor, would, could, or should Munster? Where, then, can you place the limit, short of the whole island? What imaginary boundary can you draw beyond which the rate in aid is not to be extended? If you studiously exclude the rich portions of the island from contributing to the rate in aid of poverty in the poorer districts, you deliberately consign their inhabitants to starvation. It is obvious that the principle of a local rate in aid is wholly inapplicable, and that the only alternative is a general tax.

It being established, then, that the rate in aid can only be limited by the extent of the island, the only question remains between local taxation, confined to individual estates, with a general tax, and a general tax without any reference to locality. This question, however, we must reserve to a future article.

There are few subjects of ordinary occurrence in legal practice which occasion greater difficulty to the practitioner, than to ascertain exactly the extent to which amendments of the record can be made at *Nisi Prius*. In a case argued before the Court of Exchequer, in Ireland, last Trinity Term (*Doolan v. Laffan*, June 15, 1848), the question arose on the following state of facts. The action was by the indorsee against the accommodation maker of a promissory note, made payable, in the body of the note, at a particular place. The declaration contained two special counts; the first averring special presentment, the other general. The plaintiff, having failed to prove presentment at the place mentioned in the first count, obtained leave, from the learned Judge who tried the case, to amend the record, by inserting an averment in the general count, that there "were no effects in the hands of the maker of the note," thereby rendering the proof of presentment unnecessary. On the motion for

a new trial, the court gave no opinion on the amendment.

Tested by the language and intention of the statutes (9 Geo. 4, c. 15, and 3 & 4 Vic. c. 105, s. 48), and the decisions thereon, the correctness of this amendment seems more than doubtful.

The first of these statutes provided only for the amendment of variances between "any matter in writing, or in print, produced in evidence and the record;" so that the desired amendment must have been taken from the written instrument in evidence, by substituting the *ipsissima verba* for the passage mistated. Under the latter statute, if the legal effect only was intended to be stated, and mistaken, the mistake could be amended by introducing the true legal construction, provided that in neither case the amendment was material to the merits. Thus a guarantee declared on as addressed to the "plaintiff" alone, but which, in fact, was addressed to "the plaintiff, or person or persons, for the time being, carrying on the business," was held clearly a variance that might have been amended at *Nisi Prius*, *Boyd v. Moyle* (2 C. B. 644); and the same rule was laid down in *Evans v. Fryer* (10 Ad. EL. 609); *Whitwitt v. Scheer* (8 Ad. & EL. 301). But whilst the court will exercise a large degree of liberality in construing these statutes, there is no case to be found which decides that an averment can be introduced which would have the effect of changing the nature of the defence, the necessity for such averment having been obvious to the pleader. In *Jelf v. Oriel* (4 Car. & P. 22), Lord Tenterden refused to amend a declaration which stated a special acceptance at A. or at B., and the bill appeared to be accepted at B. only, saying, "It would only encourage want of care in drawing pleadings,—that the act (9 Geo. 4) was meant only to aid clerical mistakes, and not such as any man who could read would avoid making." These observations, though valuable as coming from the author of the statute, as a warning to the practitioner to avoid such misstatements, must be received with the qualification, that if the defence or plea be not altered by the amendment, the court will direct it to be made. The 9 Geo. 4 admittedly applies only to cases of variance between the written instrument declared on and that produced in evidence, *Hanbury v. Ella* (1 Ad. & EL. 61); *Gurford v. Bayley* (3 M. & Gr. 781); *Webb v. Hill*, (3 Car. & P. 485); *Masterman v. Judson*, (8 Bing. 224). The 3 & 4 Vic. c. 105, s. 48, extends the principle of the former act, by empowering the Judge at *Nisi Prius*,—in cases where no written instrument exists,—to make amendments of a similar character to those allowed under the former statute; that is, if the unwritten subject matter of the action were reduced to writing, the amendment sought to be introduced should be found incorporated therein. Therefore, the rule laid down by Lord Tenterden in *Jelf v. Oriel*, and reiterated in the recent case of *Bowers v. Nixon* (2 Car. & Kir. 372) must also be adopted in the construction of this statute. In the last case referred to, in covenant on a lease, the declaration omitted to set out one of the penal rents reserved. Maule, J., says, "It appears to me that the enactments for allowing amendments at *Nisi Prius* were intended

to meet variances arising from mere slips or accidents, and that they do not extend to a case like the present, in which the party has intentionally and designedly framed his pleading in a manner which gives rise to this objection. This being my opinion, and the allowance of amendments being entirely in the discretion of the Judge at Nisi Prius, I shall not allow an amendment in this case;" and the Court of Queen's Bench, after consideration, refused a rule for a new trial. If the true construction be, that "it shall be lawful for any court, &c., to amend when any variance shall appear between the *proof* and the *verbal* on the record of any *contract*, &c., or *other matter*, in any particular—in the judgment of the court—not material to the merits of the case," &c., the amendment in the principal case was going further than the statutes warranted. The averment could not have been introduced under the 9 Geo. 4, not being a portion of the written contract declared upon; nor under the 3 & 4 Vic. c. 105, which, if our view be correct, extended only to such amendments as we before adverted to; that is, when the averment introduced by the amendment could be found in the contract, or other cause of action; and, in this view, it is immaterial to discuss whether the amendment was material to the merits, or prejudicial to the defence. The words "other matter," which appear to have been relied on in the argument of the principal case, as conferring large powers of amendment, would seem to include causes of action *ejusdem generis* with those previously enumerated, such as actions not directly founded on written instruments, ejectment and replevin, which previously were not amendable under the 9 Geo. 4, as not professing to set out any written instrument, *Ryder v. Malbon* (3 Car. & P. 594), and not expressly named in the 3 & 4 Vic. c. 105.

Before entering on an examination of the cases decided on these acts, we must call the attention of our readers to two very important distinctions in the practice of pleading in this country and in England, which must be kept in view; first, the allowance in England of but one count; secondly, the necessity of pleading specially, defences which in this country are admissible under the general issue, both of which will be seen to have an important effect on the law of amendment,—the first, by narrowing the plaintiff's statement, would, particularly with respect to instruments difficult of construction, place him at a considerable disadvantage if it were not for the very liberal construction the courts have given these statutes, a construction admittedly adopted to relieve plaintiffs from the difficulty alluded to, *Smith v. Knowelden* (2 Man. & Gr. 561), and for which the same reasons do not exist in this country, it being here in the plaintiff's power to state his case in as many forms as he pleases. The second is of consequence, in considering the rule established by the English authorities, that the amendment is improper where it admits of a plea different from that on the record, *Garrett v. Handely* (3 B. & Cr. 462); *Brashier v. Jackson* (6 M. & W. 554); *Boucher v. Murray* (6 Q. B. 362), as being prejudicial to the defence, a test not so easily applied in this country, where the matters of defence,—that must be pleaded spe-

cially in England,—are not only here less usual in practice, but would, in many instances, be improper, as amounting to the general issue.

We shall consider the cases on this subject in two classes, those in which the amendment sought was held not to be within the purview of the acts, and those in which the question, admitting the propriety of the amendment in other respects, was, whether it was in a particular immaterial to the merits, or whether the defence would be prejudiced thereby.

In the first class we find it established that the object of the statutes was, not to cure vicious pleadings, but to prevent non-suits from variances, *Atkinson v. Raleigh*, (3 Q. B. 85; 6 Jur. 731); to give the court the power of protecting a plaintiff, by amending an obvious mistake, *Brown v. Dean*, (2 Nev. & Man. 222, Denman, C. J.) and not to give either plaintiff, or defendant an opportunity of mending their hand, by introducing on the record either a cause of action, or a defence different from that first put forward; and on this principle, that if the record had in the first instance stated the cause of action in its amended form, and the other party had not been misled by his opponent's pleading, different issues might have been raised; when the question really is not whether there is a variance between the proof and the record, but whether the defect is in the declaration, amendments will not be allowed; as where the year of the demise was not stated in the declaration in ejectment. *Doe v. Parsons*, (8 M. & W. 158); see also *David v. Preece*, (5 Q. B. 440); *Franklin v. E. of Falmouth*, (6 Car. & P. 529); *Doe v. Errington*, (1 Ad. & El. 750, S. C.; 3 N. & Man. 646).

In the next place, supposing the amendment proper—as not introducing new matter, it then will be for consideration whether the variance be not in a particular material to the merits, or the amendment proposed prejudicial to the defence, as where the defendant would be thereby deprived of what would have been ground for a motion in arrest of judgment, *Atkinson v. Raleigh*, (5 Q. B. 79; 6 Jur. 731); or the pleading, as amended, would be demurrable. *Evans v. Powis*, (11 Jur. 1043). And the best test of the extent to which the particular amendment is prejudicial, is that before alluded to, namely, whether the same plea would be applicable before and after the amendment. In *Southee v. Denny*, (17 Law Jour. 171, Ex. N.S.) the words proved being different from those laid in the record, the court refused a new trial, saying, "the words as amended were actionable, but, that if the words inserted by amendment could have been answered by a plea of justification, and that the original words could not, the amendment would not have been proper;" and, in a similar case, *Pater v. Baker*, (11 Jur. 170; 16 Law Jour. 124, C.P.N.S.) Wilde, C. J., says the amendment must be allowed. "Any plea the defendant could have pleaded would have equally been an answer to both," i.e. the amended and original record, and the same rule is followed in *Smith v. Knowelden*, (2 Man. & Gr. 561). And, in all cases where the amendment required arises merely from a mis-statement of the cause, not a misconception of the right of action, the court will be very liberal in the exercise of this power, if it be not prejudicial to the merits. *Sainsbury v.*

Mathews, (4 M. & W. 343); *Gurford v. Bayley*, (3 Man. & Gr. 781); *Hanbury v. Ella*, (1 Ad. & El. 61); *Evans v. Fryer*, (10 Ad. & El. 609), *Whitworth v. Scherr*, (8 Ad. & El. 301); *Boyd v. Moyle*, (2 C. B. 632); *Smith v. Brandram*, (2 Scott, N.R. 539; 1 Nev. & Man. 332). In *Edwards v. Leach*, (3 Man. & Gr. 229,) the demise in the ejectment was on the 15th, the proof was of a right of entry on the 16th. This variance was amended, and on a motion for a new trial, Tindal, C. J. says—“There was a variance between the allegation in the lease and the proof, the amendment of which is clearly warranted by the statute. It is said, this is an improper interference with the admission of the defendant in the consent rule; on the amendment being made, the declaration is to be considered as having been always in its amended form, and the consent rule is to be taken as always applicable thereto. *Coltman, J.*—In many instances, undoubtedly, it may be material to the merits whether the right of entry accrued on the one day or the other. In such a case the judge would in all probability refuse to amend, and *Mauls, J.*—“The consent is to confess any lease that will establish the title of the lessor;” in *Mariott v. Edwards*, (1 M. & Rob. 320, S. C. 6 Car. & P. 208,) the court allowed the proper parish to be inserted, the parties not being misled by the misdescription; and see *Gladwell v. Stagall*, (8 Scott, 60); *Roberts v. Snell*, 1 M. & Gr. 577; *Boys v. Ancell*, (5 Bing. N. C. 390). There is one case which illustrates strongly the length to which the court will go where the merits are not affected. The action was by the indorsee against the indorser of a bill of exchange. The evidence was, that the defendant was payee of the bill, and, in that capacity, indorsed to the plaintiff. The court allowed the amendment, as the defendant could raise no defence to the record as amended that was not open to him in its original form. This case is not opposed to *Jelf v. Oriel*, there the bill was stated to be specially accepted at “A. or B.” in the alternative, purporting to give the *hæc verba*, whereas in the former case, according to the usual form of pleading, the legal effect alone was given, which the court will, as we have shewn, be most liberal in amending, when the defendant is not thereby prejudiced.

To apply these principles to the case under consideration, we think the amendment went further than any of the cases we have referred to; first, because the averment placed on the record was not drawn from the instrument upon which the action was founded, whether it be considered with respect to the *issuance verba*, or the legal effect; and secondly, because the plaintiff, having stated his cause of action in as many shapes as appeared to him necessary to sustain it, should not be allowed to introduce an averment necessarily requiring a new plea. It may be said that as all these defences are in this country available under the general issue, that the defendant was not prejudiced as he would be at Westminster, if confined to one plea, but it appears to us that the plaintiff having the right to state his case without any limit as to the number of counts, and the defendant going to trial with a legal defence to each, which, in *Duckworth v. Harrison*, (5 M. & W. 427,) was held to be the defence at Nisi Prius,

and not the defence to the action, that it was never intended by the legislature that the plaintiff should be allowed at the trial not only to cure a variance between his statement and his proof, but, in the language of Parke, B., (*Doe v. Parsons*), “to cure a defect in his declaration.”

By these observations we do not mean to imply that the discretion of the judge in the principal case was not rightly exercised; if he had refused to amend, his decision could not be reviewed, and his strong sense of justice no doubt induced him to allow the amendment—whether his own opinions were favourable or otherwise—in order that the question might receive a more solemn adjudication by the full Court.

(Continued from page 48.)

5. That the Bishop in whose diocese the church of such district shall be situate, shall have all ecclesiastical and spiritual jurisdiction, powers, and authorities in and over such district, and the incumbent or perpetual curate and inhabitants thereof, in the same manner, as if the entire of the said district had been formed out of parishes situate within such diocese; and the said district shall be deemed to be within the limits of such diocese: provided that nothing herein contained shall render the incumbent of any parish a portion whereof shall be included in such district, or the emoluments, rents, or tithe rent-charge of his benefice, subject to the jurisdiction of any bishop, save the bishop in whose diocese his benefice shall be situate, or prejudice his rights or liabilities otherwise than same would have been affected in case such district had been formed under the provisions of the said first-recited act.

6. ‘And whereas there are united parishes in Ireland, and it may be expedient on the death or removal of the incumbents thereof, to disunite same: And whereas, glebe houses have been or may be built on the glebe land of the parishes forming same; and the incumbents of same may be entitled to certain sums of money to be paid to such incumbents, or their executors or administrators, on the removal or death of such incumbents, by their successors: And whereas in the event of such united parishes being disunited, the glebe houses would be too large for the residence of the incumbent of any one of the two parishes theretofore forming such united parishes:’ Be it enacted, after the passing of this act any such incumbent of any such united parishes may, with the consent of the Lord Lieutenant and the Privy Council, six at least of the said Privy Council assenting, exchange such glebe on which such glebe house may have been built, for lands of equal or greater value in any one of such disunited parishes, whereof he, the said incumbent may be entitled to, in such manner, with such consents, and under all the rules in the acts relating to the exchange of glebes in Ireland mentioned: provided, that in ascertaining the value of the glebe land so to be exchanged, such value shall be set upon such glebe house and other buildings as the Lord Lieutenant and Privy Council shall deem just; and it shall not be lawful for such incumbent, his executors or administrators, to have, or claim from any successor, any sum of money to which he or they might be entitled in respect of any such glebe house, building, or improvements; and that any certificate granted to such incumbent shall, after such exchange, be null and void.

7. That all the provisions in the said acts herein-before recited applicable to districts formed there-under shall as amended by this act, be applicable to districts to be formed under and by virtue of this act, so far as the same are not inconsistent with this act.

8. That this act may be amended or repealed.

CAP. XLII.

An Act to facilitate the performance of the duties of Justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences.

[14th August, 1848.]

Sec. 12 *English warrants may be backed in Ireland, and vice versa, in the event of parties escaping. Warrants so indorsed to be valid.*

14. *English or Irish warrants may be backed in Scotland. Warrants so indorsed to be valid.*

15. *Scottish warrants may be backed in England or Ireland. Warrants so indorsed to be valid.*

32. *Act to extend to Berwick-upon-Tweed, but not to Scotland, Ireland, &c., except as to backing of warrants.*

33. *Commencement of act.*

12. That if any person against whom a warrant shall be issued in any place in *England or Wales*, by any justice of the peace, or by any judge of the court of Queen's Bench, or justice of Oyer and Terminer or gaol delivery, for any indictable offence shall escape, go into, or be, suspected to be, in any part of *Ireland*, or if any person against whom such warrant shall be issued in any county or place in *Ireland*, shall escape, go into, or be, or suspected to be, in any place in *England or Wales*, it shall be lawful for any justice of the peace in and for the place into which such person shall escape or go, or where he shall reside or be, to indorse (K.) such warrant shall be a sufficient authority to all persons, to execute same in the place where the justice so indorsing it shall have jurisdiction, by apprehending the person against whom such warrant shall have been granted, and to convey him before the justices who granted the same, or some other justices who shall thereupon proceed in such manner as if the said person had been apprehended in the said last-mentioned county or place.

14. That if any person against whom such warrant shall be issued in *England or Ireland*, shall escape, go into, or be, or be suspected to be, in *Scotland*, it shall be lawful for the sheriff or steward depute or substitute, or any justice of the peace of the county or place where such person shall go into, or be, to indorse (K.) the said warrant, which shall be a sufficient authority to all persons, to execute same in the county or place where it shall have been so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into *England, Wales, or Ireland* where the justice who first issued the said warrant shall have jurisdiction to be there dealt with according to law.

15. That if any person against whom such warrant shall be issued in *Scotland*, who shall escape, go into, or be, or shall be suspected to be, in *England or Ireland*, it shall be lawful for any justice of the peace in the place into which such person shall escape, or where he shall be, or shall be suspected to be, to indorse (K.) the said warrant which shall be sufficient authority to the persons bringing same, and to all persons to execute the said warrant in the county or place where it is so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the place in *Scotland* next adjoining to *England*, to be dealt with according to the practice of the law of *Scotland*, as if the said offender had been apprehended in *Scotland*.

32. But nothing in this act shall extend to *Scotland or Ireland*, or to the isles of *Man, Jersey, or Guernsey*, save and except the provisions respecting the backing of warrants.

33. That this act shall commence and take effect on the 2d October, 1848.

CAP. XLIII.

An Act to facilitate the performance of the duties of justices of the peace out of sessions within *England and Wales*, with respect to summary convictions and orders.

[14th August, 1848.]

CAP. XLIV.

An Act to protect justices of the peace from vexatious actions done by them in the execution of their office.

[14th August, 1848.]

CAP. XLV.

An Act to amend the acts for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements; and also to facilitate the dissolution and winding-up of joint stock companies, and other partnerships.

[14th August, 1848.]

Sec. 1. *To what Companies Act is to apply.*

2. *Act to apply to Mining Companies and certain Building Societies.*

3. *Interpretation:—" Lord Chancellor:" "Company;" "Member;" "Constitution of a Company;" "Contributory;" "Call;" "Creditor;" "Person;" "The Court;" "Master;" "Fiat" and "Court of Bankruptcy;" "Order absolute;" Number and Gender.*

4. *Short Title of Act.*

5. *Who may petition: Act of Bankruptcy: declaration of insolvency: Judgment against the Company: Decree or order against the Company: action against a member for Company's debt: Creditors Affidavit of debt, and Writ of Summons. Dissolution or ceasing to carry on business: other sufficient ground for dissolution.*

6. *No Petition after Fiat but under direction of Court of Bankruptcy.*

7. *Proceedings in Bankruptcy to be conclusive.*

8. *Heading of Petition and subsequent proceedings.*

9. *Proceedings not to be impeached by reason of the petitioner not having been duly qualified.*

10. *Petition to be advertised in London Gazette, and served.*

11. *Court may order Petition to stand over for further Service.*

12. *Court may make order Nisi or reference to Master.*

13. *Court may apply the provisions of the Constitution of the Company.*

14. *Court may make order absolute.*

15. *Every order, until order absolute, to be advertised.*

16. *From what period Companies to be dissolved.*

17. *Petitioner to carry in order absolute before Master within ten days.*

18. *On dissolution in Suit Court may order winding-up under this act.*

19. *After order absolute Assets not to be disposed of.*

20. *Master may appoint Interim Manager.*

21. *Notice of appointment of Official Managers by the Master.*

22. *Master to appoint Official Manager.*

23. *In appointing Official Manager, Master may either adopt or reject proposals.*

24. *Recognizances of Official Manager and his sureties.*

25. *Master may order Official Manager and his Sureties to pay on their recognizances.*

26. *Master may take Security of Guarantee Society.*

27. *Appointments and removals to be valid without confirmation, and to be advertised.*

28. *Manager to have custody of books, &c.*

29. *On appointment, all Estate, effects, and credits of the Company, and all powers, &c., to vest in Official Manager. Registration of orders absolute and appointments of Official Manager.*

30. *When order made on Petition by direction of the Court of Bankruptcy, all estate, &c. of Assignee to vest in Official Manager.*

31. *Until Court shall regulate by general orders all matters relating to Official Manager not provided for by the Act, practice as to receivers to be followed.*

32. *Court may allow Salary to Official Manager.*

33. *Official Manager may employ Solicitor.*

34. *Duties of Official Manager.*

35. *As to passing accounts of Official Manager; who allowed to surcharge, &c.*

36. *Official Manager to keep books of proceedings, which shall be certified by the Master.*

37. *Master to determine what parties are to attend proceedings before him; and may appoint representatives of Contributories or classes of Contributories.*

38. *All Contributories on the list may appear, submit proposals, &c.*

39. *Lunatics to be represented by their Committees, and Minors by their Guardians.*

40. *Parties to name Solicitors on whom notices to be served.*

41. *In default of due diligence, prosecution of proceedings may be given to other parties.*
 42. *Death of Petitioner, &c. not to abate proceedings.*
 43. *Proceedings to be by proposal, and not by state of facts and proposal.*
 44. *Master may dispense with warrants.*
 45. *Adjournment of proceedings.*
 46. *Master may order other advertisements or services.*
 47. *Master to give certificates of Entries, &c.*
 48. *Contributories may inspect books.*
 49. *Books of partnership and official manager to be evidence.*
 50. *Dissolved Companies to sue and be sued in the name of "the Official Manager" of the particular company.*
 51. *Criminal proceedings on behalf of the Company to be prosecuted by the Official Manager.*
 52. *Pending actions, &c., against the Company may be prosecuted against the Official Manager.*
 53. *Pending actions, &c., on behalf of the Company may be prosecuted in the name of the Official Manager.*
 54. *Death of Official Manager to abate action, &c.*
 55. *Official Manager with the approbation of the Master may compromise.*
 56. *Orders and Decrees of a Court of Equity against the Official Manager to take effect against the Company.*
 57. *Judgments against Official Manager to take effect against the Company.*
 58. *Act not to affect rights of creditors nor existing contracts.*
 59. *Official Manager to be indemnified.*
 60. *No action or suit to be instituted or proceeded with by Official Manager but by leave of the Master.*
 61. *No claim of any contribution in respect of his share to be set off against any demand of the Official Manager of a dissolved Company against such contributory.*
 62. *Official Manager, with leave of Master, may defend actions or suits against individual contributors.*
 63. *The Master may summon any person, whether a member of the Company or not, to give evidence as to the affairs, &c.*
 64. *Cost of witnesses.*
 65. *Penalty on Contributories, &c., concealing the estate of the Company, £100, and double the value of the estate concealed.*
 66. *Pending the winding up, Master may require payment of balances.*
 67. *Orders may be enforced upon affidavit of default, and without previous demand.*
 68. *Conveyances or assignments of real estate or chattels real by Official Manager, how to be made and certified.*
 69. *As to stock in the Funds, &c.*
 70. *Payment of money into the Bank.*
 71. *List of debts to be made out by the Official Manager.*
 72. *Master to advertise commencement of winding up.*
 73. *No action or suit to be instituted or proceeded with against the Company but after proof of debt.*
 74. *Proof of debts to be made as in bankruptcy, or otherwise as Master shall direct.*
 75. *Master to allow or disallow debts.*
 76. *Official Manager to make out list of Contributories.*
 77. *List to be settled by Master and notice given of his beginning to settle.*
 78. *Notice to be given to parties included in or excluded from the list.*
 79. *List to be conclusive when settled, unless cause shown to the contrary.*
 80. *No person entitled to appear as Contributory, unless Name on List.*
 81. *Contributories may summon other persons to show cause why they should not be inserted on, or excluded from the List.*
 82. *Master to direct payment of Debts.*
 83. *Although Assets not insufficient until collected, Master may take Calls.*
 84. *Master to apportion amounts of Calls.*
 85. *Notice of intention to make Calls to be given by advertisement.*
 86. *Unless cause shown to the contrary, order to be made for payment of Calls.*
 87. *Order to be advertised and served.*
 88. *Official Manager may, with approbation of Master, enforce payment, give time, &c.*
 89. *Master may direct Action or Suit where Assets of a deceased contributory are not admitted.*
 90. *Official Manager, by direction of Master, to circulate Accounts and Ballance Sheets, &c.*
 91. *Power to Master to direct Issues, Special cases, and Actions.*
 92. *Master to adjudicate on matters of internal contest.*
 93. *Orders of Master to be valid without confirmation.*
 94. *Orders, &c. to be filed.*
 95. *Order of the Master to have the effect of Orders of Court.*
 96. *Master to have all usual powers.*
 97. *In case of illness or absence of any Master, the Master acting for him to have all usual Powers.*
 98. *Master acting during Vacations to have all usual Powers.*
 99. *Appeals to Lord Chancellor, &c.*
 100. *Master may make Special Report as to matters arising in winding up.*
 101. *Rehearing before the Lord Chancellor.*
 102. *Appeal to the House of Lords.*
 103. *Costs of proving Debts, &c. to be at the discretion of Master.*
 104. *Costs of proceedings before the Court.*
 105. *How costs to be ascertained.*
 106. *How recoverable.*
 107. *Lord Chancellor may fix Table of fees.*
 108. *Notices may be served by being sent by post.*
 109. *As to advertisements in Ireland.*
 110. *Advertisements in London and Dublin Gazettes to be evidence.*
 111. *Courts to take judicial notice of signature of Master or Registrar and of Office seats.*
 112. *Forging any such signature or seal to be Felony.*
 113. *Punishment of persons giving false evidence, &c.*
 114. *Any Contributory of a Company dissolved, &c. under this act, with knowledge of or in contemplation of dissolution, &c. destroying books, &c., guilty of a misdemeanor.*
 115. *Enforcement in Ireland of orders of the Court of Chancery of England, and vice versa.*
 116. *Decrees, &c., under this Act may be registered in Scotland, and execution may be had as upon a decree interposed upon a bond, &c.*
 117. *Where the Company shall be wound up in England, and where in Ireland.*
 118. *Court to have such jurisdiction as upon a suit duly instituted. General practice of Courts to be followed where not varied under this act.*
 119. *Court may stay proceedings on any report or order.*
 120. *Matters not provided for to be reported to the Court.*
 121. *Power to Lord Chancellor to appoint Official Managers.*
 122. *Lord Chancellor, with the advice and consent of Master of Rolls and Vice Chancellor, to make General Rules and Orders.*
 123. *District Commissioners of Bankruptcy and Judges of County Courts to be Masters Extraordinary in Chancery, and matters may be referred to them. Provisions as to General Rules, &c., to apply to such District Commissioners and Judges.*
 124. *Provision as to General Orders to apply to Ireland.*
 125. *Petition for dissolution, &c. to be a Lis pendens.*
 126. *Forms in Schedule may be used.*
 127. *Act not to apply to Scotland.*
 128. *Act may be amended, &c.*
- * Whereas, by the 7 & 8 Vict. c. 111, for facilitating the winding-up of the affairs of joint stock companies unable to meet their pecuniary engagements: and the 8 & 9 Vict. c. 98, for facilitating the winding-up the affairs of joint

stock companies in Ireland unable to meet their pecuniary engagements: and by the 9 & 10 Vict. c. 28, to facilitate the dissolution of certain railway companies, it was enacted that it should be lawful for a meeting of the shareholders of any company in said act mentioned, to determine same should be dissolved; and that, in addition to the question of dissolution, it should be imperative on the meeting to decide whether such dissolution should or not be an act of bankruptcy, for the purpose of having the affairs of the company wound up, but that such provision should not extend to railways in Scotland; and that any three of the committee of any company so dissolved, at any time after the dissolution thereof should have been resolved, or any creditor of such company to the amount requisite to support a fiat in bankruptcy in England and Ireland, or a sequestration in Scotland, might within three months after the dissolution thereof, petition that a fiat in bankruptcy might issue against such company if in England or Ireland, or that the estates of the company sequestered if in Scotland; and, that upon the production of a copy of the London Gazette containing the resolution of any such meeting, that the dissolution should be an act of bankruptcy, or upon the petition of any three of the committee, or of any creditor, a fiat in bankruptcy should issue against such company by their registered name, and the company should thereupon be deemed within the provisions of the said acts for facilitating the winding-up of joint stock companies, &c., and for facilitating the winding-up of joint stock companies in Ireland, &c., as if a fiat had issued before its dissolution, but such last provision was not to extend to Scotland: and whereas, it is expedient that the said two first-mentioned acts should be amended, and that further facilities should be given for the dissolution and winding-up of joint stock companies and other partnerships: be it enacted, that this act shall apply to all companies, corporate or unincorporate, within the provisions of either of the two acts first-mentioned, (including all companies existing on the 1st November, 1844, and which shall have, or shall obtain a certificate of registration under the 7 & 8 Vict. c. 110,) and to all companies which would have been within the provisions of either of the said two acts if they had not been dissolved, or had not ceased to trade at the passing thereof, and to all banking companies which would have been within the provisions thereof if they had not been excepted from the provisions of the 7 & 8 Vict. c. 110, and to all companies which under the provisions of the said act to facilitate the dissolution of certain railway companies shall, before the 1st of March 1848, have become bankrupt, and to all companies, associations, and partnerships to be formed after the passing of this act whereof the capital or the profits is to be divided into shares, transferable without the express consent of all the copartners.

2. That all companies for the purposes of working mines or minerals, and all benefit building societies other than such as are certified and enrolled under the statutes respecting such societies, shall be liable to the operation of this act: provided that nothing herein contained shall affect the jurisdiction of the court of Stannaries in Cornwall.

3. That the following words and expressions in this act shall have the meanings hereby assigned to them, so far as not excluded by the context.

The words "Lord Chancellor" shall include the Lord Keeper and the Lords Commissioners of the Great Seal: The word "Company" shall mean any partnership, association, or company, corporate or unincorporate, to which this act applies:

(To be continued.)

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December, 1843.

NOTICE OF REMOVAL.

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Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 14, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, December 10, 1848.

THE Irish Jurist

No. 8.—VOL. I.

DECEMBER 23, 1848.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT W. OSBORNE, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.	Queen's Bench, including Civil Bill and Registry Appeals.....	{ JOHN T. BAGOT, Esq., and FLORENCE M'CARTHY, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARRIS HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.	Exchequer of Pleas, including Manor Court and Registry Appeals.	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	{ ROBERT LONG, Esq., Barrister-at-Law.

DUBLIN, DECEMBER 23, 1848.

By the transposition of a line, the printer rendered uninteresting the illustration we gave in our last number of the inequality of the pressure of the Poor Law; we therefore re-state the instance. A father, from a property producing £600 per annum, grants a rent-charge of £400 to his eldest son for life, remainder to trustees and their heirs, to the use of that son's issue, and subsequently conveys the estate, subject to a life interest for himself, to his second son. Then comes the Poor Law, throwing the whole rate on the £200 per annum, during the life of the eldest son, thus exempting the rent-charge, which comes within the saving of the 79th section of the 1 & 2 Vic. c. 56. We have known of rates struck within the year of 10s. in the pound, and, in such case, the father would be left nothing, whilst the son, whose interest is better in amount and probable duration—his life being the younger of the two—pockets the whole of the rent-charge, without the deduction of a single farthing.

Is not this an unjust anomaly, which never could have been contemplated by the legislature?

In our last number—dismissing the hope of further relief from the Consolidated Fund—we reduced the discussion, as to the source from whence means for the relief of the pauperism of Ireland was to be derived, to a question between a local tax confined to the limits of individual estates, with a rate in aid extending to the entire surface of Ireland, and a general tax, irrespective of any proportion between its amount and the quantity of pauperism in particular estates or localities.

It is contended that the adoption of the former would stimulate the proprietors of particular estates to exertion. Give us our own poor, they say, and protect us from the pauperism of our neighbours.

We will employ the able-bodied on the cultivation of our estates, and by this means we will be enabled to support the infirm, contribute to the general expenses of the union, and pay a rate in aid beside, if our own taxation does not exceed a certain amount.

To carry out this plan, would require, in the first place, a vast multiplication of electoral divisions by the erection of each individual estate into one, as its sole hope of success rests on the stimulus which the separate taxation of each estate would impart to its owner.

A second requisite would be, a settlement for the pauper—in fact, a chaining of paupers to individual estates.

There would be great difficulty in properly carrying out the first requisite. We know poor electoral divisions, and many of them, which contain thirty or forty different properties—of course there are many containing less—but we are sure we are below the mark when we say, that by this arrangement, the number of electoral divisions would be increased tenfold. The accounts of each of these divisions must be kept distinct, and though some of the proprietors might undertake to support or employ their own poor—as the death of each pauper would be a positive gain to the proprietor—a very strict superintendence would be necessary to prevent such an event occurring either, by design, or accident, and to take care that the poor were fairly treated. Thus the machinery of the poor law—far from being rendered less expensive—would be rendered more complicated and costly.

Having carried out this minute subdivision, how many would be in a position to take advantage of it? We fear very few in proportion to the whole number of proprietors; for even if inclination and energy existed in all, the vast majority would want power—first, that very numerous class, whose incomes are scarce sufficient to pay the interest and annuities with which their estates are charge-

able; and, secondly, that class, also very numerous, whose estates are under the control of Courts of Equity. We have no accurate means of ascertaining to what precise proportion of the country estates so circumstanced extend; but from the rough estimate we have been enabled to form, we conclude, that in the distressed parts of Ireland three-fourths of the estates are helpless from one or other of these causes.

The next requisite would be a law of settlement. This would give the pauper, on a well-circumstanced estate, the advantage of employment and wages, but it would cut off the pauper on the embarrassed estate from the chance of either—as when the paupers were once settled (which, *in initio*, would cause much trouble and litigation), each proprietor would take care to prevent any more families settling on his estate—besides many proprietors have their estates in large grazing farms, quite free from population; and others, of late years—by justifiable or unjustifiable means—have got rid of their population: so much so, that a system of taxation based on the numerical amount of the population on each estate, would be very unequal, and often very unjust.

But, by limiting the local tax, it is said, all this would be remedied; by this contrivance, the densely-peopled estate will not be taxed more than it can bear, and the grazier and exterminator in the neighbourhood will be compelled to aid in the support of the poor.

But what should be the limit to the local tax? What the amount, which—whilst it would compel proprietors to give employment—would not, at the same time, by weighing too heavily on them, deter them from exertion.

Now, it must be remembered that the parts of the country where the limit would be most needed—where, in fact, it could not be dispensed with—were those in which the value of land is very much depreciated; so that any rate based on the present valuation will be far higher than that represented by the proportion expressing it. In fact, property has been reduced, at least, twenty-five per cent.; so that 3s. in the £1, on the valuation, would be 4s. in the £1 in the value; and in the districts which are almost out of cultivation, of course much more—in some of these, 3s. in the £1 is more than they could pay.

Assuming, then, 3s. in the £1 as the limit of the local taxation, and assuming that the sum required for the support of the poor in 1849 will be the same as that required in 1848, according to the first Annual Report of the Poor Law Commissioners for that year, we propose to submit the system of local taxation, with a rate in aid, to the test of figures, and ascertain what that rate in aid would probably amount to.

The total number of unions in Ireland are 231, of these there are 58 unions which, according to the Report of the Commissioners referred to, required a rate of more than 3s. in the £1, and in which, if the rate were limited to 3s., the proceeds would fall short of the sum required by £610,255. This sum should be raised by a rate in aid on the remaining 63 unions, and which—their valuation

amounting to £8,624,762—would require a rate of 1s. 5d. in the £1.

Again, by the addition of 1s. 5d. to the local taxation, the rate on 36 out of these 63 unions would be raised above the prescribed limit; on which, in consequence, the proceeds would fall short of the sum required by £96,515, which sum must be raised by an additional rate in aid of the remaining 27 unions; and, their valuation being £4,523,774, would require an additional rate of 5½d. in the £1.

Hence, on this supposition, 94 unions would be taxed to the limit, and the remaining 27 to 1s. 10½d. in the £1.

Again, a necessary part of the local taxation is, the cost of the Poor Law establishment. The cost for 1848 amounted to about £540,000, being about £45,000 a month, and this cost would require a rate of 10d. in the £1, and hence, independent of the support of the poor of the union, the rate in these twenty-seven unions would necessarily be 2s. 8½d. in the £1.; so that on the score of economy to the well circumstanced unions, this system would not be worth the additional trouble.

It may be said that 3s. in the £1. is too low a limit. Let us consider to what, one of 4s. in the £1. would reduce the rate in aid.

There are forty-one unions in Ireland which require for the support of the poor-law more than a rate of 4s. in the £1., and the limitation of the rate to this amount would cause a deficiency in the proceeds amounting to £373,825; this sum should be raised by a rate in aid on the remaining ninety unions, whose valuation amounts to £10,386,015, so that the rate in aid would be 9d. in the £1.

Again, the addition of 9d. to the local taxation would raise the rate on sixteen of these ninety unions to above 4s. in the £1., and create an additional deficiency of £25,170, which should be raised by an additional rate in aid, off the remaining seventy-four unions, and their valuation being £8,691,070, would require a rate in aid, of about ¾d.

Hence the rate required to aid a local tax limited to 4s. in the £1., would amount to 9¾d., and, added to the establishment expenses, would produce 19¾d. which each of the seventy-four unions should bear, beside the cost of its own poor; in fact it would be more, as the expenses of management would be greatly increased by the multiplication of minute electoral divisions; so that, even on this supposition, the rate in aid would be by no means a trivial tax.

We do not suppose it necessary to urge the calculation further, and try the effect of a limiting tax of 5s. in the £1. on the rate in aid. In fact it is idle to suppose that 4s. in the £1. could be raised on the present valuation off the distressed districts, and, if it were insisted on, would have the effect of discouraging all exertion in them.

Putting out of view altogether for the present, the enormous expense and litigation annexed to the multiplication of minute electoral divisions, and a law of settlement for the pauper. What is the advantage of this system over that which would provide for the support of pauperism by a general tax?

How does the rate in aid differ in principle from

the general tax? If not in this, that the rate in aid is raised for the benefit of unions which do not contribute to it, and paid by unions, who, by no exertion, can in the least diminish its amount; whereas the general tax, varying with the number of persons relieved would be slightly affected by individual exertion.

The tendency of the local tax to stimulate the owners of minute electoral divisions to exertion, is the sole argument in its favour. Where proprietors are rich, and the flood of pauperism not overwhelming, it may lead to beneficial results—results which at least ought to follow from a better principle, and without the necessity for all this cumbersome and expensive machinery. Where capital is abundant, and labour cheap, it would not seem to require the stimulus of a heavy tax to compel the capitalist to employ the labourer.

Where proprietors are helpless, and pauperism overwhelming, the system admittedly will not work. In these cases it says, we will confine your poor to your estate—we will make you pay all you can afford to keep them from dying, 4s. in the pound, if possible, if not, 3s.—and we will compel your more fortunate neighbours to supply what may still be wanting. However, though we won't allow you to employ the paupers, we will by no means suffer them to be idle. We will employ them ourselves at breaking stones, for which we will charge the country ten pence in the pound. But, alas, this will not render the estate better able to pay 4s. in the pound, or tend in the least to diminish the amount of the rate in aid required from the rest of the county. Hence the benefit of this system thus extends only to those parts of Ireland where the proprietors are rich, or comparatively so, and where pauperism is confined to moderate limits—that is not one-third of Ireland.

On the other hand, what are the advantages of a general tax over the system we have explained?

1st. A diminution in the expense of the machinery of the Poor Law, by getting rid of minute electoral divisions.

2d. The necessity of a law of settlement for the paupers would be obviated.

3d. All property in Ireland would be placed on the same level, and thus the distressed parts rendered as attractive to the capitalist as the richest and most prosperous.

As the stimulus given to the proprietor by the hope of diminishing the local tax is the *cheval de bataille*, of the former system, so the rendering the distressed districts of Ireland attractive to the capitalist is the strong point of this. The former claims credit for protecting from heavy taxation the rich unions of Ireland, whilst on the contrary, the hopes of the latter rest entirely on rendering the poorer ones self-supporting.

Which tends most directly to the general prosperity of the country—a prosperity by which the rich unions are sensibly affected, as appears from the preceding calculations—admits of easy solution.

MASTER HENN'S OFFICE.

IN RE MAHER, A LUNATIC.

Serjeant O'Brien appeared, and was about to apply to the Master, who said he could not hear

one of her Majesty's Sergeants-at-Law. Serjeant O'Brien said he was not aware such was the practice, and that the Solicitor-general was to oppose him. *Mr. Henn*.—I cannot hear you or the Solicitor-general. In England, even Queen's counsel are not heard in the Master's offices.

Court Papers.

ORDERS IN CHANCERY SINCE 1843.

Dated the 18th April, 1844.

1. Whereas by an order, bearing date the 13th of July, 1843, it was referred to the Masters in ordinary of the Court of Chancery to reconsider the Schedule of fees allowed to the solicitors of the said Court, and it was directed that the Masters, in re-considering the same, should have regard to the schedule of fees proposed for adoption by the Barons of the Court of Exchequer, with a view to assimilate, so far as practicable, the rate of charge in each court: and the said Masters having made their report, bearing date the 3rd day of October, 1843, pursuant to the said order, and having therein submitted certain matters for consideration, his Lordship with such advice and assistance as aforesaid, did, by order, bearing date the 29th January, 1844, direct that the fee of three-pence per folio for copies of documents should continue to be allowed to the solicitors of the Court; and that no alteration should be made in certain items in the said report, and in the said order specified: and did further direct that said report should be confirmed in all other particulars, and did thereby refer it to the said Masters to amend the schedule of fees, pursuant to the said report and order: and the said Masters having, by their report, bearing date the 12th of April instant, certified that they had accordingly amended the said schedule of fees, and that they had annexed the same to their said report, and to which, as a part of said report, they thereby referred: it is ordered by his Lordship, with the advice and assistance of the Right Honorable the Master of the Rolls, that the said report be confirmed, and that the said schedule of fees thereunto annexed be, and the same is hereby approved of: and it is further ordered, that that the operation of the same shall commence and take effect from the 1st day of May next; and that the schedule of fees referred to in the 156th general order of the Court, and set forth in the Appendix to the said general orders be, and the same is hereby rescinded, from and after the said 1st day of May, but to have full operation in all matters up to that day inclusive.

2. That whenever one of the Masters in ordinary of this Court shall, in pursuance of the 171st general order, deem it right to appoint a person guardian of the fortune of a minor without a receiver, and to give such person an allowance or poundage for his pains, such Master shall in no case allow such person any greater sum than two and a half per cent. on the sum to be received by him, and then subject to the direction of the Court.

3. That the Master may, in every case where a receiver is acting over the estate of a minor or lunatic, from time to time, after he has exercised the power given to him by the 172nd general order, make the like inquiry as to whether any, and what abatements or allowances should be made or continued to the tenants, or any of them; and the better to enable the Master to make such inquiry, guardians, committees, and receivers shall receive and enter in a book, to be kept by them for that purpose, all such claims for abatements or allowances as the tenants shall think themselves entitled to make; and every such guardian, committee, or receiver shall, at the time of passing his annual accounts, or of proceeding before the Master upon any statement of facts in relation to other matters connected with the estate, submit such claims, with his opinion thereon, to the Master, and the Master shall then examine into the justice of such claims, and shall by a certificate to be signed by him, authorise the receiver, or guardian, or committee, to make such abatements or allowances to the tenants whom he shall therein

specify, as he shall think fit; and such receiver, or guardian, or committee, shall thenceforth receive and enforce from the said tenants the abated rent only, until such certificate shall be varied or set aside, either by a further certificate of the Master, or by an order of the court, upon the application of the committee or guardian; but no tenant shall originate such inquiry otherwise than by so submitting his claim to such receiver, or guardian, or committee, or be allowed to interfere therein, further, or otherwise, than as the Master shall think proper.

And it is further ordered, that said two last-mentioned orders shall take effect from the date hereof.

EDWARD B. SUGDEN, C.
F. BLACKBURN, M. R.

Dated 3rd day of January, 1845.

1. That it shall not be necessary to enter an appearance for a defendant in the books kept in the registrar's office of this Court, but the entry of such appearance in the books kept in the office of the clerk of appearances and writs shall be deemed sufficient for all purposes, and the clerk of appearances and writs shall, from and after the day that these orders are to come into operation, be at liberty to issue a certificate of an appearance that has been or may be entered in his books, in the same manner as the registrars of the Court have heretofore done; and the fee of 2s. 4d. now payable to the registrar on such certificate shall from and after said day be received by the clerk of appearances and writs, and paid by him weekly over to the registrars, who are to account therefor in the same manner as for the other fees receivable in their office.

2. It having been found impracticable to carry the whole of the 190th general order into execution, the same shall be considered from this date as rescinded, except so far as the same is herein repeated.

That the solicitor for the party, on the day he shall file an original bill, or obtain the first order on a petition matter, shall lodge a docket in the office of the clerk of the appearances and writs, stating the title of such cause or matter, and the clerk of appearances and writs shall, on the day following that on which such docket shall be lodged in his office, mark on such docket (and which shall afterwards be transcribed into a book to be kept for that purpose) the name of the Master to whom such cause or matter is to stand referred, and to whom all references therein are to be directed, and for that purpose he shall introduce the name of each Master in rotation, in each cause and matter respectively commencing with the senior Master: and it is further ordered, that the clerk of appearances and writs shall at the time of inserting the name of every such Master stamp the said docket with the seal of his office, in order that the Master to whom the cause or matter is referred may have evidence that his name has been properly inserted therein: and that so much of the 189th general order as requires the clerk of the appearances and writs to have the several books of notices in his office indexed shall also be rescinded, but the clerk of appearances and writs shall have such notices bound up in one or more volumes, at the end of each term, according to the dates that such notices were respectively served.

3. That no guardian, receiver, or sequestrator shall either himself, or by any bailiff or other person, receive, in such character, any sum of money whatever, either for rent or otherwise, from any tenant or other person bound or legally authorized to pay the same, without giving to such person a good and sufficient receipt or acknowledgment in writing for the same; and if it shall at any time appear to the Master before whom such guardian, receiver, or sequestrator shall account, that any monies have been received by or for or on account of such guardian, receiver, or sequestrator without any such receipt as aforesaid having been given for the same, the Master shall, upon passing the account of such guardian, receiver, or sequestrator, when or next after such fact shall have come to his knowledge, disallow to such person so accounting, all or such part of his poundage or costs of accounting, or both, as he shall deem right or proper.

4. That every guardian, receiver, and sequestrator shall, upon the passing of his account before the Master lay before him an exact copy of the account lodged by him in the Mas-

ter's office; and if upon the passing of such account, the account produced before him shall vary in any particular, which the Master shall deem essential, from the copy so lodged, the Master shall be at liberty, not only to disallow to the said guardian, receiver, or sequestrator, the costs of the summons which he shall have issued for the purpose of passing the said account, but also to order that he shall pay to such parties as shall attend upon the said summons the costs of their several attendances, and to order that he shall at his own expense amend the account so lodged in the Master's office, by making the same conformable to the copy so laid before him; or if necessary, file a new account, and issue a summons to pass the same for such day as the Master shall then appoint; and the Master shall, in every such case, upon passing the said account, be at liberty to make such rule, in relation to the said receiver's poundage, and costs of accounting, as the justice of the case shall seem to him to require, without putting the estate to the expense of a certificate to enlarge the time for accounting, in case the period limited by the 115th rule for passing his account shall have expired before the time appointed by the Master for passing such new or amended account; and all such costs as the Master shall so award shall be recoverable in like manner as ordered by the 133rd general rule, and every receiver and sequestrator shall, if required by the person or persons to whom the property belongs, subject to the charges for the security of which the receiver or sequestrator was appointed, or by his or their solicitor, furnish to him or them a copy of any account lodged by him in the Master's office, on being paid the usual scrivenery charges therefor.

5. That the fees in the schedule hereunto annexed shall be established fees and emoluments to be allowed on taxation to solicitors, and that the schedule of fees referred to in the first general order, bearing date the 18th day of April, 1844, be and the same is hereby rescinded.

That the above general orders shall come into operation and have effect from and after the 11th day of January, 1845, but the schedule of fees mentioned in the first general order of the 18th day of April, 1844, shall have full operation in all matters up to that day inclusive.

EDWARD B. SUGDEN, C.
F. BLACKBURN, M. R.

And the foregoing orders, Nos. 2, 3, 4, and 5, to apply in like manner to Committees of Lunatics.

EDWARD B. SUGDEN, C.

Dated 28th day of October, 1845.

1. That the office of the Taxing Master of the Court of Chancery shall, until further order, be held at No. 2, Capel-street, in the city of Dublin.

2. That the office of the Taxing Master shall be open for business upon all days of the year, except as hereinafter mentioned, that is to say, Sundays, Christmas day, and the three next after Christmas day, New Year's day, Good Friday, and Easter Monday and Tuesday, and for such period, or periods during the long vacation as the Lord Chancellor, for the time being, shall from time to time appoint; and the hours of attendance therein shall be from half-past ten until four o'clock each day during term and the sittings after term, or until five o'clock on any days which the Taxing Master shall deem it expedient or necessary to extend the time; and from twelve until two o'clock each day the office is open during the long vacation, and from twelve until three o'clock in all other vacations; but the closing of the office shall not preclude the Taxing Master from requiring the continued attendance of the clerks for such further time as he may deem necessary; and the Taxing Master shall be at liberty to grant such holiday or holidays during the long vacation to the clerks as he shall deem right, having regard to the state of the business of the office; but in every case of his so doing he shall communicate to the Lord Chancellor, in writing, the extent of the permission so given.

3. That the Taxing Master shall perform all such duties as have heretofore been referred to, or performed by the Masters in Ordinary in relation to the taxation of costs, and shall in respect thereof have all such powers and authorities of every description as are now vested in the Masters in Ordinary; and shall direct and adopt all such proceedings as may now be directed and adopted by the Masters in Ordinary

on a reference for the taxation of costs, and taking an account of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court, and shall administer such oaths, and take such affirmations and attestations of honour, as the said Masters in Ordinary have heretofore being in the habit of doing, on such references, or as may become necessary for the purpose of carrying said act, or these orders into execution.

4. That all general orders of the Court, which relate to the taxation of costs, or any proceedings before the Masters in Ordinary in relation thereto, shall, so far as they may be applicable, be applied to the taxation of costs, and all proceedings before the Taxing Master in connexion therewith.

5. That the respective Masters in Ordinary shall, on or before the first day of November next, cause all bills of costs which have been or shall be lodged in their offices before the said first day of November next, pursuant to the 160th general order of the Court, to be transferred to the office of the Taxing Master; and that on and after that day, all bill of costs shall be lodged in the office of the Taxing Master, in the same manner and subject to the same regulations as are specified in the 160th and 161st general orders of the Court, now in force in relation to bills of costs now directed to be lodged in the office of the Masters in Ordinary.

6. That all bills of costs which, by any decree or order, have been referred for taxation to any Masters in Ordinary, who shall not have certified the costs due thereon before the first day of November next, are hereby transferred to the Taxing Master, and that if any bills of costs have been proceeded with before the said first day of November, the Taxing Master shall be at liberty to adopt the whole, or such part as he shall think fit, of the proceedings which have taken place before the transfer thereof to him.

7. That in cases where the accounts of any trustee, executor, administrator, consignee, or committee, shall consist in part of any bills of costs, and in cases of any proceedings under any general order, whereby the Master in Ordinary is at liberty to award and tax the costs of any proceedings before him, the Master in Ordinary, to whom it may be referred to take such account, or before whom any such proceedings may take place, shall be at liberty to request the Taxing Master to tax and settle such bills of costs; and the Taxing Master, on receiving such request, shall proceed to tax such bills, and shall have the same powers as if the same had been referred to him by the Court, and shall certify the amount due thereon to the Master in Ordinary at whose request the same were taxed.

8. That if upon the taxation of any bill of costs it shall appear to the Taxing Master, that for the purpose of duly taxing the same, it is necessary to inspect any books, papers, or proceedings relating to the cause or matter which shall be in the office of any Master in Ordinary, the Taxing Master shall be at liberty to request the Master in Ordinary having any such book, paper, or proceedings in his office, to cause the same to be transmitted to the office of the Taxing Master, and also to request any Master in Ordinary to certify any proceedings in his office which may be comprised in a bill of costs under taxation; and in that case the Master in Ordinary, when and so soon and at and for such times as the due transaction of the business in his own office will permit, shall direct such books, papers, and documents to be transmitted to the office of the Taxing Master, for his use during the taxation, and shall certify the proceedings which have taken place in his office, according to the request of the Taxing Master, and after the costs, in respect of which such request of the Taxing Master was made, shall have been certified, the Taxing Master shall cause the same books, papers, and documents, which have been transmitted to his office, to be returned to the office of the Master in Ordinary by whom they were transmitted.

9. That when any paper or document shall be transmitted from the office of a Master in Ordinary to the office of the Taxing Master, the Taxing Master, or his clerk, shall sign a receipt therefor in the book of the Master in Ordinary; and that when any such paper or document shall be returned from the office of the Taxing Master to the office of the Master in Ordinary, an entry of such return shall be made

in the same book, and signed by the Master in Ordinary, or his clerk.

10. That all orders that shall be made by the Taxing Master shall be drawn up in a short form, and shall be signed by the Taxing Master, and entered by his clerk in a book to be called the "Taxing Master's Order Book," to be kept exclusively for that purpose; and each order, before the same is issued, shall be marked by the Taxing Master's clerk in this form, "Entered A. B.;" and each party shall be at liberty to inspect, during office hours, the entry of all such orders without fee or charge.

11. That all orders of the Taxing Master requiring any person to do any act hereby ordered, shall state the time, or the time after service of the order, within which such act is to be done; and upon the copy of the order which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words, or to the effect of that directed by the 104th general order of the Court, with respect to all such orders issued by the Court.

12. That an office copy of every decree or order, whereby any costs are directed to be paid, shall be lodged in the office of the Taxing Master before he shall proceed with the taxation of such costs; and the solicitor lodging such copy shall be answerable that it is a correct copy and also every application for the taxation of costs, pursuant to the 165th general order, and the undertaking therein mentioned, shall be lodged in his office.

EDWARD B. SUGDEN, C.
F. BLACKBURN, M. R.

Dated 13th March, 1846.

Whereas by an Act of Parliament made and passed in the Session of Parliament held in the 8th & 9th years of the reign of Her present Majesty, intitled "An act to alter and amend an act passed in the third and fourth year of the reign of Her present Majesty Queen Victoria, intitled "An act to enable the owners of settled estates to defray 'the expenses of draining the same by way of mortgage,'" it was amongst other things enacted, that, for simplifying the proceedings under the said act, and rendering the same inexpensive, it should be lawful for the Lord High Chancellor, with the assistance of the Master of the Rolls, from time to time to make such orders and provision as he might think proper for the facilitating the mode of application to the court, and of the proceedings before the Master or otherwise; and whereas the right honorable Sir Edward Burtenshaw Sugden, Lord High Chancellor of Ireland, has with the assistance of the right honorable Thomas Berry Cusack Smith, Master of the Rolls, and for the purpose in the said act mentioned, thought proper to make the following orders and provisions. Now, therefore, it is ordered by the Lord High Chancellor, with the assistance of the Master of the Rolls, that all applications made to this court pursuant to the said act, and all proceedings to be had thereunder, shall be made and conducted in the manner directed by the several orders and provisions herein-after set forth; viz.—

I. Any person entitled to land within the meaning of the said act, may present to the Lord Chancellor a petition in the form herein-after set forth, with such variations as the nature and circumstances of the case may require.

(*Form of petition.*) In the matter of and
In the matter of the act (8 & 9 Vict. c. 56), &c.

To the right honorable the Lord Chancellor.

The humble petition of A. B.

Sheweth—That the lands herein-after mentioned, viz. [&c. &c. &c.] are now vested in your petitioner as tenant for life [or otherwise in some other character described in the act], and that your petitioner claims to be entitled to make permanent improvements in the said lands, by such means as are in the said act mentioned, and to cause the expense of making the same to be made a charge on the inheritance of the said lands under the provisions of the said act.

That the said lands are in the actual occupation of C. D. who hath consented in writing to this application.

Your petitioner therefore prays, that your petitioner may be at liberty to make permanent improvements in the

said lands, by the means in the said act mentioned, or some of such means, and to cause the expense of making such improvements to be made a charge on the inheritance of the said lands under the provisions of the said act, or that your Lordship will make such other order in the premises as to your Lordship shall seem meet.

And your petitioner, &c. (Signed) A. B.
I hereby consent to this petition.
(Signed) C. D., occupying tenant of the lands sought to be improved.

II. The Lord Chancellor, or Master of the Rolls, by whom such petition may be heard, may, upon consideration of such petition, and without any attendance of counsel, solicitor, or petitioner thereon, if he shall so think fit, make an order on such petition to the effect following, or to such other like effect, with such variations as the nature and circumstances of case may require.

(Form of Order).—Date In the matter of, &c.
and in the matter of the act (8 & 9 Vict. c. 56,) &c.

Upon consideration, &c., of the petition, &c., it is ordered that it be referred to the Master in rotation to enquire and state to the court whether the petitioner is entitled in possession to the lands in the petition mentioned, or any, and which of them, within the meaning of the said act of parliament, and whether the said lands are in the actual occupation of C. D. in the said petition named; and if so, under what title, and whether the said C. D. has consented in writing to the said petition and to the improvements proposed to be made under the provisions of the said act? And if the Master shall find that the petitioner is so entitled, and that the said C. D. is in such occupation, and has so consented, let the Master further enquire and state to the court succinctly, what, if any, other persons or person are or is entitled to, or interested in, the said lands, or any of them, in remainder or reversion; and the petitioner is to be at liberty to lay before the Master proposals for making permanent improvements in the said lands, by any such means as are in the said act mentioned, and to set forth in such proposals the nature and extent of such improvements, and the estimated expense thereof, and the estimated value of the permanent improvements proposed to be made; and such proposals are to be sufficient without any charge or state of facts: and the Master is to enquire and state whether such proposed improvements are permanent improvement within the meaning of the said act; and if so, what will be the expense of making the same, and what will be the value of such permanent improvements? and whether it will be beneficial to all persons interested in the said lands, that such permanent improvements should be made under the provisions of the said act?

III. The Master to whom the said reference may be made is to require proof of the deed, will, or other instrument under which the petitioner claims to be entitled to the land, but he is not otherwise to require proof of the title to the land, nor is any charge to be allowed for searching the registries.

IV. The Master, if he shall think it necessary for the due prosecution of reference, but not otherwise, may direct the petitioner to serve any other person interested in the land, with notice of the proceedings; and such person, so served, may afterwards attend such proceedings as a party thereto, as long as the Master shall deem his presence necessary; but if such person being so served, shall decline or neglect to attend pursuant to such notice, the Master may proceed in his absence, and he is to state the same in his report? any person so attending will have to bear his own costs.

V. The Master is, during the reference, to be at liberty to apply by note, in writing, to the judge by whom the order was made, for any special directions, or for leave to state any special circumstances, touching the matters referred to him; and, if he shall receive any such special directions, or such leave, he is to state the

same, and his proceeding thereon, in his report; but such note and directions are not to be treated as regular reports or orders of the court requiring to be filed or otherwise.

VI. Any person interested in the land is, without its being necessary for him to take any objection or give any previous notice, within fourteen days after the filing of the report, to be at liberty to petition the Lord Chancellor that such report may be reviewed: if such petition shall be presented, the Judge by whom the reference was made is to take the same into his consideration: and, if he shall so think fit, he may dispose thereof, either by dismissing the same, or by referring the matter back to the Master with or without special directions: he may also direct any person interested to attend, and may, if he shall think it necessary, but not otherwise, direct the same to be argued by counsel in open court or otherwise.

VII. That the petition to confirm a report may be in the form herein-after set forth, with such variations as the nature and circumstances of the case may require.

(Form of Petition).—In the matter of, &c. and in the matter of the act (8 & 9 Vict. c. 56), &c.

To the right honorable the Lord Chancellor.

The humble petition of &c.

Sheweth—That in pursuance of an order made in this matter, bearing date the day of Mr. the Master to whom the said matter was referred, has made his report bearing date, the day of and for the reasons therein stated has [here state the Master's finding.]

That the said report has been filed in the Report office of this court, and that no special application has been made to review the same.

Your petitioner, therefore, humbly prays your Lordship, that the said report may be confirmed absolutely, and that your petitioner may be authorized to make such permanent improvements as are certified in the said report, under the provisions of the said act.

VIII. The order confirming the report may be in the form following, with such, if any variations, as the nature and circumstances of the case may require.

(Form of order).—Date In the matter of
and in the matter of the act (8 & 9 Vict. c. 56), &c.

Whereas did on the day of prefer his petition to the right honorable the Lord Chancellor, thereby setting forth, and praying, that he might be at liberty to make permanent improvements in the lands therein mentioned, under the provisions of the said act; and thereupon his Lordship, on consideration of the matter of the said petition, did, by his order, dated the day of refer it to the Master to make the inquiries therein mentioned; and, in pursuance of the said order, the said Master has made his report, dated the day of, [the particulars not to be stated,] and the said report was duly filed in the Report office, on the day of and no application has been made that the same may not be confirmed, and that the said A. B. doth now by his petition pray that the same may be confirmed, and that he may be at liberty to make such permanent improvements as are specified in the said report, under the provisions of the said act: his Lordship, on consideration of the matter of the said petition, and the said Master's report, doth hereby order that the said report be confirmed, and that the said petitioner be at liberty to make such permanent improvements in the said lands as are in the said report mentioned, under the provisions of the said act.

IX. The Master by whom the said report was made may, upon production to him of the order confirming the same and giving leave to make the improvements, deliver to the party who has obtained such order a certificate to the effect and in the form herein-after stated, with such variations as the nature and circumstances of each case may require.

(Form of Certificate.)—Date In the matter of
and in the matter of the act (8 & 9 Vict. c. 56.) &c.
Whereas [*Recite, 1st, the Order of reference, shortly ;*
2d, the Report, with its date, but without any particular ;
3d, the Order "confirming the Report, and authorizing
the improvements to be made," with its date, and
generally in the terms within inverted commas.]

Now, therefore, I the said Master, in pursuance of the said act, do hereby certify that any person advancing money for making the said permanent improvements specified in my said report, will, upon its being made to appear to me that such money, to the amount specified in my said report, has been fully expended in making the said improvements, or in paying the expense of obtaining the authority of this court, become and be entitled under the said act to a charge on the land for the repayment of the money advanced, with interest; but such charge is to be subject to the terms and conditions provided by the said act, and before the same can become effective, the amount of money expended as aforesaid is to be stated by me by way of endorsement on this certificate.

X. The endorsement required by the act to be made by the Master on the said certificate, may be to the effect and in the form herein-after set forth, with such variations as the nature and circumstances of each case may require.

(Form of Endorsement.)—Whereas it has been alleged before me that the sum of £ being the whole [or part] of the sum of £ mentioned in my report recited in the within certificate, has been expended in making such improvements and paying such expenses as are therein mentioned; I have, pursuant to the liberty given to me by the said act, enquired what expenses have been incurred in and about the application to the court, and making the necessary surveys, valuations, and estimates, and also what sums of money have been actually expended in such improvements; and evidences as to such expense hath been laid before me, and I have duly considered the same, and I do hereby state and certify that it hath been made to appear to me that the sum of £ hath been fully expended in manner aforesaid in such expenses as aforesaid, and the sum of £ for improvements by drainage, warping, irrigation, or embankment, and the sum of £ for improvements by the erection of buildings: and I do hereby further certify that the said several sums amount in the whole to sum of £ and that the same was [or were] advanced on, &c. [or at such several times and in the several sums herein-after set forth; viz. &c.] and that such several sums are to be repaid, with interest after the rate of per centum per annum, by such equal annual instalments as herein-after mentioned, viz. &c. &c. [This is to be varied according to the mode of expenditure and the provisions of the 9th section of the act.]

EDWARD B. SUGDEN, C.
T. B. C. SMITH, M. R.

N.B.—Section 14 of the act points out the nature of the evidence to be received by the Master; section 5 requires the report to be filed in the Report Office, and gives power to apply to review a report within fourteen days; and section 6 gives liberty to the Master to inquire into the expenditure, and to indorse upon the certificate the amount thereof; and section 7 requires such certificate to be filed in the Report Office, and a duplicate thereof to be provided as evidence of title.

Dated 27th January, 1847.

It is this day ordered, by the right hon. the Lord Chancellor of Ireland, by and with the advice and assistance of the right hon. the Master of the Rolls, that the Masters in ordinary of this court, do annex to their reports, to be hereafter made under decrees and orders of this court, a schedule of the evidence read before them on behalf of any

party, and do also state, the tender and rejection of any evidence, which they may rule to be inadmissible.

MAZIERE BRADY, C.
T. B. C. SMITH, M. R.

Dated 5th April, 1847.

1. On reading the 168th general order of the 27th March, 1843, and on reading also a certificate from William Henn, Esq., and Edward Litton, Esq., two of the Masters of this court, dated 27th January, 1847, in the following words:—
‘Master Litton and Master Henn, certify to the Lord Chancellor, that their mode of acting on the 168th rule of 27th March, 1843, was to note in their books the attendance of counsel, and their disapprobation when they considered the attendance of counsel unnecessary, but when they approved of such attendance they made no entry whatever; while on the other hand, Master Goold generally marked his approbation when he thought the attendance of counsel necessary, and made no entry when he considered his attendance unnecessary; and Master Townsend uniformly adopted a course similar to that of Master Goold. All the Masters would suggest that the existing rule should be modified, by authorizing to endorse upon the original summons the attendance of counsel when they considered such attendance necessary, and that the attendance of counsel should be disallowed on taxation in all cases in which no entry of approbation appears.’

It is this day ordered, by the right hon. Maziere Brady, Lord High Chancellor of Ireland, by and with the advice and assistance of the right hon. Thomas Berry Cusack Smith, Master of the Rolls, that on the taxation of costs, no sum whatever shall be allowed by the taxing Master, for the attendance of counsel before any of the Masters in ordinary of the court, on references under any decree or order unless the Master in ordinary shall endorse upon the original summons on which counsel shall attend, or upon the copy thereof served upon the party for whom counsel shall attend, his approbation of such attendance of counsel, and unless the said original summons or copy, with the said endorsement thereon is produced to the taxing Master. And it is further ordered, that if the Master in ordinary shall approve of the attendance of counsel, the endorsement of such approbation shall be made by the said Master, at the time such attendance shall take place. And in no case, shall the Master permit more than one counsel to attend for the same party. And it is further ordered, that in the taxation of all costs, incurred prior to the date of this order, no sum whatever shall be allowed by the taxing Master for the attendance of counsel before any of the present Masters in ordinary of the court, on such references as aforesaid, unless a certificate shall be produced to the taxing Master signed by such Master in ordinary, stating his approval of the attendance of counsel on the days and times for which such attendance shall be charged in the bill of costs. And no sum shall be allowed by the taxing Master for the attendance of counsel before the late Master Goold, or Master Townsend, on such reference as aforesaid, unless a copy of an entry in the books of the said Master Goold and Master Townsend, respectively, shall be produced to the taxing Master, as required by the 168th general order of the court.

2. And it is further ordered, that the following order be substituted for the 146th general order of the 27th March, 1843. That a receiver, sequestrator, or guardian, upon production of a certificate of his recognisance being enrolled shall be at liberty to enter the general order, that the tenants do pay their rents and arrears of rent to him, and shall cause the same to be printed and served upon the immediate tenants of the person over whose estates or property he has been appointed, or at their residences; and every receiver, sequestrator, or guardian shall be at liberty whenever rent shall be in arrear for the space of five months after the same shall have become due, in case the same is reserved by half-yearly payments, or for the space of two months, after the same shall have become due, in case it is reserved by quarterly payments, or so soon as it shall become due in case such rent is payable weekly, (or at any other time after any half-yearly or quarterly rent shall become due, if the Master shall deem it expedient to allow him to

do so,) to proceed by distress, for recovery of such rent, without any rule or order for that purpose; such remedy to be deemed the proper one in the first instance; but when the receiver, sequestrator, or guardian shall find the remedy by distress insufficient, or inapplicable, he may lay the special facts before the Master, and if the Master shall deem it expedient to proceed by notice to quit, or by civil bill ejectment, process, or by ejectment for non-payment of rent, or by action at law, or by civil bill, the Master shall make an order or a report thereon as he shall see fit, and thereupon the receiver, sequestrator, or guardian shall be at liberty to proceed as the Master shall direct. And in every case in which the Master shall be of opinion that the receiver, sequestrator, or guardian shall proceed by attachment and not by distress for payment of any rent, the Master being first satisfied that such rent is in arrear, and that the general order to pay such rent to the receiver, sequestrator, or guardian, has been duly served upon the tenant against whom the attachment is sought, or that such tenant is either lessee or assignee of a lease under the court, or has himself paid, or is the assignee of one who has paid rent to the receiver for the holding in question, and that the rent although demanded by the receiver, sequestrator, or guardian, or by his agent duly authorized, has not been paid, shall be at liberty to give a certificate that an attachment shall issue for non-payment of such rent, stating to what period such rent is calculated, and the amount of the rent claimed to be due, and thereupon the Registrar shall issue an order that the tenant shall pay to such receiver, sequestrator, or guardian, the rent mentioned in such certificate to be due, the amount whereof shall be stated in such order, together with the sum of two pounds ten shillings for the cost of such certificate, order, and of the service of the same, within ten days after personal service of such order, or shew cause within the same period why an attachment should not issue against him for non-payment of said rent. And in case the same shall not be paid, or good cause shewn within said period, the clerk of the appearances and writs shall, on being satisfied by affidavit that such order was duly served, without any further rule or order, issue an attachment against such tenant for non-payment of said sums.

MAIERE BRADY, C.

T. B. C. SMITH, M.R.

(To be continued.)

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Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON & MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, December 23, 1848.

THE Irish Jurist

No. 9.—VOL. I.

DECEMBER 30, 1848.

Price {Per Annum, £1 10s.
Single Number, 6d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

Court of Chancery, including Bankruptcy Appeals.....	ROBERT W. OSBORNE, Esq., and
	JOHN PITT KENNEDY, Esq., Barristers-at-Law.
Rolls Court.....	WILLIAM BURKE, Esq., and
	WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.
Equity Exchequer.....	CHARLES HARE HEMPHILL, Esq., and
	WILLIAM HICKSON, Esq., Barristers-at-Law.

Court of Exchequer Chamber.....	JOHN BLACKHAM, Esq., and
	A. HICKEY, Esq., Barristers-at-Law.
Queen's Bench, including Civil Bill and Registry Appeals.....	JOHN T. BAGOT, Esq., and
	FLORENCE M'CARTHY, Esq., Barristers-at-Law.
Exchequer of Pleas, including Manor Court and Registry Appeals.....	CHAS. H. HEMPHILL, Esq., and
	WILLIAM HICKSON, Esq., Barristers-at-Law.
Common Pleas.....	ROBERT LONG, Esq., Barrister-at-Law.

DUBLIN, DECEMBER 30, 1848.

At the close of the last session of parliament, the Chief Secretary for Ireland announced that her Majesty's government had it in contemplation to introduce a law for the better regulation of receiverships under the Court of Chancery. The initiative of this very important subject is due to Mr. Bernal Osborne. The returns moved for by him, and laid before parliament, shew that whilst the number of estates over which receivers have been appointed has been stationary, or decreasing, the increase of the arrears due on those estates has been enormous.

Nor can this increase be attributed solely to the distress of the country. Much must be ascribed to the system, and the management of it. In proof that "the famine in the land" has not been the sole cause, we give a summary of two returns, the first from the Devon Commission, which comes down to the year 1843, and the second, that already alluded to, which has been more carefully compiled, and extends to the year 1847.

The first states the average number of causes for the years 1841, 42, 43, in the Courts of Chancery and Equity Exchequer, as 1002; the rental of the estates over which receivers had been appointed £702,822. 5s. 2d.; the arrears when appointed, £83,406. 9s. 11d.; when they last accounted, £400,206. 17s. 9½d., that is, they had considerably more than quadrupled, and this before the famine! The costs allowed to receivers amounted to £30,115. 1s. 10d. and this of course exclusive of their poundage.

The parliamentary return is more carefully compiled. The Chancery returns are given separately for the years 1844, 45, 46, 47, shewing the aggregate number of estates under the control of the court, over which receivers had been appointed, and the counties in which they are situated. The average total number for these four years would

be 820 estates, with an average rental of £680,000. The arrears in 1844 amounted, at date of receiver's appointment, to but £34,559, when they accounted to £380,888, that is, they had increased more than eleven times.

Nor does the picture brighten in 1845, the arrears, at date of appointment, were £33,560; at time of reckoning, £442,902, that is, more than thirteen fold. In 1846 it grows still more gloomy; as to arrears, they had swelled at date of appointment to £207,161, but the disproportion at time of accounting was infinitely less, amounting only to £375,374. In 1847 it grows darker and darker still, the arrears at date of appointment were but £33,044; at time of accounting they had increased to £469,191. The returns from the Court of Exchequer are taken for the same period of time, but collectively, and the result shews that there are 448 estates under receivers, the rental of which amounts to £155,403, the arrears at date of appointment amounted to £61,779, and at time of reckoning to £171,839.

But these returns shew facts more startling still. The amount expended in improvements on estates under the Court of Chancery over this enormous rental, the greater part of the estates being situated in the most unimproved parts of Ireland, amounted, in the year 1844, to only £2,522, and in the three succeeding years respectively, to £4,772, £1,507, and £2,555; whilst, in the Court of Exchequer, on a rental of £155,000 a-year, one single shilling during four years, was not expended. The average expenditure in improvements during the last four years was thus but £2,851 16s. 8d. per annum, being exactly 5½d. per cent. per annum on the gross rental; but it will be found, on examination of the return, that there is over £900,000 a-year of rental, allowing for accumulations, out of which there is not one shilling expended, either in improving these neglected estates, or in any way assisting to give employment to the poor!

The regeneration of the condition of the Irish people, as an agricultural community, must be wrought through the soil of Ireland; on it they live, and move, and have their being. Is that improvement accelerated by the mode allowed to incumbrancers to realize their debts, through the medium of Courts of Equity? The lamentable results which the foregoing returns exhibit testify the contrary, and they form subject for deep and anxious consideration.

The Irish incumbrancer is, in fact, the owner of the soil; he extracts its produce, and he gives no direct return. On him the law casts no responsibility; with him property has its rights, but not its duties. It is right and just that the capitalist should have secure places for the investment of his capital, and that his capital should be returned, provided that the process for the return be just and equitable, and not ruinous and destructive. If the creditor have not power to enforce his contract, without the aid of a Court of Equity; in seeking that aid, the creditor confesses his impotency, and the court, in rendering assistance, should give it only on the terms of being omnipotent, not merely in regulating, directing, and controlling the equities between the parties, but the properties which are delegated to their care pending such adjustments. A Court of Equity should not be a mere bailee for safe custody, but in truth the great *parens patriæ* under the *arbitrium boni viri*; the deposit should not only be not depreciated, it should be improved during the period of its being placed under the care of the court.

But what *should* be, is not. The law allows the creditor to take property from the hands of the debtor, whose responsibilities are in some degree defined, though the obligation, being an imperfect one, could not always be enforced by law. The transfer involves the creditor in no burden of proprietorship, but places the *management* of the estate under a Court of Equity, which has hitherto been potent for evil and powerless for good, in consequence of the system, not of the managers of it, who do much to counteract its evils.

Very many of these properties are very small; they have been placed under the dominion of Courts of Equity since the years 1836 and 1840, in consequence of the "fatal facility" given by the Judgment Acts (5 & 6 Wm. 4, c. 55, and 3 & 4 Vic. c. 105), whilst the expense of appointing, and completing the appointment of a receiver, is considerable, frequently much more than the amount of the debt. We have heard, on unquestionable authority, of a sum due by a half-pay officer possessed of some very trifling property, which amounted to only £11, whilst the costs in the Receiver's matter exceeded £70. The debtor died a pauper in a workhouse!

In the counties of Armagh, Carlow, Donegal, Leitrim, Londonderry, and Monaghan, to their credit be it spoken, there were only five properties in each, under Receivers of the Court of Chancery, the aggregate rental of the thirty estates amounting to little more than £12,000 per annum. In Londonderry the rental of the five properties was only £712 14s. 6d. In the year 1847, there was only one property in Down with a Receiver under

the Court of Chancery. The largest number were in Dublin, Galway, Limerick, and Tipperary. There are, however, a large number (276) in the return of the year 1847 not described as to locality. It is to be observed, that not only does the estate lose by the power of the proprietor to improve being taken from him, and vested in nobody; but it loses, likewise, in the change of men who are to act as Receivers—in one sense, truly, and yet not truly, so called; for, although their sole duty is to *receive*, yet even that is ill done. They are so shackled in power, so incapable of acting with promptitude, or power of adaptation to circumstances, that much less is received from the estate than was previously due by the owner, whilst the tenants were less impoverished. Nearly every proceeding by a Receiver must, if he wish to protect himself, be taken under the direction of the Master to whom the cause or matter has been referred, and this can only be done by a written, verified statement of facts, and every statement of facts causes delay and costs money; and even then there is no sufficiently controlling power, the jurisdiction of the Master is limited, and frequently an application must be made to the court; every such application causes delay and costs money, and neither Receiver, Master, nor Court can of themselves, and without the consent of creditor or inheritor, expend money in improving the properties placed under their care.

The responsibility of the office, the irksomeness of the duties, not a single pleasurable act connected with them in the way of rewarding or encouraging an industrious tenant—the difficulty of procuring solvent sureties, and the reluctance to ask friends to sign a recognizance which formed an incumbrance on their estates, whilst they are obliged to qualify on oath—the perpetual necessity of making affidavits, and the unpleasantness of serving many masters,—the Court, the great supervisor, the Master, the Director-General, the plaintiff in the cause, and every other creditor not caring a rush for the estate, provided they ever receive their money from it, whether wrung from the tenant, or from the Receiver made answerable for some loss a generous proprietor would never have charged him with, and the precariousness of the tenure of office, have all contributed to render the appointment exceedingly undesirable. In fact, no gentleman who can obtain a private agency would accept of it.

There is but one qualification for the office, the power of procuring sureties.

Formerly the amount of private jobbing in these appointments was enormous. The plaintiff, or the plaintiff's solicitor, appointed his friend without opposition—the solicitor having either become reckless, or an absentee—on an understanding that the solicitor for the receiver should be either the plaintiff's solicitor, or some one who would divide the profits. Immediately on his installation, the receiver collected every shilling in which he had not been anticipated by the proprietor, who, before bidding his last farewell to his lands, took from the tenants whatever they could give in money or kind, and gave them receipts in full. The celerity was not thereby to pay off the creditor who was badly in need of his interest, no such thing; by

prudent management the time for accounting could be extended, and meantime something handsome could be realized by prudently taking a turn out of the money.

The interests of the tenant and receiver were in antagonism; the one shilling poundage could be doubled, or quadrupled, by collecting quickly, accounting very slowly.

In some degree these evils have been abated by the new rules of 1843, for which Sir Edward Sugden deserves our highest approbation.

We do not wish, for the mere sake of making out a strong case—the facts are plain, they require no colouring of ours—to deal out sweeping censures, on the contrary, we attack a system, not individuals, a system which is susceptible of improvement, and to the investigation of which we must recur again.

Court Papers.

LEGAL DIRECTORY—1849.

JAN.

- 10 Last day for making Country Writs returnable, so as to file Declaration, and have Judgment on appearance this Term. Q. B., C. P., Ex.

Hilary Term.

- 11 Hilary Term begins. Dublin Quarter Sessions.
 12 Last day in Q. B. to serve notice to set aside verdicts for surprise, or newly-discovered evidence, by Rule 26 Jan. 1822. Last day to set down Causes to be heard this Term in Chancery.
 13 Petition day in Chancery. City Record Court sits.
 15 Last day to appear to Town Writs returnable before Term, Q. B., C. P., Ex. Last day to move to set aside verdicts for surprise, &c. Q. B. Last day for serving notice to set aside verdicts, to set down points saved, and bills of Exceptions. Ex. in Q. B. no notice necessary, except under Rule, 26 Jan. 1822.
 17 Petition's Rolls. Last day to move to set aside verdicts, &c. Ex.
 18 Short Causes, Chan. G. O. Ap. 1848. Grand day. Q. Inna. Causes, Demurrers, and Pleas, Rolls.
 19 Causes, Demurrers, Pleas, Rolls. Last day for moving on Ejectments in Q. B. if not under ancient rule.
 20 Petition day in Chancery. Last day to file declarations on Common Appearance, Q. B., C. P., Ex. Last day for serving notice of Civil Bill appeals for sittings after Term, 11 & 12 Vic. c. 34. Civil B. C. sits.
 23 Last day to file Declarations on P. Ap., Q. B., C. P., Ex., and Ejectments, Ex., except it be under the provisions of 1 & 2 W. 4, c. 31, s. 12.
 24 Petitions, Rolls.
 25 Causes, Demurrers, Pleas, Rolls. Last day for moving on Postea, to make rule absolute this Term, Exch., except under 1 & 2 W. 4, c. 31, s. 16.
 26 Causes, Demurrers, Pleas, Rolls. Last day for Mandamus or Information motions, or for Attachments, save for non payment of costs, and against officers of Court of Q. B. Cr. side. Last day to change Venue on Common Affidavit, Q. B., and last day to move on Postea and Inquisitions, Q. B.
 27 Petition day in Chancery. Last day for moving on Ejectments in Q. B. under ancient rule. Last day to fine Sheriffs for not returning writs so as to make Rule absolute this Term, Q. B., C. P., Ex.
 29 Last day to move to change Venue on Common Affidavits, and for Attachments, Ex.
 31 Hilary Term ends. Last day to serve notice of Motion, Rolls. Last day to enter Rule for Judgment, and

upon Scire Facias, Q. B., C. P., Ex., which, if on Declarations in Ex., C. P., should be served two days previous.

FEB.

- 2 Last day for serving notice of motion, Eq. Ex.
 6 Judgment may be marked on Rules entered last day of Michaelmas Term, C. P., Ex., provided same be served two clear days previous, and in Q. B. without service of Rule for Judgment.
 7 Petition Rolls.
 8 Causes, Demurrers, Pleas, Rolls, } if not disposed of
 9 Causes, Demurrers, Pleas, Rolls, } in Term.
 13 Entitled to Judgment in Q. B. on Ejectment, moved upon last Term under ancient rule.

Easter Term.

APRIL.

- 16 Easter Term begins.
 17 Dublin Quarter Sessions. Last day to set down causes to be heard this Term in Chancery. Last day to make Country Writs returnable to have judgment this Term, Q. B., C. P., Ex. Last day to serve notice in Q. B. to set aside verdict for surprise or newly-discovered evidence, Rule, 26 June, 1822.
 18 Petitions Rolls.
 19 Causes, Demurrers, and Pleas, Rolls. Last day to move to set aside verdict for surprise, &c. Q. B. Last day to appear to town writs returnable before term, Q. B., C. P., Ex. Last day to serve notice to set aside verdicts, and set down points saved, and bills of Exceptions, Ex.
 20 Causes, Demurrers, Pleas, Rolls.
 21 Last day to make town writs returnable to have judgment this term, Q. B., C. P., Ex. Last day to move to set aside verdicts, Ex.
 24 Appear to country writs returnable before Term, Q. B., C. P., Ex.
 25 Petitions, Rolls. Civil Bill Court sits.
 26 Causes, Demurrers, Pleas, Rolls. Short causes, Chan. G. O., April, 1848. G. day, Q. Inna. Last day to move on Ejectments to have judgment this Term, Q. B.
 27 Causes, Demurrers, Pleas, Rolls. Last day for Declaration on appearance to have judgment this Term, Q. B., C. P., Ex. To serve notice of C. B. appeal for sittings after Term, 11 & 12 Vic. c. 34.
 30 Last day for Declaration on P. A.—Q. B., C. P., Ex., and Ejectments, Ex.

MAY.

- 2 Petitions, Rolls. Last day for moving on Postea to make rule absolute this Term, Ex.
 3 Pleas, Demurrers, Exceptions, Rolls. Last day to move on Postea, and to change the Venue, Q. B. Last day to move for Mandamus and Informations, and for Attachments, except for costs, and against the Officers of the Court. Q. B., Cr. side.
 4 Last day to fine Sheriffs for not returning writs, Q. B., C. P., Ex. Causes, Demurrers, Pleas, Rolls.
 5 Last day to move for Attachments, or to change the Venue, Ex.
 8 Easter Term ends. Last day to serve notice of motion, Eq. Ex. Last day to enter rule for judgment, and on Scire Facias, Q. B., C. P., Ex. On Declarations in Ex., C. P., two previous days service of rule for judgment should be given.
 14 Judgment may be marked on rule entered last day of Term, provided same be served two clear days previous, C. P., Ex., and in Q. B. without service of rule for judgment.

Trinity Term.

- 22 Trinity Term begins. Last day to make country writs returnable so as to have judgment this Term, Q. B., C. P., Ex.
 23 Last day to serve notice to set aside verdicts in Q. B. for surprise or newly-discovered evidence, under rule 26th June, 1822. Petitions, Rolls.
 24 Pleas, Demurrers, and Exceptions, Rolls.

- 25 Pleas, Demurrers, and Exceptions, Rolls. Last day to serve notice to set aside verdicts, and to set down Bills of Exceptions and points saved, Ex., and also to appear to town writs, Q. B., C. P., Ex., and to move to set aside verdict for surprise, &c., Q. B.
- 26 Last day to make town writs returnable to have judgment this Term, Q. B., C. P., Ex.
- 28 Last day to move to set aside verdicts, &c. Ex.
- 30 Petitions, Rolls. Appear to country writs returnable before Term, Q. B., C. P., Ex.
- 31 Short causes, Chan. G. O., Ap. 1848. G. day, Q. Inns. Last day to move on Ejectments to have judgment this Term in Q. B. except under ancient rule. Pleas, Demurrers, and Exceptions, Rolls.

JUNE.

- 1 Pleas, Demurrers, and Exceptions, Rolls. Last day to file Declaration on common appearance to have judgment this Term, Q. B., C. P., Ex. Last day to serve notice of C. B. appeal for sittings after Term, 11 & 12 Geo. 4, c. 34.
- 4 Last day to file declarations on P. Ap. to have judgment this Term, Q. B., C. P., Ex., and Ejectments, Ex.
- 6 Petitions, Rolls. Last day to move on Postea, to make rule absolute this Term, except as provided 1 & 2 W. 4, c. 31, s. 16., Ex.
- 7 Pleas, Demurrers, and Exceptions, Rolls. Last day to move on Postea, and to change venue, Q. B. Last day to move for Information and Mandamus, and for Attachments, except for costs and against Officers of the Court, Q. B. Crown side.
- 8 Pleas, Demurrers, and Exceptions, Rolls. Last day to fine Sheriffs, to make rule absolute this Term, Q. B., C. P., Ex., and for moving on Ejectments under ancient rule, Q. B.
- 9 Last day to change venue on common affidavit, or to move for Attachments, Ex.
- 12 Trinity Term ends. Last day to enter rule for judgment, and for moving on Scire Facias in Q. B., C. P., and Ex. Two days previous, service of rule on judgment upon Declarations in the two latter Courts necessary.
- 14 Last day to serve notice of motion, Eq. Ex.
- 18 Judgment may be marked on rule entered last day of Term, if same be served two days previous in C. P., Ex., and in Q. B. without service.
- 25 Entitled to judgment on Ejectments moved on in previous Term under ancient rule, Q. B.

JULY.

- 10 Dublin Quarter Sessions.
- 20 Civil Bill Court sits.

OCT.

- 2 Dublin Quarter Sessions.
- 20 Civil Bill Court sits.

Michaelmas Term.

NOV.

- 2 Michaelmas Term begins.
- 3 Last day to serve notice to set aside verdict for surprise or newly-discovered evidence, Q. B. Rule, June, 26, 1822.
- 5 Last day to make country writs returnable, to file Declaration, and have judgment this Term, Q. B., C. P., Ex.
- 6 Last day to serve notice to set aside verdicts, to set down points saved, and Bills of Exceptions, Exch. Last day to move to set aside verdicts for surprise, Q. B. Appear to town writs returnable before Term, Q. B., C. P., Ex.
- 7 Petitions, Rolls.
- 8 Last day to move to set aside verdicts, &c. Ex. Pleas, Demurrers, and Exceptions, Rolls.
- 9 Pleas, Demurrers, and Exceptions, Rolls. Last day to make town writs returnable to have judgment this Term, Q. B., C. P., Ex.
- 10 Petition day, Chancery. Appear to country writs returnable before Term, Q. B., C. P., Ex.
- 14 Petitions, Rolls. Last day to move on Ejectment to have judgment this Term, Q. B.

- 15 Short cause day, Chancery, G. O., Ap. 1848. Pleas, Demurrers, and Exceptions, Rolls. Last day to file Declaration on appearance, Q. B., C. P., Ex.
- 16 Pleas, Demurrers, and Exceptions, Rolls.
- 17 Last day to file declaration on P. A., Q. B. C. P., Ex., and Ejectments, Ex.
- 20 Last day to move on Postea, to make rule absolute this Term, except under 1 & 2 W. 4, c. 31, s. 16.
- 21 Petitions, Rolls. Last day to move on Postea, and to change Venue on common affidavit, Q. B., and for Mandamus and Information motions, or for Attachments, save for non-payment of costs and against officers of Court Q. B. Cr. side.
- 22 Pleas, Demurrers, and Exceptions, Rolls. Last day to fine Sheriffs not returning Writs, Q. B., C. P., Ex.
- 23 Pleas, Demurrers, and Exceptions, Rolls. Last day to move for Attachments, and to change Venue on common Affidavit, Ex.
- 26 Mich. Term ends. Last day to enter rule for judgment, and on Scire Facias, Q. B., C. P., Ex. Two days' previous service of rule for judgment on Declarations in Ex., C. P., should be given.
- 28 Last day to serve Notice of motion, Eq. Ex.
- 30 Last day for serving Notice on Commissioners of Woods and Forests, of the objects and provisions of local Acts, intended to be applied for in ensuing Session of Parliament, 11 & 12 Vic., c. 129.

DEC.

- 1 Entitled to judgment on Rule for judgment entered last day of previous Term, provided same served two clear days previous, C. P., Ex., and in Q. B. without service of Rule.

ORDERS IN CHANCERY SINCE 1843.

(Concluded.)

Dated 18th June, 1847.

On reading a further certificate of Masters Henn and Litton, dated the 3rd day of June, 1847, referring to the statements contained in their certificate of the 27th day of January last, in reference to the entering by Masters Townsend and Gould, in their books of the attendance of counsel before them, it is this day ordered, by the right honorable Maziere Brady, Lord High Chancellor of Ireland, by and with the advice and assistance of the right hon. Thomas Berry Cusack Smith, Master of the Rolls, that number one of the general orders, bearing date the 5th of April, 1847, be amended, by adding thereto the following words:—"or a certificate shall be produced to the taxing master, of either Master Henn or Master Litton, certifying that having examined the briefs used on the occasion, the case appeared to them to have been a fit one for the employment of counsel."

MAZIERE BRADY, C.
T. B. C. SMITH, M. R.

Dated 22nd May, 1848.

It is ordered, by the right hon. the Master of the Rolls, that in all cases where a motion is made at the Rolls, to make a consent a rule of court, purporting to be made between all the parties in the cause, there shall be a certificate at foot of, or endorsed on, the consent, signed by the solicitor for the party on whose behalf the motion is made to the following effect, or as near thereto, as the circumstances of each case will admit.

"I hereby certify, that I have carefully compared the title of this consent with the Rolls certificate, (or certificates,) and that it corresponds therewith; and I further certify, that this consent has been signed by, or on behalf of all the parties in the causes and matters in the title hereof mentioned, save and except (here name the persons if any, who have not signed.)"

And if there shall have been a decree to account in any of such causes, and any person shall have proved a demand thereunder, and such consent shall seek to transfer or pay over, any stock or cash, add after the words "all the parties" the words "and all persons who have proved under the decree."

It is further ordered by the right hon. the Master of the Rolls, that when a motion shall be made at the Rolls, for the transfer of any stock or the payment of any money out of Court, or by the receiver, and the motion shall be grounded on a report of the Master, or a decree, or on both, whereby the priorities of the several parties and creditors, or incumbancers are ascertained, there shall be a certificate at foot of, or endorsed on, the notice of motion, signed by the solicitor for the party on whose behalf the motion shall be made, to the following effect, or as near thereto as the circumstances of the case will admit.

'I hereby certify, that I have compared this notice with the Master's report, (or decree, or both, as the case may be,) and I further certify, that the stock sought to be transferred (or the money sought to be paid out of Court, or by the receiver, or as the case may be) is sought to be transferred (or paid as the case may be) in exact accordance with the rights and priorities of the several parties, as ascertained by the said report (or decree, or both as the case may be.)'

And if the notice is not framed in exact conformity with such report or decree, add these words "save in the following particulars," and then describe with perfect accuracy, wherein the notice varies from such report or decree.

T. B. C. SMITH, M. R.

10th, April, 1848.

The Lord Chancellor desires that a list of short causes be made out in each term to be heard on the second Thursday in term and following days. That causes set down or bills and answer only, or on reports unexcepted to, or on returns to commissioners of petitions be considered as short causes within this rule, and all other causes in which the solicitor for the party setting down the cause shall hand to the Registrar the certificate of counsel that it is not from its nature, likely to take time, and is fit to be heard as a short cause.

MAZIERE BRADY, C.

IN LUNACY.

August 21st, 1848.

It is ordered by the Lord Chancellor, that, in the letting of lands the property of lunatics or idiots, the Masters, Committees and Receivers shall have regard to the provisions of the 23rd and 24th sections of the statute 11 G. 4, and 1 W. 4, c. 65; and that (unless in special cases, and on special grounds, to be approved of by the Lord Chancellor) no lease of such lands shall be made dependent on the duration of the matter of such lunacy or idiocy; but every such lease shall be made for some certain term, so far as the estate and powers of the lunatic or idiot will admit;—it appearing to the Lord Chancellor that it will be for the benefit of the estates of such lunatics or idiots that the leases thereof should have such certainty of duration: and such term shall not in any case be less than twenty-one years, unless otherwise especially ordered: and every such lease, where the Master shall not otherwise direct, shall contain proper clauses, to be approved of by him, for preventing the assignment or subletting of the lands demised, in addition to the other clauses and covenants to be inserted therein pursuant to the present general orders.

MAZIERE BRADY, C.

(Continued from p. 56.)

The word "Member" shall mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the petition for dissolving the same or winding up the affairs thereof under this act: The expression "Constitution of a company" shall mean every deed of partnership or settlement, charter, act of parliament, regulations, or other instrument whatsoever, including any bye laws, by or under which the business of the same is or was, or is or was intended to be carried on:

The word "Contributory" shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or adminis-

trator of a deceased member, or as a former member of the same, or of heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever:

The word "Call" shall mean a demand or requisition upon contributories of a company made or to be made for a contributory payment towards the funds or assets thereof, or for or towards the payment or discharge of any of the debts, liabilities, or losses of such company or otherwise:

The word "Creditor" shall include every person having any debt or demand enforceable against any company in any court of law or Equity, or for nonpayment or non-satisfaction of which damages could be recovered:

The word "Person" shall include corporations:

The words "the court" shall mean Her Majesty's High Court of Chancery in *England* or *Ireland* (as the case may be) before which any proceeding under this act shall take place:

The word "Master" shall mean the master in ordinary of the court for the time being acting in any matter under this act:

The word "Fiat" shall include any commission of bankruptcy which shall be issued in *Ireland*, and the words "Court of bankruptcy" shall include any commissioner acting in the prosecution of any such commission of bankrupt in *Ireland*, and the Lord Chancellor of *Ireland* sitting in bankruptcy:

The words "Order absolute" shall mean the order absolute for the dissolution and winding-up, or for the winding-up, as the case may be, of any company under this act:

And every word importing the singular number only, shall extend to several persons or things, as well as to one person or thing, and every word importing the plural number only, shall extend to one person or thing, as well as to several persons or things, and every word importing the masculine gender only, shall extend to a female as well as to a male.

4. That in citing this act, it shall be sufficient to use the expression "The Joint Stock Companies Winding-up Act, 1848:"

5. That any person who shall be, or claim to be a contributor of a company, may present a petition to the Lord Chancellor, or to the Master of the Rolls in a summary way, for the dissolution and winding-up, or for the winding-up of the affairs of such company, in any of the following cases:—

1. If any company shall have committed any act, which under the said recited acts or any of them would be deemed an act of bankruptcy:

2. If any company shall, by a resolution passed at a meeting of such company, or of the directors, summoned in that behalf, have filed in the office of the Lord Chancellor's Secretary of bankrupts, a declaration in writing that the said company is unable to meet its engagements:

3. If any person shall have recovered judgment in any action personal, for the recovery of any demand in any of Her Majesty's courts of Record, against any such company, or against any person authorized to be sued as the nominal defendant on their behalf, or against any one or more of the members or contributories of such company, acting or sued in the name, or on behalf of the other members or contributories, and shall be in a situation to sue out execution upon such judgment, and same shall not be restrained or suspended by any rule of any court, and there shall be nothing due from the plaintiff which may be set off against such judgment, and if within ten days after notice in writing served upon a chief clerk or secretary, or registrar of the said company, or if there be no such officer, then either on any director of the said company, personally or by the same having been left at the head or only office for the time being of such company, requiring immediate payment of such judgment debt, such company shall not have paid, secured, or compounded for the same:

4. If any decree, or order shall have been pronounced in

any cause depending in any court of equity, or any order made in any matter of bankruptcy or lunacy, against such company, or against any person authorized to be sued as the nominal defendant on their behalf or against any one or more of the members or contributories thereof, ordering any sum of money to be paid, and such company shall not have paid same when same ought to be paid:

5. If any action shall have been brought in any court or record against any contributory for any demand due of claimed to be due from or by such company, and such company shall not, within ten days after notice in writing by such contributory of such action served upon the company in manner herein-before directed with respect to any judgment debt, have paid, secured, or compounded for such demand, or procured such action to be stayed, or shall not have indemnified the defendant to his satisfaction against such action, and all costs, damages, and expenses to be incurred by him by reason of the same:

6. If any creditor of a company to the amount requisite to support a fiat shall have filed an affidavit in any superior court of law at *Westminster* or *Dublin*, that such debt is justly due to him from the said company, and shall have sued out of the said court a writ of summons or other writ against such company, or any person authorized to be sued on behalf of such company, or against any one or more of the members or contributories thereof in the name of the other members or contributories, and shall have given notice of same as before directed, and such company shall not within three weeks after service of such notice have paid, secured, or compounded for such debt to the satisfaction of such creditor, or have made it appear to the satisfaction of one of the judges of the court out of which such writ shall have issued that it is the intention of such company to defend the action upon the merits, and shall not within three weeks next after service of such notice have caused an appearance to be entered to such action in the proper court in which the same shall have been brought:

7. If any company shall be dissolved, or cease to carry on business, or carry on business only for the purpose of winding up its affairs, and the same shall not be completely wound up:

8. Or if in any other matter or thing shall be shown which in the opinion of the court shall render it just and equitable that the company should be dissolved.

6. That in case any fiat shall have issued against any company under any of said acts, no petition shall be presented for the dissolution and winding up or winding up of such company under this act by any person other than creditors assignees of the estate and effects of such company, who may by the order of the court of bankruptcy (but not otherwise,) present a petition to the Lord Chancellor or Master of the Rolls, for the winding up of such company under this act, and such order shall be a sufficient ground for such petition; and upon an order for the winding up of such company by the court of Chancery the court of bankruptcy shall make upon the proceedings under the fiat a memorandum of such order of the court of bankruptcy, and the said proceedings shall be deposited with the master to whom the matter shall be referred by the court of Chancery, provided, that the master may dispense with such deposit.

7 That all proceedings, accounts and matters in the prosecution of any fiat, before order absolute under this act, shall, for the purposes of winding up under this act, be as valid as the same would have been under the said fiat, and any pending proceedings, accounts, and matters under such fiat may be concluded under this act.

8. That every petition and proceeding under this act shall be intitled "in the matter of Joint Stock Companies Winding-up Act, 1848," and in the matter of the company to which such petition or proceeding shall relate, describing such company by its most usual style or firm, until any order absolute under this act, and after any such order then by the style by which such company shall have been designated in such order absolute.

9. That no order absolute, nor any order or proceeding under this act shall be impeached by reason of any of the petitioners being afterwards discovered not duly qualified to present the petition on which the order absolute shall have been made; provided that a petition may be presented under this act by some person duly qualified, praying to have the benefit of the former proceedings, and to be allowed to prosecute same.

10. That every petition for dissolution and winding-up or for winding-up under this act shall be advertised once in the *London Gazette*, and served, at the head office of the company, upon any member, officer, or servant of the company there, or in case no such member, &c. can be found there, then by been left at such office, or in case no such office can be found, then upon any member, &c. of the company: provided that no petition by direction of the court of bankruptcy, nor any order thereon, shall require advertisement, and in case no office of the company, nor any member, &c. can be found, the court may hear and make any order on such petition on production of the *London Gazette* containing such advertisement as aforesaid, and without proof that such petition has been served in manner aforesaid.

11. That the court may at the hearing direct any such petition, whether served or not, to stand over, and direct such service of the petition as shall seem meet.

12. That on any petition the court may require any parties to show cause, why the company should not be dissolved and wound up or wound up under this act, or may make a conditional order or refer it to the master to make inquiry and in case no sufficient cause be shewn, or in case the terms of such conditional order be not fulfilled, or it shall appear from the master's report, that the dissolution and winding-up or the winding up of any such company under this act is necessary or expedient, may make such order absolute as hereafter mentioned.

13. That the court may, before making any order absolute, direct the application or performance, either wholly or in part, of any provisions contained in the constitution of the company towards the purposes of such dissolution or winding up.

14. That the court, on the hearing of any such petition, may dismiss such petition with or without costs, or to make an order absolute for the dissolution, &c., and by such order it shall be referred to one of the masters to wind up the affairs of the company under this act.

15. That the date, title, and ordering part of every order of the court made upon any such petition, previously to and including the order absolute, shall, within twelve days after the date thereof, be advertised once in the *London Gazette*, and be served as the court shall direct.

16. That from the date of any order absolute for dissolution, or from any date to be therein fixed for that purpose, the company therein specified shall be absolutely dissolved.

17. That the petitioner on whose petition an order absolute shall be obtained shall without delay carry in the same before the master; and in default of his so doing in ten days next after the date of such order any person being or claiming to be a contributory may present his petition, praying to have the carriage of said order absolute, and such order shall be made as to the court shall appear just; and it shall be sufficient to serve such petition either upon the petitioner who obtained the order absolute, or upon his solicitor.

18. That the court, in any decree or order for the dissolution of a company, association or partnership, and also by any order after a decree for the dissolution of a company, &c., may order that the affairs of such company, &c., shall be wound up under this act, and the costs of same shall be paid and recovered under this act, and any such decree or order shall, if the court shall so direct, be deemed an order absolute under this act.

19. That from the date of any order absolute it shall not be lawful for the directors, members, or officers of the company in respect of which same shall have been made to convey, assign, pay, or otherwise dispose of any of the property, monies, or other effects of the company otherwise than by the direction of the master.

20. That until an official manager shall be appointed, as herein-after mentioned, and when there shall be no official manager, the master may in any case, immediately upon the

order absolute being brought in before him, appoint by writing under his hand an interim or provisional manager of the property, &c., of such company, or of such part as the master shall think fit; and the person so appointed shall have all the powers and authorities usually exercised by receivers in a suit, together with all powers and authorities exercised by any official manager under this act, except so far as the master shall otherwise direct; and such person shall act under the direction of the master, in collecting receiving and disposing of the property, &c., of such company, and such interim manager may, under the direction of the master, signified by writing under his hand, apply any part of the monies, &c., collected, or got in by him in the discharge of any judgment debt against such company; and the master may fix the amount and nature of the security of such interim manager, and also appoint any person to be interim manager without any security, provided that upon the appointment of an official manager under this act all the powers and authorities of such interim manager shall cease, and such interim manager shall deliver up and pay to the official manager all the goods, monies, &c., of such company come to his hands as such interim manager, together with all books, &c., relating thereto, and the master may make an order, directing such delivery and payment, and for vacating any recognizance entered into by such interim manager and his surety: provided that no action, or other proceeding shall be instituted or prosecuted by or against any such interim manager, as representing the company, otherwise than by the style and designation of the official manager of the company; and that every such action, &c., shall be instituted and prosecuted, as if an official manager of the company had been already appointed, and were a party to same, nor shall same abate by reason of the appointment of an official manager, but shall be carried on by or against him.

21. That upon any order absolute being carried in before the master, or upon the death, removal, or resignation of any official manager, the master shall forthwith direct the party having the carriage of the order, to insert an advertisement in two successive numbers of the *London Gazette*, and also in such two or more newspapers as the master shall appoint, giving notice that the master will proceed, at a day, hour, and place to be stated in such advertisement, such day to be within fourteen days from the publication of the first advertisement, to appoint an official manager, and previously to the making out such list of contributories as herein-after mentioned all persons being or claiming to be contributories of such company, and after the making out of such list all persons appearing on same shall be entitled to attend, and offer proposals or objections as to such appointment; and the master may adjourn the appointment of any official manager same to be stated to the parties present, and it shall not be requisite to give notice of such adjournment by advertisement.

22. That at the time and place to be fixed in such advertisement, or at any other time or place to which the appointment of an official manager shall have been adjourned, the master shall, by writing under his hand, appoint an official manager of the company, and the master shall have power, at his discretion, but subject to any special direction of the court, to remove, by writing under his hand, any such official manager, and thereupon, and also upon the death or resignation of any official manager, to appoint any other person in his stead; and such official manager may be either any contributory of any company, or the assignee in bankruptcy of any company, being bankrupt, or of any bankrupt member or contributory of the same.

23. That in making the first or any subsequent appointment of an official manager, the master may adopt the proposal of any party attending him; and the proposal of any of the parties who shall have appeared before the court shall not be entitled on that account to any preference; and the master may appoint any person whom he shall think proper, although not proposed by any of the parties.

24. That upon the appointment of any official manager, or within such period as the master directs the official manager, and two or more persons as his sureties, to be approved of by the master, shall enter into a recognizance as in the schedule hereto set forth, or otherwise as the court by any

general order, or by any special order, shall direct, and in such sum as the master shall direct (but not to exceed by more than one thousand pounds the greatest sum or value which in the judgment of the master the official manager shall be likely to have at any one time in his hands,) for the duly accounting for all monies, &c., which shall come to his hands, and the recognizance of the official manager shall be for the whole amount of the sum to be so fixed, and the recognizances of the sureties shall be either joint or several for the whole or any portion of said sum, but the total amount of the recognizances shall not be less than the sum in which the official manager shall be bound; and upon the death, bankruptcy, or insolvency of any surety the master may require recognizances in his place; and may require additional recognizances by the official manager and his sureties, and upon the breach of the condition of any recognizances, the same shall under an order of the master, be put in force by the official manager, or by any contributory of the company, in like manner as the recognizances of receivers of the Court of Chancery; and the master, after any person shall have ceased to be official manager, and his final account shall have been passed, and any balance due thereon paid, to order such recognizance to be vacated.

25. That in case default shall be made by the official manager in accounting for what he shall receive as such, or in paying same as the master shall direct, the master may require the official manager and his sureties, to pay to such person, and within such time as the master shall appoint, the whole or any portion of the sum in which they shall have become bound by recognizance: provided that nothing herein contained shall extend the liability of any surety beyond the sum in which he became individually bound on his recognizance.

26. That notwithstanding anything herein-before contained, the master may accept the security of any guarantee society established by charter or act of parliament in any part of *Great Britain*, in lieu of the security of such sureties as aforesaid.

27. That every appointment and removal of an official manager shall be valid without confirmation by the court, unless otherwise ordered in the particular matter; and every such appointment, and removal shall be advertised in the *London Gazette*, and in such newspaper as the master shall think proper.

28. That immediately after the appointment of an official manager the master shall, direct all the books of account, deeds, cash, &c., and writings of the company to be delivered up to the official manager, and upon the appointment of any new official manager all the same matters shall be delivered over to him: provided that the master may make such order as he shall think fit relative to the custody or deposit, of such books of account, &c.

29. That on every appointment of an official manager all the estate, effects, credits, and rights of action of the company, and all powers which might be exercised by an official manager, shall, except so far as the master shall, by writing under his hand, direct to the contrary, become absolutely vested in the official manager, either solely, or jointly with any other official manager, as joint tenants; and when, according to any laws now in force, any conveyance or assignment of real or personal property vested in any official manager under this act would require to be registered, then the order absolute, together with the first appointment of an official manager, shall be registered in the registry office, wherein such registry or assignment would require to be registered; and the registry hereby directed shall have the like effect as the registry of any such conveyance or assignment would have had; and the title of any purchaser of any such property for valuable consideration, or of any mortgagee thereof without fraud, who shall have duly registered his purchase or mortgage deed previously to the registry hereby directed, shall not be invalidated by such order absolute or appointment: provided that if the master shall, by writing under his hand, direct that any of the said estate, &c. shall not vest in the official manager, the court, or the master, may at any time after discharge or vary such direction, and thereupon the estate, &c., comprised in such direction shall,

either wholly or to the extent to which the same shall be so discharged, become vested in the official manager.

30. That when any order shall have been made on petition, by direction of the Court of Bankruptcy, for winding up under this act the affairs of any company, all the estate, &c. of the bankrupt company for the time being, vested in the assignees in bankruptcy shall, upon the appointment of an official manager, unless otherwise provided by the order absolute, become absolutely vested in such official manager, together with all the powers an official manager might exercise in any matter instituted under this act in which the company had not become bankrupt.

31. That until the issuing of any general orders by this act authorized to be made, the practice of the court with respect to receivers and managers of partnership estates shall, subject to the provisions of this act, and to any special orders or directions relative to the official manager, with respect to any particular company, (and which the court and the master are hereby authorized to make,) apply to every official manager under this act.

32. That the court may allow remuneration, by way of percentage or otherwise, to the official manager, and to any receiver to be appointed as herein-before provided, and increase or diminish same.

33. That the official manager, with the approbation of the master, may employ, and from time to time dismiss an attorney or solicitor.

34. That the official manager shall proceed, under the directions of the master, in the making up, continuing, completing, and rectifying the books of account of the company, and in providing and keeping all other books of account necessary for showing the debts and credits of the company, including a ledger, which shall contain the separate accounts of the contributories, (and in which every contributory shall be debited with the amount payable by him in respect of any call to be made as hereby provided,) and in balancing such books and accounts of the contributories, in getting in, and converting the estate and assets, and winding up the affairs of the same company, in paying the debts as herein provided, and in dividing and distributing the surplus assets of the company amongst the parties entitled, and in bringing before the master all questions necessary to be determined and settled in order to the winding up of the affairs of the company; and the official manager shall, without the necessity of any proposal in writing, take the directions of the master with reference to all proceedings necessary to be taken for the complete winding-up of the affairs of the company.

35. That the accounts of the official manager and receiver if any, shall be passed before the master, and vouched as he shall direct; and that the contributories shall only be at liberty to surcharge and falsify such accounts.

36. That the official manager shall make, in books provided by him for that purpose, true entries of all matters and proceedings in the winding-up the affairs of the company; and such books shall be kept in the custody of the official manager, and shall on all occasions on which the master is required to proceed in the matter of such company be produced before the master.

37. That upon any order absolute being brought before the master for consideration, he shall, after insertion of the advertisement relative to the appointment of an official manager, determine what parties shall attend him in the proceedings under such order absolute; and the master may direct any other contributories to attend him, and the master, with the consent in writing of the majority in number and interest, of the persons to be represented, may appoint and remove any contributories to watch the proceedings of the liquidation, as representatives of the contributories in general, or such as the master shall be of opinion ought to be so represented: and all the proper parties shall in manner hereinafter mentioned be served with notice of all proceedings before the master: and the costs incurred by all such parties, except so far as the master shall otherwise direct, shall be part of the general costs of winding up the company under this act.

38. That all contributories shall, at their own expense, receive notice, as the master shall direct, the proceedings

in the matter of the dissolved company, and at their own expense may attend the proceedings; and any contributor may, at his own expense, submit any proposal before the master in relation to the affairs of such company.

39. That if any contributory shall be an idiot or lunatic he shall be entitled to attend, and shall be sufficiently represented by his committee; and if any contributory shall be a minor, he shall be entitled to attend, and shall be sufficiently represented by his father or guardian, or by his mother, or next friend to be appointed by the master provided that the master may appoint a guardian of a contributory being a minor, or a representative of any contributory being a lunatic, but not found so by commission for the purposes of any winding-up under this act.

(To be continued.)

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Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by **THOMAS ISAAC WHITE**, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at **COLLEGE GREEN**, in same Parish, by **EDWARD JOHNSTON MILLIKEN**, residing at the same place, all being in the County of the City of Dublin, Saturday, December 30, 1848.

THE Irish Jurist

No. 10.—Vol. I.

JANUARY 6, 1849.

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DUBLIN, JANUARY 6, 1849.

THE practice of granting leases for lives, with covenants for perpetual renewal—a mode of tenure peculiar to Ireland—has given occasion to an incalculable amount of litigation, and been most unsatisfactory both to landlord and tenant. The legal interest thus created was a mongrel, and no one will regret its extinction, or, rather, conversion into a known and legitimate mode of tenure. There was an uncertainty about the interest that was exceedingly uncomfortable to the lessee; for him, lives always dropped inopportunely, whilst to the landlord they appeared perfectly patriarchal. Forfeitures were incurred, that could only be relieved against by tenantry acts and courts of equity; or, if not, fines swelled to enormous proportions, being increased beyond all natural limits by a septennial computation which we never could well understand, with the addition of all possible kinds of interest. But, nevertheless, leases for lives renewable for ever were favourites. Landlords were proprietors of large tracts, and had no duties to perform, or responsibilities to fulfil. The very uncertainty of the tenure lent them a charm to the lessee; the selection of an octogenarian was interesting to the natural land-leased philosopher, who became as knowing in discerning men of longevity and long-lived families, as in the points of a horse; the words, *renewable for ever*, fell pleasantly upon the ear—*demi-landlordism* arising from an estate which, though dead, was yet of its own inherent nature, capable of resuscitation—whose animation, though long suspended, was yet susceptible of renewed life and vigour. It was something more than equivocal generation, electricity, or galvanism—a discovery in law unattainable in other sciences. It led, too, to a numerous offspring of sub-infeudations; lessees were generous, and granted a term as good as their own to sub-

lessees. They have, to be sure, latterly found it inconvenient, there being the same lives, the same estate—no reversion, therefore, no distress or action of ejectment* maintainable. And thus a combination of legal inconveniences and anomalous landlord relationships has forewarned the termination of an existence which the legislature has doomed, and last session was introduced a bill, to “convert the renewable leasehold tenure of lands in Ireland into a tenure in fee.”

It was withdrawn, but only for the Session, principally in consequence of the opposition of Mr. Law on behalf of the Irish Society; but the interests of no public body can be allowed to impede the enactment of so desirable a measure. It is perfectly right those interests should be considered, and if affected, the owners should be compensated, but they cannot be allowed to stay legislation of so generally useful a character.

We purpose to give an outline of the way in which this important change in the law is to be effected. The bill proposes to convert all tenures of

* This is to be understood as applying to replevin or ejectment suits, arising merely from the relation of landlord and tenant. In *Pluck v. Digges* (2 H. & Br. 21, S.C. 5 Bligh P.C., N. S. 31) it is apprehended the replevin was not maintainable, if the avowry had been special, (there being a clause of distress in the lease to the plaintiff,) and not the common avowry, arising from the relation of landlord and tenant, which it was decided did not exist in that case. In a case, argued in the Court of Exchequer in Ireland, in Trinity or Michaelmas Term, 1844, similar in facts to that of *Pluck v. Digges*, except that the action was in ejectment and not replevin, which, much to the loss of the profession, has never been reported, and the name of which, we believe, was *Leusee Porter v. Welsh*, it was held by Brady, C.B., Pennefather, B., and Richards, B., that there must be a reversion, in the absence of any express covenant to entitle the landlord to his action of ejectment. Lefroy, B., after a masterly review of the authorities, in a judgment that to our mind then appeared conclusive, held that there was a common law right of entry, consequently that the action was maintainable, but that he was bound by the decision of the House of Lords in *Pluck v. Digges*.

the nature we have described into fee-farms, adding to the rent the probable average amount of the renewal fines. The machinery by which the conversion is to be made, is the following:—The owner of a lease in perpetuity petitions the Court of Equity Exchequer, who by side bar rule refer the matter to the Chief Remembrancer, who is empowered to give notice to all persons interested in the lease, and, having ascertained its terms, to compute the yearly average of the renewal fines, which computed average is to become the amount of the fee-farm rent. All under-lessees in perpetuity are to have notice of the proceedings, and may, within one month after notice, come into the office and acquire a fee-farm tenure in the lands comprised in their under-leases. When the Chief Remembrancer's Report has been confirmed—it may be varied on motion without taking exceptions—the leasehold interests, whether legal or equitable, shall be enlarged into a legal estate or estates of inheritance in fee, subject to the fee-farm rent included in the Report, and subject also, “and without prejudice, to any estates, rights, titles, or interests, which shall never have been bound at law or in equity by the lease in perpetuity.”

This is an awkward mode of expression; and the act, in the subsequent sections, is tediously and unnecessarily minute in defining what interests are not to be affected, or what changes are to be wrought by the conversion of the quality of the estate.

A few expressive words, that no existing rights were to be displaced, and that subject thereto, and to the computed rent, the estates created were to have all the incidents of estates in fee, would be simpler and better, with the exception of one very proper and important provision—that owners of the rent may recover in ejectment. This, we think, could, with great benefit to the community, be extended to cases of fee farm grants, whether created by conversion under the statute, or by the original conveyance. The decision of *Pluck v. Digges*, though no doubt very sound in point of law, was very injurious in point of practice.

The 20th section of the bill is as follows—“That every fee-farm rent made payable under the provisions of this act shall be recoverable by all or any of the ways, means, or remedies, which, according to any law or statute now in force in Ireland, or hereafter, is, are, or shall be provided for the recovery of any rent service reserved upon any lease for life, or for years, executed by any landlord or person seised in fee simple, and subject to all the like rules and regulations by statute or otherwise, any law, usage, or custom to the contrary notwithstanding.”

The act gives a right of redeeming after judgment in ejectment, and execution executed, to the owner of the fee-farm within six months, or to the owner of an inferior fee-farm, or the owner of the lands out of which the rent is payable, within nine months; and in the event of such redemption being made by such last-mentioned parties, or a mortgagee, or other person now entitled to redeem under the ejectment statutes, declares that all sums of money so paid shall be the first charge, not only upon the estate or interest of the person making

default, but also upon the inheritance of the rent, save only where charges are created under the Drainage Acts.

This unequivocally establishes the right of salvage, which would, we think, be otherwise open to some doubt. In *Angell v. Bryan* (2 Jon. & Lat. 763), Sir Edward Sugden, C., decided that a person who had advanced money to pay rent, and then took a mortgage of the land for the amount, was not, as a salvage creditor, entitled to any priority; in *Burroughs v. Molloy* (Id. 521), he held a similar opinion with respect to advances by a mortgagee. In *Brice v. Montgomery* (Wallis, Rep. Lyne. 325) the landlord, having advanced money to his tenant to secure the arrears of a fee-farm rent due to himself, was declared to have priority over a prior charge on the same lands. Whatever be the existing state of the law, the legislature, we trust, will, when the bill shall be again before them, carry into effect this useful provision.

The 19th section provides that if persons hereafter shall be so self-willed as to grant leases, with covenants for perpetual renewal, that all such leases shall operate as a conveyance at a fee-farm rent, at the rent reserved, increased by one-seventh of the renewal fine.

We would suggest, as the most effectual extinguisher of such leases, the omission of that part of the section which gives the landlord the one-seventh of the fine.

The framers of the statute have been sufficiently gallant to provide expressly that the right of dower shall attach upon lands when once converted to fee farms.

On the whole, the measure has been carefully drawn, but we think it capable of, and that it would be improved by, abridgment. We trust soon to see it amongst the acts of 1849, and shall accept it as a measure of useful law reform.

THE case of *Fulton v. Farran*, reported in a former number, p. 66, has satisfactorily established the practice, that after a charging order has been obtained and made absolute upon a fund in court, the creditor can obtain the funds so charged by motion, and without the necessity of filing a bill. The summary jurisdiction of the court will, however, only be applied in those cases where the right of the creditor is clear—at least, the principal case only goes to that extent; but it is probable, the practice having been once established, the jurisdiction will in simple cases be extended still further, and be applied to those where there are several creditors and no contest as to rights. There does not appear to be any difficulty, in such instances, in either making the order for payment, or having a sub-allocation report of the priorities and charges of the creditors upon a particular fund, which they have charged under the statute.

The decision is one obviously of much practical importance, even without regard to its capability of extension, and restores the rule made by the present Chief Justice when Master of the Rolls, in *Burke v. Burke*, (7 Ir. E. R. 174,) the authority of which, it was feared, had been shaken by the

later English decisions of Sir Launcelot Shadwell and Lord Langdale. The effect of the opinion of the learned Judge in *Whitfield v. Prickett*, (13 Sim. 259), and *Wastall v. Leslie*, (15 Sim. 45.) was, that he could only grant a stop order in the usual terms, and the same restricted operation was attributed to the English statute by Lord Langdale in *Newton v. Askew*, (12 Jur. 766.) In the first case no person appeared for the respondent in the petition matter; the next case was opposed, but it does not appear on what grounds; it may have been therefore that the petitioners right to the fund was disputed. It should be observed that in the last case there appears to have been a serious question of right, there being an appeal to the Lords against the judgment on which the charging order was founded; that there was also a doubt whether that particular security (redeemed annuities) was within the meaning of the act, (1 & 2 Vic. c. 110, 3 & 4 Vic. c. 105, Ir.) and further, that the question was not properly before the English Master of the Rolls, the fund not being in court.

The inconvenience of adopting the English rule—if from the foregoing review of the authorities it can be affirmed to be settled there, and if settled, it arose, in a great measure, from a difference in the practice of the Equity Courts there and here; in England it not being the practice to make sub-allocations on cross motions, whilst in this country it is—is manifest, for thus in every simple and trifling case the creditor would have been obliged to resort to the tedious and expensive process of filing a bill to establish a right which was incontestable, or admitted of no controversy. In fact, the narrow construction given to this section of the statute in England has frittered away its benefit. The summary jurisdiction by motion is more extensively used in this country, and to the benefit of the suitor. The creditor obtains relief speedily, the funds are less burdened with costs, which is no small benefit likewise to the honest debtor. All that a Court of Equity wanted was to get the fund under its dominion; having attained that, it knew how to distribute it. What purpose was gained by rendering it necessary to file a bill to establish an Equity which was already settled? It is satisfactory that the practice of our Equity Courts does not clash with the true and broad construction of the act; and we were anxious promptly to call the attention of the professions to a decision which places this branch of the law on its proper basis.

Court Papers.

Chancery.

LIST OF CAUSES IN CHANCERY.

Part heard.

Bennett v. Bernard, Same v. Sargent,

Standing from last Term.

Beeth v. Dub. Dandram, Doyle v. Callow,
and Rathfarahata Railway Free v. Trant,
Company, Malony v. O'Brien,
Benfield v. O'Shanghnessy, Buntan v. Lowry,
Anderson v. Pratt, Hogg v. Garrett,

Purcell v. Ruckley,
Killikelly v. Dillon,
O'Dowda v. O'Dowda,
Harrison v. Mason,
Sergerson v. O'Sullivan,
Smithwick v. Smithwick,
Seaver v. Fivey,
Same v. same,
Vaughan v. Magill,
Delap v. Hall, and other
causes.
Ellis v. Ellis,
M'Carthy v. M'Carthy,
Sugrue v. Molloy,
Hodges v. O'Sullivan,
Hunter v. Earl of Limerick.
Guinness v. Darley,
King v. Daly,
Aylward v. Aylward,
Cooney v. Holland.
Casement v. Taggart,
Stewart v. Donegal.

Roe v. Scott,
Connell v. O'Donnell,
Callaghan v. Blake,
Dudgeon v. O'Connell,
Archbishop of Dublin v.
Trimleston,
DeMontmorency v. Crosbie,
Jones v. Bateman,
Same v. same,
Earl of Limerick v. Hunter,
Tredennick v. Fearon,
Ross v. O'Ferrall,
Galway v. G-aydon,
Thunder v. Chambers,
Bell v. Ahearne,
Beresford v. Beresford,
Downes v. Rochfort,
Warren v. Stubber,
Kirwan v. Woodhouse,
Darely v. Guinness,
Hamilton v. Hamilton.

Queen's Bench.

Standing for Judgment.

Guardians of Castlebar Union v. Lord Lucan
Guardians Westmeath Union v. Same.

Causes for argument remaining from last Term.

Case from Chancery.

Verschoyle v. Perkins.

Special case.

Executors of Lascelles v.
Dowdall.

Demurrer.

Whitmore v. Ryan.

Motions to set aside verdicts obtained last Term.

Lessee Jones v. Conolly,	Lessee De Bourgho and others
Holt v. Kelly.	v. Gabbett and another,
Wakefield and another v.	Lessee Putland and others v.
Ennis and another,	Pluck and another.
Lessee Reade and others v.	Lessee Weston and others v.
Kennedy,	Sheehan,
Lessee Walker and another v.	Lessee Daneckert and others
Archer,	v. Wilson,
Carmichael v. Waterford and	Martin and another v. Barry,
Limerick Railway Company.	Neville v. Murphy and
Lessee Earl Kingstown and	others,
others v. Jeffrey,	Mahony v. Foley and
Assig. Chapman v. Stevenson.	another.

Common Pleas.

Motions standing over.

Mahon v. Martin,
Shaw v. Bury.

New trial motion.

Reynolds v. Falkiner.

Exchequer of Pleas.

Bills of Exceptions.

Alford v. Begg,	Fitzgerald v. Anderson,
Cowan & others v. Allen,	Lessee Gunning v. Corr,
Lessee Close v. Batt and	Kennedy v. Whaley,
others,	Lessee Corporation of Drogh-
Vaughan v. M'Carthy,	eda v. Holmes,

Motions to set aside verdicts.

Lessee Talbot v. Guilmarin,	Lessee Weeks v. Cauty,
Colquhoun v. Dolan & others.	Scanlan v. Sceales,
Jeffreys v. Evans,	Croftou v. Moore,
Smith v. Lindsay,	Lindsay v. Geraghty,
Baldwin v. Irvine,	Lessee Marquis of Donegal v.
M'Kenna v. Harnett & others,	Lord Templemore,
Byrne v. Reeves,	Buckley v. Leader,
Gaitshell v. Bowden,	Wheeler v. Powell,

Demurrers.

M'Manus v. Delany and	Fisher v. Whaley,
others.	Coffee v. Nagle,

Motion to set aside non-suit.

Morton v. Mahon,

Pleas of nul tiel Record.

Corban v. Earl of Mount- Same v. Murphy,
cashel, Connor v. M'Quin,
Walker v. Curry,

(Continued from p. 72.)

40. That every party who shall attend before the master state to the master whether he appears in person or by solicitor; and if in person he shall state his name and address, and if by solicitor the name and address of his solicitor, and also any new solicitor; and same shall be entered in the master's book of proceedings; and notice of all proceedings shall be sufficiently given by service upon the party or upon his solicitor.

41. That if the proceedings before the master, not being proper to be taken by the official manager, shall not be prosecuted with due diligence, or if for any reason it shall appear advisable, the master, upon the application of any contributory, may commit to him the further prosecution thereof; and if any official manager shall not prosecute the proceedings with due diligence, any contributory may apply to the master, who shall give necessary directions, and remove, if he think fit, such official manager.

42. That after any order on petition under this act, the death of the petitioner or party shall not abate the proceeding; but the Court and the master, after an order absolute brought in before him, upon the application of any party interested, supported by evidence, and if made to the court by way of motion, may direct that the further prosecution of the proceedings to be committed to such party as the master shall think proper; and the costs of such application, and of the deceased party, shall, if the court or master so direct, be part of the general costs of winding up the company under this act.

43. That all proceedings before the master under this act shall be proceeded in, not by state of facts and proposal, but by proposal in writing, or as the master shall direct, to be supported, if need be, by evidence: provided that the master may direct the parties before him to proceed by a state of facts in writing.

44. That the master may dispense with any warrants under the order of reference, and direct any warrants to be taken out and prosecuted before him, and fix the time at which same shall be returnable, or any proceeding shall be taken, and proceed *de die in diem*.

45. That the master may, with or without notice to any party, adjourn proceedings before him under this act, either *de die in diem*, or to any other time and place to be fixed by the master.

46. That the master may order the advertisement in the *London Gazette* or otherwise, or the service on any person as he shall think fit.

47. That the master shall, on request of any party interested, give certificates of any decisions or matters transacted in the winding up of any company under this act.

48. That, subject to the controul of the master, all contributories shall be entitled, without fee, to inspect all the books of the company, or of the official manager or receiver, and to take copies or abstracts thereof.

49. That as between the contributories the books, &c. of the company, until the order absolute, and of the official manager or receiver after such order, shall be *prima facie* evidence of all matters therein contained.

50. That after the appointment of any official manager all actions, and proceedings at law or in equity, by or on behalf of the company, shall be commenced and prosecuted by the official manager by the style of "the official manager" of such company, (describing it as in the order absolute,) as the nominal plaintiff, and that all debts against the estate of any bankrupt or insolvent debtor to the company shall be proved by the official manager, and that all actions, suits, and proceedings at law or in equity, to be instituted by any persons, whether contributories or otherwise, against such company, shall be instituted and prosecuted against the official manager (by such style and designation as aforesaid).

51. That all indictments and prosecutions on behalf of such company, for any stealing or embezzlement of any money, &c., or other property of such company, or for any fraud &c., or offence against such company or the property thereof, whether same have taken place before or after his appointment, shall be carried on by the official manager; and in all such indictments, &c., it shall be sufficient to state the money, &c. of such company to be the money or property of the official manager by such style and designation as aforesaid; and any forgery, &c. committed against such company shall in such indictment, be laid or stated to have been committed against the official manager of such company, by such designation as aforesaid; and any such offender may thereupon be lawfully convicted; and in all other allegations or proceedings, in which it otherwise might be necessary to state the names of the persons composing such company, it shall be sufficient to state the style and designation of the official manager.

52. That where any action or proceeding shall be pending against the company or the nominal defendant on behalf of such company, the plaintiff may substitute the official manager as the defendant by entering a suggestion on the roll to that effect in such action, and by obtaining in such suit an order on motion or petition, without notice, and the plaintiff may prosecute same against the official manager, and have the same benefit of any order, &c. obtained, as if such action, &c. had been commenced against the official manager as defendant under this act.

53. That where any action, &c. shall be pending on behalf of the company, or by any member or contributory suing in the name of himself and the other members or contributories, such plaintiff may substitute the official manager of the company as the plaintiff, by entering a suggestion on the roll in such action, and by obtaining an order in such suit, to be obtained on motion or petition without notice, and the official manager may thenceforward prosecute such action, &c. as if same had been commenced by the official manager under this act.

54. That the death, resignation, or removal of the official manager shall not abate or prejudice any action or proceeding under this act.

55. That the official manager may, under the direction of the master, compromise any right or demand which the company may have against any person, and to which the company may be liable, and also any action or suit brought by or against the official manager on behalf of the company, and also submit to arbitration any dispute affecting the estate, rights or liabilities of the company, and upon any award, perform and give effect to same.

56. That all orders and decrees made in any suit in any court of equity against the official manager shall have the like effect upon and against the property of the company, and the persons and property of every contributory as if same had been made against the company, or the nominal defendant on behalf of same, or as if every contributory were before the court as a party to such suit; and the court by which same shall have been made, may direct that such decree against such official manager be enforced against every contributory or class of contributories, to the extent of their legal or equitable liabilities, and upon order for that purpose upon motion *ex parte*, but in open court, such decree shall, after seven days notice to the person sought to be charged, be enforced and executed accordingly.

57. That all judgments in any action at law against the official manager shall have the like effect against the property of such company, the persons and property of the contributories, and shall be enforced in like manner, as if such judgments had been entered up against such company, or against any person authorized to be sued on behalf of the same.

58. Provided that except as is by this act provided, nothing in this act nor any petition or order for the dissolution and winding-up or for the winding up of any company, shall extend, alter, or affect the rights of creditors, or other persons, or the rights of creditors being contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories, nor the rights of the company against any contributories or other persons, nor any contracts or

engagements entered into by or with the company, or any person on behalf of same, previously to any such petition, nor any actions, or other proceedings pending at the date of such petition.

59. That no judgment, &c. to be obtained against the official manager of any company, shall be executed against the person or property of such official manager, otherwise than as a contributory, and that every official manager shall be fully indemnified, out of the assets of the company, and, if necessary, by calls to be made on the contributories, for all losses, costs, &c. except such losses, costs, &c. as shall have been improperly incurred by such official manager.

60. That no action, suit, or other proceeding in any of her Majesty's courts at *Westminster* or *Dublin* shall be proceeded with by the official manager, whether against a contributory of the company or any debtor or other stranger thereto, but with the leave of the master; and that no such action or other proceeding shall be proceeded with if the master shall, by writing, direct that same shall be stayed: provided that the want of such leave shall not constitute a defence to any such action or other proceeding.

61. That no claim which any contributory may have in respect of his share, or of the share of any deceased or former contributory of the capital or joint stock, or of any dividends, interest, &c. payable in respect of such share, shall be capable of being set off against any demand which the official manager may have against such contributory, upon an independent account, between such contributory and the company: provided that if a balance be due from any contributory on his account with the company as entered in the books thereof, and such contributory shall, upon an independent account, be a creditor of such company, the official manager shall set off such balance against the demand which such contributory shall be entitled to as such creditor.

62. That the official manager, with the leave of the master, may defend, by his official designation, or in the name of the original defendant, any action or suit brought against any individual contributory; but in such case any judgment or decree to be obtained by the plaintiff shall have the same effect, as if the same had been obtained against the original defendant.

63. That the master, as well before as after the order absolute, may summon before him any person, who shall be or shall be deemed to be capable of giving information concerning such company, or the estate, dealings, or affairs thereof, and may require such person to produce, and if a contributory to leave with the master or official manager, any books, papers, &c. in the custody, possession, or power of such person, necessary or expedient to be produced or left as aforesaid; and the master may examine such person on oath, by word of mouth, or upon interrogatories in writing concerning such company, &c.; and every person so summoned who shall not come before the master, or shall refuse to be sworn and examined, or shall refuse to produce such book, paper, deed, &c. shall be liable to be committed to the Queen's prison: provided that every such default or refusal shall be certified by the master, and thereupon such order shall be made by the court, upon motion of which notice shall be given to the person sought to be affected.

64. That every person summoned before the master shall be entitled to such costs as are allowed to witnesses; but that where any person who at the time of the order absolute was a contributory of such company shall be summoned, such person shall have such costs and charges as the master shall think fit; but in such cases the master may suspend the payment of such costs until such time as he shall think reasonable.

65. That if any person who at the date of the order absolute was a contributory of such company shall conceal any real or personal estate of such company, and shall not within thirty days after the order absolute discover such concealed estate to the master or official manager, such person shall forfeit the sum of £100, and double the value of the estate so concealed, to be recovered in action of debt by the official manager in any of her Majesty's courts for the use of the company; and the certificate of the master of such wilful concealment, shall be evidence in such action of debt of such concealment.

66. That after the appointment of the official manager, the master shall from time to time, by order to be made upon the application of the official manager or of any contributory require any contributory, trustee, receiver, banker, or agent to pay, or transfer forthwith, or within such time as the master shall direct, into the hands of the official manager, any sum or balance, books, &c. or effects which shall be in his hands, and to which the company is entitled, or which, in the case of a contributory, shall appear to the debit of his account as contributory in the books of the company, anything in the present practice of courts of equity to the contrary notwithstanding: provided that the person upon whom any such order shall be made may apply to the master to discharge or vary such order, or to enlarge the time hereby fixed.

67. That when any order shall be made under this act, by the master or by the court, for the payment of any monies, or for the delivery of any effects, books, or documents to the master or the official manager, and default shall be made by any person in obeying such order, the same may be enforced upon affidavit, by the official manager, of such default, and without any demand by the official manager.

68. That the conveyance or assignment by the official manager of all real estate, of whatever tenure, and chattels real, by this act vested in such official manager, shall be by deed of grant; and that every such deed of grant shall be approved by the master, and such approbation certified in the usual way; and being so approved and certified, shall be effectual to grant all the interest for the time being vested in the official manager, or which by such deed shall be expressed to be granted, of and in the real estate or chattels real intended to be granted, to the uses, intents, and purposes, or upon the trusts, or subject to the powers, provisions, agreements, and declarations, which may be contained in the same, according to the nature and tenure of the subject of the grant, without any confirmation by order of court or otherwise; and that the signature of the official manager to any deed so certified, wherein any money shall be expressed to be received by him, shall effectually discharge all persons by whom the same shall be expressed to be paid from suing to or being accountable for the application of the money therein acknowledged: provided that in the case of any copyhold or customaryhold hereditaments such deed shall be entered upon the court rolls of the manor of which the same are holden, and when so entered shall be effectual without any surrender or admittance of the grantee, subject nevertheless to the rents, and services due and of right accustomed for said lands.

69. That where any part of the assets of any company respecting which an order absolute shall have been made shall consist of any government stock, &c. or of the stock of any company in *England*, *Scotland*, or *Ireland*, not standing in the name of the company, the master, may by writing, direct such person as the master shall appoint in the place of the person in whose name such stock, shall be standing, (but subject to any strings, stop order, or other process which may affect the same,) to transfer the same into the name of "the official manager" of the company (described as aforesaid;) and the governor and company of the bank of *England*, and all other companies and societies, are required to allow such transfer, and are indemnified for all things done pursuant to such direction.

70. That all monies which shall be collected, by the official manager, and which shall be derived by the sale of any of the assets of the company of which he shall be appointed official manager, shall be paid into the bank of *Ireland*, or any branch bank, to the credit of "the account of the official manager" of the particular company in respect of which such monies shall have been collected, and no money which shall be standing to such account shall be paid out by the bank except upon cheques signed by the official manager and countersigned by the master; provided that the official manager may retain in his hands for current purposes such a sum as the master shall direct.

71. That the official manager shall with all speed after his appointment, make out from the accounts and papers of the company a list of all debts and demands of the company, and shall make such observations on such debts as to the

amount thereof, as he shall think proper to be made, to assist the master in forming a judgment when any debt shall be claimed to be proved before the master in pursuance of the advertisement herein-after mentioned; and when any debts shall be proved before the master as hereinafter mentioned, the same shall be entered in a new list by the official manager, so that the debts allowed by the master shall be distinguishable from such of them as shall be disallowed, or shall be allowed only as claims; and in case any debts which shall be disallowed, or allowed only as claims, shall be afterwards allowed by the master as having been proved, or shall be duly established by legal proceedings, such changes shall be made by the official manager in such list of debts as shall be required in order that such list may correctly represent the state of the affairs of the company in regard to the debts due from them; and in such list the official manager, in cases where it shall be necessary for the purposes of the winding up, shall enter the dates at which such debts were contracted, and shall enter all sums of money which shall have been paid on account of such debts; and such lists, and all changes therein, shall be entered by the official manager in a book to be kept by him; and such book shall, as occasion shall require, be inspected by the master.

72. That within ten days after the order absolute shall have been brought in before him, the master shall advertise in the *London Gazette* that he is winding up the company, and thereby require creditors to come in and to prove their debts.

73. That after the first appointment of an official manager, no creditor shall, except so far as the master shall permit, have power to commence any action against the official manager, or against the company, or any person who is sued as a contributory thereof, until after proof of his debt or demand before the master, and any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, may order that all further proceedings in such action shall be stayed, until such proof shall be made.

74. That the creditors of the company making proof of their respective debts before the master shall make proof by deposition or affidavit in the same manner as debts are now proved in bankruptcy: provided that the master may allow the proof of such debts to be made by the official manager, or by the creditors in such other form and in such other manner as he shall think fit.

75. That the master shall, upon proof of the debts due from the company, either allow or disallow, or allow as claims only, such debts respectively, according to the nature of the case, and of the proofs exhibited before him, and shall, by writing, declare such allowance and disallowance, or such allowance as claims only.

76. That the official manager shall make out a list of the members and other contributories, together with the addresses, and the number of shares or extent of interest of each, and such list shall distinguish the classes of contributories, and such additions shall be from time to time made therein, as that the same shall be a true list of such members and other contributories; and in case any of the contributories shall after the making of the order absolute assign or dispose of any share, right, title or interest in the company, the master, upon the application of the contributory making such assignment, or of the person to whom the same shall have been made, or of any contributory of the company, or of the official manager, may introduce into the list of the contributories the name of the person to whom such assignment shall have been made: provided that no such assignment shall release or exonerate the party making the same from any liability further than he would be released or exonerated if the affairs of the company were not wound up under this act.

77. That the list of contributories so made out by the official manager shall be settled by the master, and notice of his being about to settle the same shall be given in the *Gazette*, and otherwise as he shall direct; and such list and additions thereto, when settled by the master, shall be entered in a book which shall be inspected by the master, and certified under his hand to be entered therein.

78. That notice shall be given to every person included in or proposed to be excluded from the list of contributories, or in any addition thereto, before the same shall be so settled, notifying that such person is included in or excluded from the list, and if included then in what character, and for what number of shares, and of what amount, or for what other interest such person is so included; and that, if no cause shall be shown to the contrary, by a day to be fixed, and specified in such notice, the list shall not as to every person failing to show cause, be afterwards disputed, without leave of the court.

79. That so far as the master shall have settled such list or any addition thereto, every person included in such list, or in any addition thereto, or specially excluded, shall, unless cause be shown to the contrary, be bound and concluded by the list so settled, or by any exclusion therefrom, and shall not be entitled to contest the same without leave of the court.

80. That after the master shall have commenced to settle the list of contributories no person shall be entitled to appear before him as such unless his name shall be on the list: provided that any person specially excluded from such list, shall be at liberty to claim, before the master, that his name shall be inserted upon the list; and the master shall, upon consideration thereof, either admit or reject such claim, by writing under his hand.

81. That it shall be lawful for any person whose name shall stand upon the list of contributories to summon any person whose name shall not be upon such list, and who shall not have been specially excluded therefrom, to appear before the master, at a day specified, to show cause why his name should not be included in or specially excluded from the list; and upon the return of such summons, or at any future time to be fixed, he shall not consider the liability or right of the party so summoned to be inserted in such list, and shall by writing declare whether such party shall or shall not be included in or excluded from the list.

82. That the monies and assets of the company, or any part thereof, shall with all convenient speed be paid and applied by the official manager, under the direction of the master, to be from time to time given under his hand, in or towards the satisfaction of the debts of the company, by way of dividend or otherwise, as the master shall direct.

83. That at any time before the whole of the assets of such company shall have been collected, and if the assets remaining to be collected shall not be capable of being immediately realized, although such assets may not appear to be insufficient, and also after the assets of the company shall have been wholly exhausted, it shall be lawful for the master to make calls on the contributories, or on such individual contributories or classes of contributories as he may think proper, (but so far only as such contributories respectively shall be liable at law or in equity to pay the same,) as well for raising the amount necessary to pay the debts of such company, or the costs and expenses of winding up the same, as also for the settling the claims of contributories upon each other, or upon the company, whether such claims shall have arisen since or before a petition for dissolution and winding-up, or for winding-up, and the amount to be raised by such calls, and also the residue of the estate of the company after the payment of all debts and liabilities, shall be distributed by the official manager, under the directions of the master, in such manner as shall (as far as possible) satisfy all claims, and wind up and settle the affairs of the company.

84. That after the master shall have determined the amount to be raised by means of a call he shall apportion the same among the several contributories appearing upon the list, so far as then settled, or such of them as ought to contribute thereto, according to their respective liabilities, and that such apportionment may be made against such parties as he has already determined to be contributories, although it may then be under consideration whether other parties ought or ought not to be included in the list.

85. That previously to the making of any call the master shall, by any general order or any special order of the court direct, and in default of and subject to any such direction then by advertisement in two successive numbers of the *London Gazette*, as he shall think proper, give notice of a

day, hour, and place at which he will make such call, and of the amount thereof; and all parties interested shall be entitled to attend at such day, hour, and place, and to offer objections thereto.

86. That unless cause shall be shown to the satisfaction of the master, at the time and place appointed, the master shall then make an order for such call, and for the payment to the official manager of the balance which shall be due from the respective contributories, after debiting them with the amount of such call, on a day and at a place to be therein fixed, such day not being earlier than three weeks from the date of the peremptory order.

87. That every such order shall be advertised once or oftener in the *London Gazette*, and a copy of such order shall be served on the respective contributories, and every contributory shall also be furnished with a statement of the balance of his account, after debiting the same with the amount chargeable against him in respect of such call: provided that the advertisement of such order shall not take place at a less period than ten days after the date thereof, or in case any appeal shall be made against such order, then such advertisement shall not take place until after such appeal shall have been disposed of.

88. That the official manager, with the approbation of the master, may from time to time enforce payment of, give time, or compound or require or take any security for any balance or claim as against the contributories of the company, and also to abandon such balance where the contributory against whom the same is claimed shall die, or be bankrupt, or take the benefit of any act for the relief of insolvent debtors, or be known to be insolvent, or in such cases as the master shall think fit; and it shall not be necessary to include in any call any contributory against whom any claim shall have been abandoned, but the amount of every subsequent call shall be apportioned among the other contributories: provided that nothing herein contained shall discharge the estate of any such contributory so left out from any claim which may exist on behalf of the company or any other contributory, but that the official manager may prove for the amount in the matter of such bankruptcy or insolvency (if any,) and receive dividends thereon, or proceed against such contributory, whenever it may appear expedient so to do; and any monies so recovered shall be part of the assets of the company, or otherwise as the master shall direct.

89. That in case any money shall be due from the estate of a deceased contributory whose executor or administrator shall not admit assets, the master may direct any action to be brought for compelling payment of what shall be so due, and for obtaining, if necessary, an administration of the estate of such deceased contributory, in or towards payment of his debts; and that any such action may be brought by the official manager by the style and designation aforesaid; and the production of the order or an office copy of the order for payment of any balance, shall be sufficient evidence of the debt in respect of which such action or suit shall be brought.

90. That as far as in the judgment of the master it shall be consistent with the interest of the company, the master shall cause the official manager to advertise in the *London Gazette*, or otherwise to give notice of all accounts and balance sheets, and particulars, if any, of proceedings in and about the liquidation which it shall be expedient to make known to the contributories, or to the creditors of the company.

91. That to facilitate the winding-up of any company, and to determine any questions of law or of fact that may arise between such company and any of the contributories or creditors, or between any two or more of the contributories, or between any contributory and any creditor, the master may direct such parties as he shall appoint, shall proceed to try, in such one of Her Majesty's courts of law at Westminster or Dublin, any issues of fact, and to direct that any actions shall be brought for the purpose of trying any mixed question of law and fact necessary, to be determined in order to the complete winding up of the affairs of such company; and the said master shall settle such issues, and he may give such directions as he shall think right with

reference thereto, or to such actions: provided, that no issue or action shall be directed with reference to any questions between the company or any contributory thereof, and any creditor thereof, without the consent of such creditor.

92. That the master shall, subject to such appeal as herein provided, adjudicate and determine any matter in contest between contributories, or between the company and any individual contributories, which may be necessary to be determined in order to the complete winding up of the company.

93. That no orders, reports, or certificates of the master shall require confirmation except any such special report as herein mentioned.

94. That all orders, reports, certificates, and other acts and proceedings taken by the master in the prosecution of any matter, and all affidavits, interrogatories, examinations, and depositions, shall be filed in the master's office in one continuous file after the manner used in bankruptcy, and shall, together with all other documents relating to the same matter, be kept by him as part of the proceedings therein, and the same shall from time to time be produced in court as occasion shall require.

95. That all orders of the master shall be enforced in the same manner and by the same process as orders of the court made in any suit pending therein.

96. That the master, in addition to all powers vested in him by this act, shall, in proceeding under any reference to be made to him by any such order absolute, have all the powers and authorities, which he could in anywise have and exercise under the practice of the court in any matter referred to him by a decree or order made and pronounced in a suit.

97. That in case of the illness or absence of any master to whom any matter shall be referred, any other master, without any special direction or appointment of the court may act in the matter and exercise all the powers which such last-mentioned master might have had or exercised.

98. That it shall be lawful for any master during vacation, without special direction of the court, to act in any matter under this act in the place of the master to whom such matter shall stand referred, and to exercise all the powers which any master to whom the matter stood referred might have exercised; and when any matter shall have been referred to the master in attendance during any vacation, the master who shall commence such reference shall be considered as the master to whom such matter under this act shall stand referred.

99. That an appeal shall lie to the Lord Chancellor or Master of the Rolls on motion, without the necessity of objections or exceptions from or against all orders, directions, reports, or other proceedings of or before the master relating to the winding-up of the company, including orders as to costs, entries or omissions of entries, or alleged entries, or omissions of entries in the books of the official manager, or in any of the lists to be settled by the master as aforesaid, and any other matters affecting parties or any of the parties to the winding-up; and in all cases in which the question involved in any such appeal shall be one affecting the interests of the company, the notice of such appeal shall be served on the official manager, who shall appear on such motion as representing the company, unless the court or the master shall otherwise direct; and in all cases in which the question involved in such appeal shall be one affecting only individual contributories or others, the parties to be served with the notice of such motion shall be the parties respectively in whose favour the order appealed from was made, and who appeared thereon before the master; and upon the hearing of such appeal, and upon all applications to the court subsequent to the order absolute, the proceedings which have taken place before the master in the matter shall be produced in court, and no other evidence shall, without express leave of the court, be used in support of or against such appeal: provided that, except on special leave of the court, to be obtained on motion *ex parte*, or on notice, if the court shall so direct, no such appeal shall be brought after fourteen days after the order, direction, report, or other proceeding

complained of shall be made or shall have taken place by or before the master, or after service of the same.

100. That the master shall have power, if he shall think fit, to make a special report concerning any matter arising about the winding-up, in order that the opinion of the court may be taken therein, and such report shall be brought before the court by such parties as the master shall direct, by motion praying that such report may be confirmed, discharged, or varied by the court; and on the hearing of such motion the same shall be confirmed, discharged, or varied, as to the court shall seem just, or such directions shall be given as shall appear to be necessary.

101. That every order made by the Master of the Rolls in *England* or *Ireland*, or any of the Vice Chancellors in *England*, may be reheard before the Lord Chancellor of *Great Britain* or *Ireland*, as the case may be, and such rehearing may be brought before the Lord Chancellor by way of motion.

102. That an appeal shall lie to the House of Lords from all orders to be made under this act.

103. That the general costs of winding-up the estate, and the costs of proving debts and of trying issues, and of all other matters in which creditors or any particular contributors or classes of contributors or alleged contributors of such company shall be interested, shall be at the discretion of the master, and shall be paid either out of the estate of such company, or shall be debited or credited to any individual contributors or class of contributors, or shall be subject to such set-off as the master shall direct.

104. That the costs of all proceedings which shall take place before the court shall be in the discretion of the court.

105. That all costs shall be ascertained by the master, or shall be taxed by such persons as he shall direct; and the masters of the court may and they are hereby required to tax all such costs as the master shall direct, and to make their certificate of such taxation in the usual manner.

106. That all costs ordered to be paid shall be recovered in the same manner and by the same process as costs to be paid by any party under any order or decree made in a suit pending in the court.

107. That the Lord Chancellor, with the advice and assistance of the Master of the Rolls or of the Vice Chancellor, may fix, regulate, and vary a table of fees to be paid and charged in respect of all proceedings, under this act.

108. That every summons, notice, order of which service is required, unless specially directed by this act, by the court, or by the master to be served otherwise, may be served by post to the last known address of the party or solicitor on whom the same is to be served, within such period as to admit of its being delivered within the period prescribed, if any, for notice to be given, and that although any such party may be out of the jurisdiction of the court; and in proving such service it shall be sufficient to prove that the document was properly directed, and that it was put into the Post Office, and not returned, the person to whom it is directed not being found, and it shall be deemed to have been served as of the day when it should have been delivered in due course of post.

109. That every advertisement required to be made in the *London Gazette* shall in the case of every company whose principal or only place of business shall be in *Ireland*, or the winding up of which shall proceed in the Court of Chancery in *Ireland*, be advertised in the *Dublin Gazette* instead of the *London Gazette*: provided that it shall be lawful for the Court of Chancery in *Ireland* to direct any such advertisement to be made in the *London Gazette* as well as in the *Dublin Gazette*, and vice versa.

(To be continued.)

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TERMS OF SUBSCRIPTION.—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, January 6, 1849.

THE Irish Jurist

No. 11.—VOL. I.

JANUARY 13, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows—

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DUBLIN, JANUARY 13, 1849.

THE east and north, the west and south of Ireland, differ as much, perhaps, in property, poverty, and population, as any two peopled—and, (may we say?) civilized districts on the wide surface of the globe. The same poor-law extends over the whole island; the measures applicable to the circumstances of the east and north have been applied *without hesitation*—we had almost written without inquiry—to the west and south, with what success is told in the misery and ruin of the three last years; and, in the fearful apprehensions for the present one. The utmost care should be observed that the same mistake be not again committed, and that the distressed districts of Ireland be not legislated for on principles applicable only to the richer portions of the island.

From the appendix of the First Annual Report of the Poor Law Commissioners for 1848, we have the means of ascertaining the relative poverty of each union in Ireland, by the rate required for the support of its poor.

From this we learn, that in the provinces of Leinster and Ulster—excepting, in the former, the unions of Granard, Mountmellick, and Athlone; and, in the latter, the counties of Cavan and Donegal, all of which verge towards the west—the poor-rate required for the support of the poor did not, in any union, exceed 4s. in the £1, and in the great majority (viz, in 41 out of 63) did not exceed 2s. This moderate rate is owing to the number of resident proprietors, gentry and wealthy farmers; and, further, to the fact that the pauper population is not excessive. These resident gentry and farmers have given considerable employment, and, should a necessity arise, could give more. A system of taxation which would render each property liable to the support of its own poor, would be applicable in these provinces, and would probably be attended with considerable success.

On the other hand, in the provinces of Connaught and Munster (excluding the county of Waterford), out of 51 unions, 31 required a greater rate than 4s., 21 more than 5s., 8 more than 10s., and 1 more than 21s. in the £1 for the support of their poor. Here there is an excessive population, few resident proprietors, gentry or wealthy farmers, and no employment, or means of affording employment, at all proportionate to the vast number requiring it; and here, also, we find the absolute poverty of each district directly in proportion to the number of paupers to be supported—the cultivated surface of each union decreasing, directly as the numbers on the relief lists increase. It is clear that a system of taxation which would render each property liable to the support of its own poor, is utterly inapplicable under such circumstances as these.

It is said, in these circumstances the rate in aid will supply the deficient funds; but it appears to be not sufficiently considered, that the adoption of this principle at once destroys the separate responsibility of estates. Again, the few still solvent proprietors are embarked on the ocean of pauperism, struggling to swim amongst multitudes of sinking men—*rari nantes in gurgite vasto*.

It is not to be supposed, because we say that 4s., or 10s., or 21s. in the £1, on the valuation, was required for the support of the poor in these unions, in 1848, that these rates were actually levied, or could be—the correspondence lately published, between the Marquis of Sligo and Mr. Redington, on the state of the Westport Union, is conclusive to the contrary. From this correspondence it appears, that since the year 1846, this union (which is valued at £38,876 per annum) received, in the way of grants and loans from government, no less a sum than £133,000, whilst from its own resources it was able to contribute only £6,000. We say *able to contribute*, because (as the affairs of the union have been long since confided to the management of paid guardians, who are entirely under

the control of the Commissioners, aided by an inspector, who, in testimony of his efficiency, has been lately promoted) it is to be concluded that they *made the union contribute all it could to the support of its pauperism*. Westport Union, however, is not singular in this respect. If the accounts of the neighbouring unions were investigated, it would be found that they received as much, if not more in proportion, in the way of grant and loan, and contributed as little; and hence (spreading these advances over three years, 1846, 1847, and 1848) it appears that these unions received more than 20s. in the £1, annually, on their valuations from governmental sources, to aid their local rates in the support of their poor.

It is not to be supposed, either, that these unions, in consequence of this enormous outlay, are now better able to support their own poor than they were three years ago: in fact, they are in a much worse condition—the paupers, who numbered about three-fourths of the whole population, having been employed on works studiously selected as being not reproductive, the lands remained untilld, and each succeeding harvest found the same, or rather an increasing destitute population, altogether unself-supporting. Hence the small amount of poor-rate which the vice-guardians have been able to collect in the Westport Union; and hence, at least, 20s. in the £1, on the valuation, must be advanced once more—from the consolidated fund, from a rate in aid, or from some other source—to enable the population to live till next harvest, and another 20s. in the £1 to enable them to live till the harvest after; and so on, *ad infinitum*, if, in the mean time, advantage be not taken of *some spring* to make a fertile land yield food.

Now, will any one acquainted with the circumstances of the western or south-western unions, seriously assert that proprietors or landholders in these districts could advance 20s. in the £1 on the valuation, or 10s. in the £1—which has been suggested as the limit to local taxation, and which, as we before observed, is not far from 20s. on the value—even if by advancing this 10s. or 20s. in the £1, they could have the population supported till harvest, and their lands cultivated? We say *advance*; for it is notorious that western or southern proprietors would look for credit in vain, and their labourers must be fed until next August or September, until when no return could be reaped from the land; and if proprietors could neither advance, nor pay this 10s. in the £1, how would the other parts of the country be benefitted by rendering their properties responsible, even to this limit, for the support of the poor? Or how would the poor be supported, if a rate in aid was not to be drawn on till after the locality had paid 10s., if this could not be collected? It is plain, in that event, the paupers must be supported by the rate in aid, and the local rate must remain *due* on the properties till better days arrive, if ever; or a better system be contrived; except the expedient of allowing men, women, and children to starve, be deliberately adopted.

If the proprietors and farmers in the west and south had the means of supporting their own poor till the produce of their labour enabled them to

support themselves, as the proprietors and farmers in the north and east have, there might be some reason in advocating the principle that they should be compelled to do so; but it is as clear to us as noon day that they have not those means—*that even if they adopted the suggestion of the Times newspaper, and, like the Roman Curtius, cast themselves headlong into the yawning chasm, it would still yawn on as hungrily as ever—a few pauperised proprietors* (to use the cant of the day) would go but a short way to satisfy its cravings—the fee of these southern and western unions, sold at the prices they would fetch at present, would not be sufficient. Casting on property thus pauperised the support of its pauperism, till all its resources were exhausted (a result arrived at before 10s. in the £1 on the valuation were realized), would paralyze all exertion—another spring would pass idly away, and we should, for the fourth year, witness the insane effort to compel pauper landlords to give employment and money wages, without return for the one, or means to supply the other.

It is idle to expect that these pauperised districts will recover, even a feeble strength, speedily; if they recover at all it will be gradually; and they will require, from some source, aid, liberally but judiciously applied for a considerable period of time. Burdening them with excessive taxation, as 10s. in the £1, and chaining the paupers to the soil, would, in our opinion, not only retard their up-hill progress towards prosperity, but would hurry them in the opposite direction. The profitable employment of the pauper labour is their only hope, and this can only be obtained by inducing men with capital and industry to take land and settle in the country. A general rule, placing all Ireland on a level, with respect to taxation, would not only enable the landholders who are not yet ruined, to recover, but would greatly encourage speculation in land in the distressed districts; and when the transfer of small estates in fee are rendered simple and cheap, would, by gradually introducing a respectable class of farmers and gentry into the distressed districts, eventually raise them from bankruptcy and ruin to independence and wealth.

Court Papers.

Chancery.

GENERAL ORDERS.

January 3, 1849.

The Right Honorable Maziere Brady, Lord High Chancellor of Ireland, by and with the advice and assistance of the Right Honorable Thomas Berry Cusack Smith, Master of the Rolls, doth hereby order and direct, in manner following:

1. That no recognizance hereafter to be entered into by or for any tenant, receiver, sequestrator, guardian, or other person, who, according to the general practice or orders of the Court, or to any special order made in any cause or matter, may be bound to enter into a recognizance, shall be deemed to be completed within the meaning of such practice or orders, or special order, unless and until, in addition to the due enrolment thereof, the same shall be duly registered in the office of the registrar of judgments, in pursuance of and according to the provisions of the act of the seventh

and eighth years of the reign of Her Majesty, intituled 'an act for the protection of purchasers against judgments, crown debts, lis pendens, and commissions of bankruptcy; and for providing an office for the registry of all judgments in Ireland; and for amending the laws in Ireland respecting bankrupts, and the limitation of actions'—and of an act passed in the eleventh and twelfth years of the reign of Her Majesty, intituled 'an act to facilitate the transfer of landed property in Ireland:' but the non-compliance with this order shall not affect the validity of such recognizance at law or in equity, otherwise than as the said acts, or either of them, may in such case affect the same, as against purchasers, mortgagees, or creditors.

2. That the masters shall not perfect any lease under a letting made to a tenant until, in addition to the certificate of the enrolment of his recognizance, a certificate of the said registrar of judgments, of the lodgment and entry of the memorandum or minute of such recognizance, required by the said first-mentioned act, to be left with him, endorsed on a duplicate of such memorandum or minute, in pursuance of the said act of the eleventh and twelfth years of the reign of Her Majesty, shall be produced.

3. That the production of a like certificate of the registrar of judgments shall be requisite, with the certificate of the enrolment of the recognizance, to entitle a receiver, sequestrator, or guardian to enter the general order that the tenants do pay their rents and arrears to him.

4. That all receivers, sequestrators, and guardians already appointed, shall proceed without delay, and before the first day of *February* next ensuing, to have the several recognizances heretofore entered into by them, or on their behalf, duly registered, pursuant to the said acts, in the office of the said registrar of judgments, and do produce the like certificate of the said registrar as aforesaid in respect thereto to the master, on the passing of their next accounts respectively, who may therein allow the costs of such registry; and the master shall have power to disallow his poundage on such account to any receiver, sequestrator, or guardian not producing such certificate, dated on or before the said first day of *February*, unless some satisfactory reason shall be given to him for the delay; and the masters shall not pass any such account without production of the certificate; and in their certificate of the allowance of the account, shall state that the same was produced, and the date thereof.

5. That to the next statement of facts to be laid before the master by any receiver, sequestrator, or guardian, or to his next account, whichever shall be first lodged after the date hereof, there shall be annexed, by way of schedule, a specification of the several tenants by whom recognizances have been entered into, and the amount thereof respectively; and the master shall examine into the same, and shall be at liberty in all cases, when he shall think fit, to direct the receiver, sequestrator, or guardian, or his solicitor, to effect, within a time to be fixed by the master, the due registration under the said acts, of all or any of the said recognizances, which it may be proper to have so registered, and to allow the costs thereof in the account of such receiver, sequestrator, or guardian, and to suspend the passing of any account until such direction shall have been complied with.

6. That any party interested in any cause or matter, or the receiver, sequestrator, or guardian appointed therein, may register under the said acts the recognizance of any deceased or discharged receiver, sequestrator, or guardian, or of any party which shall not have been vacated; and the master may allow in his next account to any such receiver, sequestrator, or guardian, the costs of such registration, where he shall think it was proper that the same should have been effected; and the master also may allow and direct to be paid to the general solicitor for minors, out of any funds properly applicable thereto, the costs of any such registration made by him, in cases where it may be necessary that such registration should be so made.

7. That the fee of 16s. 8d. shall be allowed to the solicitors of the Court for attending to register any judgment, decree, order, crown bond, lis pendens, or recognizance under the said acts, and for all duties relating thereto, including the preparation and signing of the memorandum

and minute to be lodged with the registrar, and a duplicate thereof; but the masters in allowing any costs, under the fifth foregoing order, for the registration of the recognizances of tenants, may allow a lesser sum for each, in their discretion, having regard to the numbers registered by the same solicitor in the same cause or matter.

8. That where a separate report shall be made by a master under a decree, containing a direction to appoint a receiver, as provided by the 153rd of the general orders of the 27th day of *March*, 1843, any objection to such separate report shall be taken by notice, and not by way of exception; and no cause shall be set down to be heard on such separate report, or on any objection thereto.

MAZIERE BRADY, C.
T. B. C. SMITH, M. R.

Equity Exchequer.

Adjourned Causes.

Hodgens v. O'Reilly, Love v. Cunningham,
Cleary v. Cleary, Woolsey v. Woolsey,
Cheguin v. Burchall,

Causes for Hilary Term.

Head v. Irvine, Stafford v. Henry.

Queen's Bench.

Causes for argument set down this Term.

Demurrer.

Batt v. Bragg, Wrixon v. Walker,
Richardson v. Newenham, Porter v. Graham.
Hendman v. M'Cracken, Bills of Exceptions.
Lessee Cooper v. Wade.

Nisi Prius days.

Saturday, 13th January. Thursday, 25th January.
Thursday, 18th ... Thursday, 1st February.

In the Queen's Bench the Chief Justice announced that the Court would not sit at the Nisi Prius after sittings, until Tuesday, the 6th of February, as the Court of Error would sit during the four days after Term.

Common Pleas.

Demurrer.

Ballinrobe Union v. Browne, Nowlan v. Goss.
Castlebar Union v. Same, Motion to set aside Fiat.
Pickington v. Warner, Callaghan v. Fogarty.
Assignee Lynch v. Kennedy, Motion to set aside Ver dict.
Bourke v. Knox.

Nisi Prius days, in Term.

Monday, 15th January,
Monday, 22nd ...
Monday 29th ...

Last day for serving notice of Trial.

6th January.
13th ...
20th ...

Nisi Prius days after Term.

Commence on Thursday 1st February.

24th January, last day for Serving Notice of Trial for
Sittings after Term.

In all cases where a Docket for a Record shall have been lodged with the Lord Chief Justice's Registrar, and the Party shall have subsequently given a Plea of Confession or Consent for Judgment, notice shall be immediately given to the Registrar, by the plaintiff's attorney, that such case will not proceed to trial.

Exchequer of Pleas.

Nisi Prius days in Term.

Monday, 15th Jan. Serve Notice on Saturday, 6th Jan.
Saturday, 20th ... Friday, 12th ...
Wednesday, 24th ... Tuesday, 16th ...

After Term.

Monday, 5th February, Serve Notice, Saturday, 27th Jan.

(Continued from p. 80.)

110. That a copy of the *London Gazette* and of the *Dublin Gazette* containing any such advertisement shall be evidence of any matter therein contained, and of which notice is directed or authorized to be given by such advertisement; and that any person who shall insert in the *London Gazette* or in the *Dublin Gazette* any advertisement under this act without authority, or knowing the same to be false in any material particular, shall be guilty of a misdemeanor.

111. That all courts, judges, justices, masters, commissioners judicially acting, in *Great Britain or Ireland*, shall take judicial notice of the signature of any master or registrar or other officer, and of the official seal of the report and other offices of the Court of Chancery in *England or Ireland*, subscribed, or appended to any order, report, certificate, or other official document.

112. That if any person shall forge the signature of any such master or registrar, or the official seal of the report or other office of the Court of Chancery in *England or Ireland*, subscribed, or appended to any such order, report, certificate, or official document, or shall tender in evidence any such order, report, certificate, or other official document with a false signature of any such master or registrar, or a false or counterfeit seal of any such office appended thereto, knowing the same signature or seal to be false, every such person shall be guilty of felony, and be liable to punishment under 8 & 9 Vict. c. 113.

113. That any person who upon examination upon oath or affirmation in any affidavit, deposition, or solemn affirmation in or about the winding-up of any company, or in or about any matter under this act, shall wilfully and corruptly give false evidence, shall be liable to the penalties of wilful and corrupt perjury.

114. That if after the passing of this act any person, being a contributory of any company respecting which an order absolute shall be made, shall, with knowledge of an act or matter committed by such company sufficient to ground an order absolute, or in contemplation of the winding-up of such company, destroy, alter, mutilate, or falsify, any of the books, papers, writings, or securities of such company, or make any false or fraudulent entry in any book of account to defraud the creditors or contributories of such company, or to defeat the objects of this act, every such person shall be deemed guilty of a misdemeanor, and shall be liable to be imprisoned in any common gaol or house of correction for any term not exceeding two years.

(To be continued.)

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IN CHANCERY.

In the Matter of Pierce Morton and his Minor son, Pierce Edward Morton, by the said Pierce, his father and Guardian, Petitioners.

And the Act of the 7th and 8th Victoria chapter 13, entitled, "An Act for authorizing the Sale of certain Estates in the counties of Meath and Cavan."

The Rev. John Rolleston and another, Plaintiffs.

Pierce Morton and others, Defendants.

Same, Plaintiffs.

Pierce Edward Morton, a Minor and another, Defendants.

Lands, and premises specified in the 4th Schedule to said Act annexed, in order to raise all such sums as shall be sufficient for the purposes in said Act mentioned.

Dated this 7th day of November, 1848.

EDWARD LITTON.

For Rentals, reference to Maps, and further information, apply to WILLIAM TATLOW, Esq., Plaintiff's Solicitor, 83, Harcourt street, Dublin; Messrs. R. HAMILTON and Co., 38, Upper Backville street, Dublin; and LORENZO WELD, Esq., 17, Molesworth street, Dublin.

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"THOMAS ANTISELL, Lecturer on Chemistry."

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 13, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):

Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 13, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, January 13, 1849.

THE Irish Jurist

No. 12.—Vol. I.

JANUARY 20, 1849.

Price {Per Annum, £1 1s
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The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, JANUARY 20, 1849.

We have in the present number stated some of the evils connected with the administration of property, placed under the dominion of our Courts of Equity.

That estates under their control are deteriorated in condition and value is the experience of every resident in the country, and of every casual traveller who visits our shores. The latter not unfrequently finds himself in a district where poverty and neglect have laid a heavier than ordinary hand,—hovels along the wayside, fields uncultivated, irregularly and ruinously sub-divided, agriculture in a state of relapse, no controlling power directing the few remaining energies of the cottier tenantry, the old family mansion of the inheritor presenting a forlorn aspect of dilapidation and decay; oppressed with a sense of painful melancholy, and surprised, even in Ireland, with this scene of desolation, he asks to what proprietor this region belongs,—and he feels quite satisfied that such should be its appearance, when he is informed that “*It is in Chancery.*”

If a proprietor were a man of very limited income, in proportion to the extent of his estate—if he were devoid of intellect and energy—we might excuse his inability or his infirmity; but if he had complete control over his estate and its revenues, was endowed with intelligence, active himself, and with the power of compelling activity in others, and yet his estate presented the appearance we have described, leniency itself could find neither excuse nor pity for control so misdirected, for activity so unemployed, and for a management productive of such lamentable results.

Now, does not a Court of Equity resemble, in many striking features, the latter of these proprietors? It possesses great control, and if not complete, because it wrongly forbore to exercise

its powers, and has built up a series of precedents, embarrassing to itself, and cumbrous to the properties placed under its care. Land and the Court of Chancery seem to have no natural affinity; they have never improved by contact with each other.

But let us not lay upon the management of such a Court more sins than it is justly chargeable with. The wretchedness of its uncared-for estates is not, in all instances, primarily attributable to it; from the embarrassment of the inheritors, they had been previously neglected, were rack-rented, and undergoing a rapid process of deterioration. But what we do blame the system pursued by the Court of Chancery for, is, that when it finds such estates bad, it makes them worse, and sometimes receives them prosperous and leaves them wretched.

An instance often illustrates a principle. We take one of the many which the annals of the Court of Chancery could furnish; the facts came before the Court the last year, and were verified by the affidavit of a Protestant clergyman. In the year 1835, a Receiver was appointed over a property of £514 a-year, paying a head-rent of £164; at the date of his appointment, the arrears on the property to the previous gale-day amounted to £2 14s. 1½d. The rental was higher than that subsequently settled by the Court; there was no hanging gale, and the rents, falling due in September and November, were paid in the following December; there was no pressure on the tenantry, and no pauperism on the estate. The very first account passed by the Receiver shewed an arrear of £322 10s. 1d.; this went on progressively accumulating, until in 1842 the arrear had reached the sum of £841 10s. 3d., the greater part of which appearing by the Receiver's affidavit to be irrecoverable, the sum of £832 5s. 3d. was wiped out by the Master in one stroke. It was to be hoped that henceforward each year would have brought a year's rent; but no; the next account showed an arrear of £269 14s. 8d., which went on increasing, till it

reached in 1846 the sum of £678 12s. 6d., and in 1848, upwards of £900. The costs incurred for this *excellent and efficient management* amounted to the moderate sum of £309 6s. 9d., to which is to be added the poundage retained by the officer of the Court, for his *meritorious services*. Nor is this the worst. In Trinity Term, 1848, two applications were made to the Court; one by the head-landlord for permission to bring an ejectment, the head-rent having fallen into arrear; and a second by the Incumbent of the parish, whose tithe-rent charge, amounting to the small annual sum of £16 4s. 2d., was allowed to remain unpaid.

Nor had the inheritor the satisfaction of knowing, that whilst landlord, clergyman, and creditor remained unpaid, his tenantry were improved. For thirteen years his property was under the dominion of the Court; during that interval, he was deprived of all control over his tenantry, unable to assist them or improve their condition, and not a shilling was expended on the property for its permanent improvement. When, at length, he was restored to his proprietorship, he found his tenantry generally unable to pay rent, and many of them reduced to the necessity of seeking relief under the Poor-law. The condition in which this estate was restored to its owner, evidences strongly the defective management of the Court of Chancery—a management which acts with a peculiarly fearful effect on properties occupied by a numerous and small class of tenantry.

What is the peculiar vice of this system?

It deprives the proprietor of the power, of aiding his tenantry, of exercising any control in preventing sub-letting, the ingress of pauper tenants, the over-cropping and mismanagement of land—and it confers that power on nobody. While the control of the Court of Chancery continues, such power is virtually extinct; the Receiver, as we have observed in a former article, requires no qualification but to find sufficient securities; he is required to discharge no duties, save to collect rents. It is the worst species of absenteeism, thus managing estates through non-resident agents who have no discretion committed to them,—who cannot interfere to prevent the subdivision of a farm, to aid a tenant whom a little assistance would enable to become independent, or to exercise any of the thousand privileges of a landlord, except at an expense to the estate which might cost more than the advantage gained was worth, or after a delay which would render his interference useless.

Why should not the Court itself perform those peculiar duties, which it takes from the landlord, and transfers to nobody?—why should it devote its entire attention to the interests of a mortgagee or incumbrancers, to the exclusion of the proprietor and the tenantry? And this consideration acquires much more importance when it is recollected that in 1847 there were over 1000 estates, covering a fifteenth part of the whole rental,—and, in all likelihood more than a fifteenth part of the whole surface of Ireland, under the dominion of our Courts of Equity; and whilst we now write, the number has increased and is increasing. The Chancellor's list for the present term contains 171

causes, nine-tenths of which relate to land. The business transacted in the Rolls Court is rapidly and progressively increasing; the fees received in the various offices connected with the Court of Chancery are swelled to nearly double their ordinary amount; the ordinary revenue hitherto derived from one, averaged £6000 per annum; last year it exceeded £11,000. Recent legislation also will still further extend the control of the Court of Chancery over land.

More attractive and dazzling subjects may present themselves to the attention of a legislator, but he could not serve his country more effectually than by devising a practical remedy for the evils we have attempted to describe. The calamities of Ireland do not spring from a single source, and they can be best combatted in detail. The proprietors of Ireland are told, that if they will exert themselves, prosperity is within their grasp; if they prefer idleness and inattention, they must inevitably sink. Should not the same reasoning be applied to the Court of Chancery? Is there anything in the property under its control, to exempt it from the common lot of Irish estates?

Let the Receivers under the Court of Chancery be more assimilated to agents on well-managed private estates, and if it be considered dangerous to give Receivers an independent discretion, at least let the instructions of the Court be conveyed with the rapidity of directions from landlords to their agents. The cumbrous and expensive machinery of statements of facts, affidavits, reports, &c., neither suit the circumstances nor exigencies of distressed estates. Surely a system can be devised which would accomplish these objects, and without any increase of expense to the country. The costs allowed to Receivers during the four years comprised in the return to which we have primarily alluded, averaged above £30,000 per annum. Add to this the 5 per cent poundage on near a million sterling, and there will be a total of nearly £80,000 a-year, shewing an expence of 8 per cent on the rental, a greater per centage than is required for the management and improvement of the most flourishing private estates.

This expense, however great, is not all that is lost under this system, large sums are annually permitted to lie unproductive in the hands of Receivers, which should, the moment they were received, be invested to the credit of the different causes, and be made to accumulate for the benefit of the parties interested. Receivers, in this respect, should be placed on a level with private agents. The country might be divided into districts, and all the properties under the courts in each district confided to a resident receiver. By a well-managed system, we feel satisfied half the present expense of managing estates would be saved, the business of the Court of Chancery would be materially lightened, and the properties under its care would be improved during their transition through it, and cease to be the speaking reproach they are now.

Court Papers.

Chancery

JANUARY 18TH.—The following gentlemen were this day admitted to the degree of Barrister:—William Black, Luke Alexander Treston, Edward Eyre Mannsall, Beecher Lionel Fleming, Nathaniel Robert Powell, David John Henry, Henry Nicholas Reynolds, Charles Henry Tandy, George Barton, Daniel Delacherois, jun.

LIST OF CAUSES.—HILARY TERM, 1848.

Dowdall v. Burke, pleadings and proofs, order pro con.
 Same v. Same, pleadings and proofs.
 Cruise v. Mac Loughlin, plead. and proofs, order pro con.
 Curran v. Glover, report and merits, further directions.
 Coulson v. Williams, pleadings and proofs, order pro con.
 Jardine v. Forrest, pleadings and proofs.
 Howell v. Henchy, report and merits.
 Burrough v. Briscoe, writ of partition and return.
 Thompson v. Thompson, report and merits.
 Thompson v. Somerville, pleadings and proofs.
 Daly v. Burke, pleadings and proofs, order pro confesso.
 Alleyne v. Alleyne, report and merits.
 Warnock v. Eccles, return of judges' certificate.
 Hamilton v. Syngo, pleadings and proofs.
 Mahony v. O'Connell, bill and answer.
 Wingfield v. Williamson, report and merits.
 Shanahan v. Gorman, pleadings and proofs, order pro con.
 Same v. Same, ditto. ditto.
 Bruce v. Jones, pleadings and proofs.
 Jackson v. Tollett, report and merits.
 Reade v. Taylor, pleadings and proofs, order pro confesso.
 Kirkwood v. Lloyd, appeal from Rolls decrees.
 Thompson v. Garnett, report and merits.
 Campbell v. Kelly, ditto. ditto.
 Rainey v. Blake, ditto. ditto.
 Magee v. Chaine, ditto. ditto.
 Vincent v. Fitzgerald, bill and answer.
 Keatinge v. Garde, pleadings and proofs, order pro con.
 Geraghty v. Geoghean, pleadings and proofs.
 Dudgeon v. Browne, ditto. ditto.
 Same v. Same, ditto. ditto.
 O'Sullivan v. M'Sweeney, return of com. par., rep. and mer.
 Baker v. M'Dermott, standing from Trinity Term, 1848.
 Nagle v. Nagle, and other causes, p. p., b. a., order pro con.
 Cochrane v. Finn, pleadings and proofs, order pro confesso.
 Geale v. Nugent, ditto. ditto.
 Waller v. Molloy, ditto. ditto.
 Dawson v. Miller, pleadings and proofs.
 Campbell v. Frayne, reports and merits.
 Getty v. Graham, ditto. ditto.
 Dooner v. Dooner, pleadings and proofs, bill and answer.
 Spanner v. White, report and merits.
 Brennan v. Kenny, pleadings and proofs.
 Massey v. Denny, ditto. ditto.
 Garty v. Bruce, report and merits.
 Curtis v. Swiney, pleadings and proofs, bill and answer.
 Swiney v. Curtis, pleadings and proofs, order pro confesso.
 Moore v. Bate, pleadings and proofs.
 Hodgson v. Hodgson, ditto. ditto.
 Cochrane v. Cox, report and merits.
 Bateman v. Same, ditto. ditto.
 Fitzsimon v. Egan, pleadings and proofs for dismiss.
 Burton v. Kennan, pleadings and proofs.
 Johnston v. Scott, ditto. ditto.
 Same v. Same, ditto. ditto.
 Ffrench v. Ffrench, ditto. ditto.
 Graydon v. Jessop, pleadings and proofs, order pro con.
 M'Donnell v. O'Neill, pleadings and proofs.
 Hamilton v. Nagle, report and merits.
 Gibson v. White, pleadings and proofs.
 Cotter v. Cotter, report and merits.
 Grayburn v. Semple, ditto. ditto.
 Carr v. Osborne, pleadings and proofs.
 Farland v. Nevin, pleadings and proofs, order pro con.

Seymour v. Walcott, report and merits.
 Walcott v. Graves, report, exceptions and merits.
 Hodder v. Hebert, pleadings and proofs, order pro confesso.
 Murphy v. Rorke, pleadings and proofs.
 Minchiner v. Jones, pleadings and proofs, order pro con.
 Fox v. M'Loughlin, ditto. ditto.
 Mullen v. Connellan, report and merits.
 Fulton v. Fulton, pleadings and proofs.
 Walsh v. Corcoran, ditto. ditto.
 Garnett v. Armstrong, rep. ex. merits and further directions.
 Irvine v. French, bill and answer.
 Thompson v. Bea, pleadings and proofs, order pro confesso.
 Mahony v. O'Connell, *et contra*, report, exceptions & merits.
 Webber v. Lynar, report and merits.
 Ready v. Lynch, standing over, and p. and p. in sup. cause.
 Same v. Tierney, ditto. ditto.
 Turner v. Russell, report and merits.
 Hayden v. Same, Bill and answer, order pro confesso.
 Graydon v. Kernan, pleadings and proofs.
 Dumoncel v. Dumoncel, ditto. ditto.
 Hackett v. Thunder, ditto. ditto.
 Hackett v. Mansfield, and other causes, report and merits.
 Mahony v. Roberts, ditto. ditto.
 Same v. Molloy, ditto. ditto.
 Houlditch v. Bonham, report, ex. & m., further directions.
 Todd v. Kennedy, pleadings and proofs.
 Todd v. Todd, ditto. ditto.
 Williams v. White, ditto. ditto.
 Hogan v. Kirkwood, pleadings and proofs, order pro con.
 Duckett v. Bunbury, pleadings and proofs.
 Joly v. Proctor, ditto. ditto.
 M'Carthy v. Murphy, ditto. ditto.
 Delany v. Firman, ditto. ditto.
 Irwin v. Massey, ditto. ditto.
 Behan v. Perry, report and merits.
 Lynch v. Livesay, pleadings and proofs, order pro con.
 Roche v. Roche, report and merits.
 Same v. Cooke, ditto. ditto.
 Powell v. Powell, pleadings and proofs, bill and answer.
 Butler v. Pennefather, pleadings and proofs.
 M'Carthy v. Clarke, ditto. ditto.
 Fawcett v. Biggs, p. and p., bill and answer, ord. pro con.
 Dwyer v. Ashe, report and merits.
 Luscomb v. Kenny, pleadings and proofs, order pro con.
 Lees v. Kenmare, bill and answer.
 Crofton v. Galbraith, pleadings and proofs.
 Williams v. Gore, report and merits.
 Noble v. Nixon, pleadings and proofs.
 O'Grady v. Atkin, and other causes, p. & p., ord. pro con.
 Hackett v. Walsh, bill and answer.
 Curtis v. Swiney, pleadings and proofs.
 Egan v. Blake, pleadings and proofs, order pro confesso.
 Warnock v. Eccles, return of Judges' cert. and furth. dir.
 Maturin v. Wilson, pleadings and proofs.
 Marquis of Donegal v. Gregg, p. and p. for dismiss.
 Smith v. Dungannon, Re-hearing.
 Reilly v. Fitzgerald, ditto.
 Purcell v. Buckley, ditto.
 Eyre v. Hollier, ditto.
 Hollier v. Hedges, ditto.

(Continued from page 84.)

115. That upon production to the registrar of the Court of Chancery in *Ireland* of any order or of the office copy of any order of the Court of Chancery in *England*, or of the master of such Court, made in any matter arising under this act, and upon production to the clerk of the entries of the report office of the Court of Chancery in *England* of any order or of the office copy of any order of the Court of Chancery in *Ireland*, or of the master of such Court, every such order shall be entered in the registrar's book of the Court of Chancery of *Ireland* or *England* (as the case may be) by the officer to whom the same or an office copy of the same shall be produced, and such entry shall be certified by the proper officer at the foot of such order or office copy; and every order so entered shall be of the same force and effect and shall be enforced in the same manner in all respects

as if it had been made by the court or by the master of the court in the registrar's book or master's order book whereof it shall be so entered.

116. That on production at the office in *Edinburgh* kept for the registration of deeds, bonds, protests, and other writs registered in the books of council and session, of an office copy of any order of the court or of the master made in any proceeding under this act, and of an affidavit that application has been made to the person mentioned in such order for payment of the sum ordered to be paid by him, and that default has been made, then such order shall thereupon be registerable in like manner as a bond executed according to the law of *Scotland* with a clause of registration and decret shall be interposed to such order, upon which execution shall pass, in like manner as execution passes upon a decree interposed to such bond, and shall have the like effect upon and against the person named in such order as if he had executed such bond.

117. That where the only registered place of business of any company or the head office of any company which shall not have any registered place of business shall be situate in *England*, then the petition for the winding-up of such company shall be presented to the Court of Chancery in *England*, and where the only registered place of business or the head office of any company shall be situate in *Ireland*, then the petition for the winding-up of such company shall be presented to the Court of Chancery in *Ireland*, and such respective courts shall thereupon exercise all jurisdiction, powers, and authorities given by this act: provided that where any company shall have a registered place of business or shall transact business both in *England* and *Ireland* a petition for the winding-up of such company may be presented either to the Court of Chancery in *England* or to the Court of Chancery in *Ireland*, and thereupon, the said Court shall have and exercise in the matter all the authorities and provisions in this act contained in like manner as if the only registered place of business of such company had been situate within the jurisdiction of the same court.

118. That the court, in addition to all powers and authorities given by this act, shall exercise the like authorities, as would have been exercisable in a suit duly instituted according to the rules and practice of the court, and to which all proper persons were parties, for the winding-up of the affairs of the company in the matter of which the petition is presented; and the general practice of the Courts of Chancery in *England* and *Ireland* in suits pending in the same, shall apply to all proceedings under this act.

119. That it shall be in the discretion of the court, on application to stay proceedings on any report or order of the master.

120. That if any matter shall arise in winding-up of any company which shall appear to the master not provided for by this act, or by any rules or orders in force, the master, on the application of the official manager, or of any party to the winding-up, or at his discretion, may report the same to the court, who may make thereon such special order or such general order, as may be necessary under the circumstances.

(To be continued.)

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1845.

A Meeting of the Members of this Society will be held in their Rooms, No. 45, MOLESWORTH STREET, on FRIDAY EVENING NEXT, the 26th inst. Chair to be taken at Eight o'clock precisely.

SUBJECT FOR DEBATE,

"Is it a good defence by a tenant who has been duly served with ejectment for non-payment of rent, that other tenants of the same premises have not been so served?" *Barr. 321, n.*

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JOHN NORWOOD, Esq. 11, Nelson Street.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in the same Parish, by EDWARD JOHNSON & MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, January 20, 1849.

THE Irish Jurist

No. 13.—VOL. I.

JANUARY 27, 1849.

PRICE { Per Annum, £1 10s
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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DUBLIN, JANUARY 27, 1849.

IN the case of *Lyster v. M'Namara*, reported 10 Ir. Law Rep. 597, the question for the first time was raised—for the consideration of the Court of Common Pleas—whether in an ejectment for non-payment of rent, not only the tenants in possession, but all persons having a legal interest in the premises held under the lease, should be served. On this question the Courts of Queen's Bench and Exchequer have for many years held opinions diametrically opposed, the Court of Queen's Bench considering it sufficient to serve the tenant in possession; the Court of Exchequer, on the other hand, requiring that all persons having a legal interest should be served with the ejectment. In the Common Pleas this question has produced a difference of opinion, the majority of the judges, however, deciding with the Court of Queen's Bench.

This contrariety of opinion leads us to a consideration of this important question, which involves not merely a point of practice, or matter of convenience, but a legal right and principle. It appears anomalous that a lease may be regularly evicted, according to the practice of the Court of Queen's Bench, and yet can be revived, as it were, in the Court of Exchequer, by any person possessing a legal interest—it matters not how minute—and who has not been served with a copy of the Queen's Bench ejectment, he is allowed to take advantage of a legal right recognized in the Court of Exchequer as still existing, and *re-evicts*, if we may use the expression, the landlord.

In the case under consideration, the party whose non-service formed the ground of objection, was the assignee of a mortgagee; the mortgage and assignment were both registered; the mortgagee had been served. A point was raised, whether the ejectment statutes did not create a special exemp-

tion in favour of mortgagees and their assigns. The court, however, gave no separate opinion on this branch of the case, and two judges out of three decided that the assignee need not be served.

It is not very easy to account for this difference of practice between the Courts of Queen's Bench and Exchequer. The former professes strictly to follow that established in England, whilst the latter is, in our judgment, more in accordance with the spirit of the English system, as will appear from the following sketch of the nature of the action of ejectment, and the English mode of regulating it. This form of action, from the period of its use, was a proceeding for the recovery of possession, and we may here observe that there was no difference between ejectments on the title, and for non-payment of rent—at least as to the persons who should be served with the ejectment process—until the legislature interfered to regulate the proceedings of the latter. It was in fact a proceeding to obtain possession of land, the lease of which had been evicted by the re-entry of the landlord for condition broken, and the persons to be served in every case were those in possession only; all other interests under the lease being destroyed by the re-entry. (Gilb. Rents, 73, Co. Litt. 201, b.) But it being found, to use the language of Lord Holt, “that tenants in possession combined with lessors of the plaintiff, and ousted the landlord of his rent, and that the combination of the tenant in possession could not be prevented, unless the landlord was permitted to defend alone. The question arises, who is landlord?” We find from a very early date that the courts were in the habit of admitting persons claiming an interest—not inconsistent with that of the tenant—to defend either with him or alone. In 12 Mod. 211, (*Anon*) it is said that “if notice in ejectment be given to an under-tenant, and he doth not acquaint his landlord therewith, but suffers judgment to go

against him, the court (upon motion) will not suffer execution to be taken out till the right be tried."

This case and others referred to in *Fairclaim v. Shamtile*, (3 Burr. 1290) shew that the anxious desire of the courts has been to assist those who claimed rights in the subject of the ejectment. But as the court could not be put in motion without an application on the part of the person seeking to join in the defence, and as the rights of those who remained in ignorance of the proceedings would be barred, the 11 Geo. 2, c. 19, was passed to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, (*Crocker v. Fothergill*, 2 B. & Al. 652,) who, by the 12th section, is directed, as soon as the declaration in ejectment is delivered to him, to give notice of such delivery to his landlord, under pain of forfeiting three years improved, or rack-rent of the premises holden. And Lord Mansfield, in the case before cited, *Fairclaim v. Shamtile*, speaking of who should be considered a landlord within the meaning of this act, says, "it extends to landlords *de jure*, as well as to landlords *de facto*. A probable cause of claim is sufficient to entitle the landlord to be made defendant." And accordingly a devisee in trust, *Loveland d. Norris v. Doncaster*, (4 T. Rep. 122,) and a mortgagee, have been permitted to defend as landlord, as falling within the meaning of the act, *Doe d. Telford v. Cooper*, (8 T. R. 645) though perhaps not such as would be entitled to notice. That statute and these cases do not apply to this country, but both illustrate the design of the legislature, and desire of the courts, to aid persons whose interests would otherwise be defeated, without any opportunity of defence, in a court of law, and whose sole remedy would be through the instrumentality of a court of equity.*

This being the English practice, has it been adopted by our Court of Queen's Bench, and is the decision of the Common Pleas, in the case in question, consonant with it? Certainly not in spirit, and, we submit, not in practice either. The persons having intermediate interests in England, are not served with process in ejectment, not being in possession, but provision is made that they shall have notice—imperfect and indirect we admit—from the tenant, and may come into court, as we have shewn, either at common law, or under the provisions of the statute, (11 Geo. 2, c. 19,) whereas, according to our Queen's Bench practice, they may be in total ignorance of the attack upon their property, until it be, perhaps, too late to undo what has been done.

In ejectments on the title, the English practice

* It will of course be understood that these observations are only applicable to the ejectment for condition broken, in which it appears incontrovertible that all estates derived under the lease are divested (Co. Litt. 202, b. (1) 1 Ro. Ab. 474; 6 Co. 40, b. 41, a.) With respect to ejectments on the title—in contra-distinction to those for condition broken—the ejectment may be brought as often as the parties please. Now, persons whose claims rest on the evicted lease, if the practice of the Court of Queen's Bench be the correct one, have not this advantage, and this is an additional reason for the service of all persons legally interested in the lease.

is to serve only those in possession; in Ireland the practice of all the courts is to serve not only every person in possession, but every person claiming a legal or equitable estate on the premises sought to be evicted, who is known to the lessor of the plaintiff, and resides within the jurisdiction of the courts. *Boardman v. Grier*, (2 F. & S. 55, note,) Longfield Eject. 31, Ed. 1846. And for this reason it was deemed unnecessary to extend the provisions of the 11 Geo. 2 to this country. If this be so, there can be no reason why the same rule which has been adopted in cases of ejectment on the title, should not also be adopted in cases of non-payment of rent. The two cases being in their nature without distinction, are now looked upon as distinct actions, by reason of the ejectment statutes, which make no change in the persons who should be served.

The result of the English practice is this, that where it concludes all parties having interests in the lands, it provides for their having notice; where it does not so provide, it allows cross-ejectments to be brought. Now, our Court of Queen's Bench concludes persons, without giving them notice, who would be without redress, after the time had expired for redemption, if the Court of Exchequer adopted a similar practice, and did not allow cross-ejectments to be brought. Therefore we think that the practice of the Exchequer is more calculated to do justice, and more in accordance with that established in England.

It has also been always consistent. In Howard's Prac. Ex. of Pleas, p. 39, it is said, "that all persons who are in possession, or claim any title in the land, must be served; and in page 64, "where an ejectment is brought for non-payment of rent the practice is the same as where it is upon the title, except that there must be a notice that it is brought for non-payment, &c." And some of the older cases in the Queen's Bench appeared to have followed the same practice, until the cases of *Nugent v. Earl of Bantry* (2 H. & Br. 156), and *Dunne v. Butler* (Batty, 316, note), in which a different rule appears to have been first established, not without some hesitation on the part of the court, who expressly rested their decision on the basis of the English practice. If we have shewn that the practice was not, nor is, really what it has been assumed to be, we think the rule *cessante ratione cessat lex* should be applied to their mode of proceeding on this subject.

So far, we have treated this question without reference to the provisions of the Ejectment Statutes. The next consideration will, therefore, be—Have they made any change as to the persons to be served? And, for distinctness, we shall consider this branch, first, as to lessees and their assigns; and, secondly, as to mortgagees and their assigns; and it appears to us, from an attentive consideration of this code of laws, that the legislature have shewn an intention of interference with respect to the latter class alone.

The first statute (the 11th of Anne, c. 11, s. 2) enacts "that the summons in ejectment shall stand in place of the demand and re-entry at common law;" "that if it should appear that more than

half a year's rent was due, and that there was no sufficient distress on the premises," then the lessor should recover as if he had demanded, &c., "and a re-entry made," &c.; "and in case the lessee or lessees, his or their assignees or assignees, or other person or persons, claiming or deriving under the said leases, shall *permit or suffer* judgment to be had, &c., and without filing any bill for relief in Equity within six months, that all such persons should be barred and foreclosed from relief at law or equity," &c. These words *permit and suffer*, &c., have been used as an argument to shew that the legislature intended the service of all persons claiming interests. This, it will be observed, is an Irish act of an Irish legislature, and was in advance of English legislation on this particular subject. It would appear, therefore, to be a more reasonable construction of those words to say, that the legislature found the practice of serving all persons having interests already in existence, and legislated accordingly. The analogous act (4 Geo. 2, c. 28, Eng.) contains the same words; and the 11 Geo. 2, c. 19, Eng., was then passed to remedy the mischiefs created thereby, which the Irish courts had already abolished, by their more equitable practice. The 4 Geo. 1 c. 5, s. 3, gives the right of ejectment when there is a year's rent due, though there be sufficient distress, but is otherwise similar to the 2nd section of the 11th of Ann.

With respect to mortgagees, the 3rd section of the Statute of Ann, and the 5th section of the 4 Geo. 1, c. 2, save unconditionally the rights of mortgagees not in possession. The previous sections of these acts being large enough to include them as persons claiming under the lease; and the 8 Geo. 1, sec. 4, extends the provisions of the former statutes, and enacts that registered mortgagees, and their assigns, if served with the ejectment, shall be bound, unless the premises be redeemed within nine months; and, if not registered within the fifth section, in that case, they were bound although not served. These provisions are, as we have said, in advance of the English legislation on the same subject, and are evidently framed with a view to the then uniform practice of the Irish courts; and in this view there appears to be no contradiction or difficulty in arriving at a conclusion as to their meaning, which we would understand to be this—the saving in the statutes of 11 Ann and 4 Geo. 1, being too general, the statute of 8 Geo. 1 was passed, which did not enact that they should be served—that being already the practice of the courts—but the unlimited saving in the previous acts being found inconvenient, the object was to provide a registry of the mortgagees of the lease, that they might be more readily discovered, and then, if served, they have but nine months to redeem; if they are not served, but are registered, their rights are to be as before—that is, with an unlimited saving. And if they had not registered under the fifth section, in that case they were to be treated as if served, and should redeem within nine months, or be barred of all right to the lease. For this reason, we think the conclusion arrived at by the majority of the Judges of the Court of Common Pleas was, in this particular

case, correct, the cases of registered mortgagees and their assigns, being especially excepted from what we conceive the general rule was, and should be, and whose rights were their first submitted to the opinion of a court of law.

We admit the force of the argument *ab inconvenienti* advanced by the advocates of the practice of the Court of Queen's Bench, that it is a hardship upon landlords that their rights may be defeated at the trial by a legal estate created by the tenant—perhaps with that very object—and of which the landlord could have had no means of discovery. This would but postpone his rights—on the other hand, substantial interests, and rights may not be postponed merely, but wholly defeated, if the party having the right happen not to have notice of the ejectment proceedings till the six months for redemption have expired. This may be said to be improbable, but it is not impossible; and if so, the mere postponement of rights is preferable to their destruction. Besides, the former evil might be easily remedied, by requiring such a registry of the assignments of interests under leases, as is required of mortgages by the 8 Geo. 1, and, if not registered, that they should be incapable of being set up at the trial in opposition to the landlord's rights.

We publish elsewhere the general orders prepared by the Chancellor and Master of the Rolls, under the Act to facilitate the sale of Incumbered Estates in Ireland.

Taken in conjunction with the act itself, they present to the owner of an incumbered property greater facilities—having regard both to rapidity and cheapness—than any one accustomed to the slowness of Chancery proceedings could reasonably have anticipated. There are many points left untouched; and some of the orders will, so far as incumbrancers are concerned, probably render many costs untaxable, as between party and party, which yet must be incurred; and the effect will be from this and other causes, that this act will rarely, if ever, be resorted to by incumbrancers.

People in this world are very selfish, and dislike trouble—except they are paid for it—and the orders require so much inquiry beforehand, so much pains-taking accuracy, so much risk as to costs, that few creditors will choose a new course of proceeding, without any profit to themselves, for the philanthropic motive of saving expense to the estate to be sold. Under the bill system—and the privilege of filing them still exists—they had only to take care of themselves, and leave the other creditors to do likewise; under the new, they have not only to state their own case correctly, but that of every other purchaser on the estate, and to swear that there is not "any person having any estate or interest in the lands or lease mentioned in the petition, or any incumbrance or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the petition." The petitioner is to do this without being allowed the expense of searches preparatory to filing the petition. The Master, for

the purposes of title, may, after an order on the petition has been made, direct them, but the petitioner is in the awkward position of being obliged, without the means of knowledge, to make a perfect case by his petition, at the risk of having it dismissed with costs.

Again, when there is any question of fact to be elicited, or point of law to be raised, the machinery of the act gives no apt form of pleading. Nor does it offer temptation to those who require haste to begin and leisure to conduct the suit when the defendants are brought before the court.

Now, a bill may be filed in a day, without oath, or without the consent of any individual except the plaintiff, and, as the suit progresses, may be amended as occasion may require. We do not say that this system is better than the one proposed, but it is less troublesome and more independent for the incumbrancer, and therefore more likely to be adopted by him. We are disposed to think that the act, for some time at least—and never, except in simple cases, such as those which are now called friendly suits—will be little used by incumbrancers.

Court Papers.

Chancery.

GENERAL ORDERS.

AN ACT TO FACILITATE THE SALE OF INCUMBERED ESTATES IN IRELAND.

Dated the 13th day of January, 1849.

The Right Honorable Maziere Brady, Lord High Chancellor of Ireland, by and with the advice and assistance of the Right Honorable Thomas Berry Cusack Smith, Master of the Rolls, doth hereby in pursuance of an act of parliament, entitled "An Act to facilitate the Sale of Incumbered Estates in Ireland," and in pursuance of all other powers in him vested, order and direct in manner following—

1. Every petition to be presented under the said act for the confirming and carrying into effect any contract for sale or for the sale of any land or lease, shall be verified by the affidavit of the petitioner or petitioners, or by that of some other person or persons, stating special reasons why the affidavit of the petitioner or petitioners, cannot be obtained in support of said petition.

2. That the deponent or deponents in every such affidavit shall depose to the truth of the several matters stated in the petition; and in addition thereto shall state that there is not to his, her, or their knowledge or belief any person having any estate or interest in the lands or lease, mentioned in the said petition, or any incumbrance or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the petition.

3. That the fees to be paid upon proceedings under the said act, and all costs to be allowed thereon, shall be the same as may be now lawfully received by or allowed to the officers and solicitors of the Court on similar proceedings in any cause or matter pending in the Court; and all rules and orders of the Court for the taxation of costs shall apply to the fees and costs of such proceedings.

4. That the masters in ordinary of the Court, and the registrars, shall cause to be duly and regularly entered in proper books, to be kept in their respective offices, accord-

ing to forms to be submitted to and approved of by the Lord Chancellor, the several particulars required to be stated in the return directed by the said act to be laid before parliament, so far as the documents and proceedings in their said respective offices will enable them so to do; and all such entries shall be made weekly at the least, so as to show at the end of each week the total amounts and quantities to that time of the several matters required to be set forth in such return.

5. Every petition shall contain an undertaking by the petitioner to submit to such order as the court may think proper to make, in the event of its appearing, on any enquiry to be directed under the petition, that such petitioner was not a person authorized by the statute to present such petition.

6. That the petition by the owner of land, under the second section of the said act, or by the owner of a lease, under the fourth section of the said act, who shall have contracted, subject to the approbation of the court, for the sale thereof, shall be entitled, and shall contain the statements as herein-after set forth, with such variations as the nature and circumstances of each case may require.

In the matter of the Act to
facilitate the Sale of Incum-
bered Estates in Ireland.
Ex-parte
[State the Name of the
Petitioner.]

TO THE RIGHT HON.
THE LORD CHAN-
CELLOR.

The humble Petition of

The petition shall state—

1st.—The date of the contract for the sale of the lands or lease, the parties thereto, and a concise abstract of the contents thereof.

2ndly.—In case the petition is by the owner of a lease under the fourth section of the act, the petition shall state the date of and the parties to the lease, and the short particulars thereof.

3rdly.—The petition shall state the estate or interest of the petitioner in the lands [or lease] so contracted to be sold, and the uses or limitations, and the trusts, if any, to which the said lands [or lease, as the case may be,] stand limited or settled; and shall also state the name of every person, who, to the knowledge or belief of the petitioner, has any estate or interest in the lands or lease in the said petition mentioned; and the dates of and parties to the several instruments referred to in the petition; and the party by whom the petition is prepared shall take special care that the abstract of the material parts of said instruments, stating the said uses or limitations, and trusts, shall be made with as much conciseness and brevity as is consistent with a clear statement of the same.

4thly.—In case the purchase money of the lands or lease contracted to be sold is less than the amount of the sum due on foot of the incumbrances and charges in the second schedule to the petition mentioned, the petition shall further state, the lands, if any, not contracted to be sold, which are subject to or affected by such incumbrances or charges and the estate or interest of the petitioner therein; and the name or names of the other owner or owners thereof, if any; and the gross rental thereof; and the several charges and incumbrances, if any, affecting said last-mentioned lands, and which shall not be specified in the second schedule to the said petition; and the net annual rental thereof.

5thly.—The petition shall further state, that in the first schedule thereunto annexed, is set forth a true and accurate rental of the lands [or leasehold interest] contracted or proposed to be sold; and such schedule shall be in the form herein-after set forth, and shall state the names of each sub-denomination, if any, the names of the tenants, the dates of and parties to the leases or other instruments under which the said tenants respectively hold, the tenures, the

number of acres held by each tenant, the annual rents, the gale days, and the arrear due by each tenant to the last gale day.

6thly.—The petition shall further state, that in the second schedule thereunto annexed, is set forth a true and correct list of all the incumbrances and other charges affecting the lands [or lease] contracted or proposed to be sold; and the names of the several persons entitled thereto, or interested therein; together with the sums due on each incumbrance or charge, distinguishing principal from interest; and such schedule shall be in the form herein-after set forth, and shall distinguish such incumbrances or other charges which affect a derivative estate or interest, or less than the whole estate or interest in the lands or lease contracted to be sold, from such incumbrances or charges as affect the whole estate or interest in the lands or lease contracted or proposed to be sold; and shall also distinguish those incumbrances or charges which affect all the lands from such as may affect only a portion thereof; and the petition shall state that there is not, to the knowledge or belief of the petitioner, any incumbrance or charge affecting said lands [or lease, as the case may be,] save the incumbrances and charges in the said schedule set forth.

7thly.—The petition shall state the crown rents or quit rents (if any) subject to which such lands [or lease, as the case may be,] shall be contracted or proposed to be sold.

8thly.—The petition shall further state, that no incumbrancer is in possession of any part of the lands, and that no receiver has been appointed over the said lands [or lease, as the case may be,] or any part thereof; or if any incumbrancer is in possession, or has obtained an order for a receiver, add—save and except the party named, and that the consent in writing to the petition has been obtained, signed by such incumbrancer—and the petition should set

forth the short particulars of the consent, and the date thereof.

9thly.—In case the lands are subject to any mortgage or mortgages, the petition shall state that they do not, nor do any of them contain any power of sale: or in case a power of sale is contained in any such mortgage, that the mortgagee has consented to the application; or if there has been a refusal or neglect to use diligence towards the exercise of such power of sale, the petition should state such refusal or neglect, as specified in the sixty-seventh section of the act.

10thly.—The petition shall further state, that no suit for foreclosure, redemption, or sale of the said lands [or lease, as the case may be,] or any part thereof, commenced before the first of July, 1848, is pending; or if any suit is pending, state the parties thereto, and when the bill was filed; and if such consent, as is stated in the sixty-seventh section of the act, has been obtained, state same.

11thly.—The prayer of the petition should be carefully framed in accordance with the tenth section of the act, according to the circumstances of the particular case; and it should further pray, that the contract for the sale should be carried into effect, in case the petitioner has previously to the petition entered into a contract in pursuance of the act, or if not, it should pray for a sale of the lands or lease, as the case may be, under the provisions of the act; and the petitioner should also pray for general relief.

The form of the petition, where the petitioner has not previously contracted for the sale of the land or lease, shall be the same, (omitting the statements numbered 1 and 4,) with such variations only as may be necessary in consequence of no previous contract having been entered into.

FIRST SCHEDULE TO THE PETITION.

Containing Rental of the Lands of _____ in the County of _____ (contracted to be Sold)—or where the Owner has not contracted previous to the Petition (which the Petitioner applies to the Court for the Sale of,) under the Provisions of the Act.

Sub-demonstration, if any.	Tenants' Names.	Date of and Parties to the Leases, or other Instruments, if any, under which the Tenants respectively hold.	Tenure.	No. of Acres.	Annual Rent.	Gale Days.	The Arrear due by each Tenant to the last Gale Day.	Observations.

If any part of the Lands is in the actual possession or occupation of the Petitioner, state the number of Acres of which the Petitioner is so in the possession or occupation.

SECOND SCHEDULE TO WHICH THE FOREGOING PETITION REFERS.

Containing a List of all the Incumbrances and Charges affecting the Lands [or Leasehold Interest, as the case may be] contracted to be Sold; or [sought to be Sold, under the Order of the Court, as the case may be.]

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.
Nature of Incumbrance; describing the particular nature of the same, according to the definition thereof in the First Section of the Act, i.e. whether it is a mortgage, or money secured by a Trust, or by Judgment, or by Decree, &c.	Charge, if any, not falling within the definition of an Incumbrance under the Act, e.g. a Jointure, or Rent Charge, or other Annual Charge not re-purchasable on payment of a gross sum of money.	Date and nature of the Instrument by which the Incumbrance or Charge was created, e.g. whether by Deed, Will, &c. and the date of the Judgment, Decree, Order, &c.	Parties to the said Instrument, Judgment, Decree, &c.	Parties in whom Incumbrance or charge now vested.	Whether the Incumbrance, Judgment, Decree, &c. affect the whole or a part, and if so, what part of the Lands contracted to be Sold, or sought to be Sold, under the Court.	Whether the Incumbrance, Judgment, Decree, &c. affect the whole Estate and interest in the Lands [or Leasehold Interest] contracted or sought to be sold under the order of the Court, or only a derivative Estate or interest, or less than the whole Estate or interest in said Lands [or Leasehold interest], and if so, the nature and extent of such particular or derivative Estate or interest.	Principal sum due on Incumbrances falling under first column.	Interest due on Incumbrances falling under the first column, stating the rate of interest payable on each respectively, and the day up to which the interest in each case is calculated.	Arrear, if any, due on the Charges specified in the second column and up to what day such Arrear in each case is calculated.

That the petition by the first incumbrancer on any land or lease, under the second or fourth sections of the said act, shall be entitled and contain the statements as herein-after set forth, with such variations as the nature and circumstances of each case may require.

In the Matter of the Act to facilitate the Sale of Incumbered Estates in Ireland,
Ex-parte
[State the name of the Petitioner.]

TO THE RIGHT HON.
THE LORD CHANCELLOR.

The humble Petition of

The petition shall state—

1st.—The incumbrance vested in the petitioner, and how created, and if same was created by an instrument in writing, the date of and parties thereto; and the petition shall further state the material parts of such instrument, and no other parts thereof; such statement to be made, and the instrument abstracted, with as much conciseness and brevity as is consistent with clearness. If the incumbrance be a judgment, decree, or order of the Court, the petition shall state the date and parties thereto. If the petitioner was no party to such instrument, judgment, decree, or order, &c. the petition shall state concisely the instruments by which the right to such incumbrance is vested in the petitioner; the party preparing the petition taking special care that the title to the incumbrance shall be set forth in as concise a manner as is consistent with a clear deduction of such title. If the incumbrance is a judgment, and shall have been revived, the petition shall state the revival, and the parties to such judgment of revival.

2ndly.—If the petition is under the fourth section of the act, it shall state the date of, the parties to, and the short particulars of the lease sought by the petition to be sold under the order of the Court.

3rdly.—The petition shall state the uses or limitations, and the trusts, if any, to which the land or lease stands limited or settled, so far as the petitioner is acquainted with same, and in whom the estate or interest in the land or lease is vested; and the name of every person who, to the knowledge or belief of the petitioner, has any estate or interest in the lands or lease in the said petition mentioned; but the petitioner is not to be allowed any costs or expenses for searching the registry.

4thly.—The petition should further state, that in the schedule thereto annexed, the petitioner has set forth, to the best of his knowledge and belief, a true and correct list of all the incumbrances and other charges affecting the lands [or lease, as the case may be,] proposed to be sold; and the names of the several persons entitled thereto, or interested therein; together with the sums due on each incumbrance or charge; and such schedule shall be in the form of the second schedule annexed to the petition by the owner of land; and which form the said incumbrancer shall fill up to the best of his knowledge and belief; and the petition shall state that there is not, to the knowledge or belief of the petitioner, any incumbrance or charge affecting said lands [or lease, as the case may be,] save the incumbrances and charges in the said schedule set forth. The petitioner, however is not to be allowed any costs for searches. This and the preceding provision, however, as to costs, are not to apply to any searches which may be directed by the master to whom the petition may be referred.

5thly.—The petition shall state the crown rents and quit rents, if any, subject to which such land [or lease, as the case may be,] shall be sought to be sold.

The petition shall further state the matters to be stated, eighthly, ninthly, and tenthly, in the petition, by the owner of land; and the prayer shall be framed under the tenth section of the act, according to the circumstances of the case; and the petition shall further pray, that the lands [or lease, as the case may be,] may be sold under the provisions of the act; and general relief.

A petition by an incumbrancer under the second or fourth sections of the act, [not being the first incumbrancer,] and being in possession of the title deeds and writings relating to the land [or lease, as the case may be,] shall be similar to a petition by a first incumbrancer, stating, in a schedule to his petition, a list of the deeds and writings in his possession.

7. That every petition as aforesaid shall be headed as follows, according to the circumstances of each case:—

1st. Petition by the owner of land who has contracted for the sale thereof, under the second section of the act; or 2ndly, petition by the owner of land, under the second section of the act, who has not contracted for the sale thereof; or 3rdly, petition by the first incumbrancer on land, under the second section of the act, for the sale thereof; or 4thly,

petition by an incumbrancer on land, under the second section of the act, having possession of the title deeds and writings relating thereto, for the sale of such land; or 5thly, petition by the owner of a lease who has contracted for the sale thereof, under the fourth section of the act; or 6thly, petition by the owner of a lease, under the fourth section of the act, who has not contracted for the sale thereof; or 7thly, petition by the first incumbrancer on a lease, under the fourth section of the act, for the sale thereof; or 8thly, petition by an incumbrancer on a lease, under the fourth section of the act, having possession of the title deeds and writings relating thereto, for the sale of such lease.

8. It is further ordered, [in order to diminish the costs and expenses of proceedings in the master's office,] that where a petition shall be presented by the owner of land or of a lease, under the second or fourth sections of the said act, [whether the said owner shall or shall not have previously contracted for the sale thereof,] and where an order of reference shall be made upon said petition, referring it to the master [amongst other things] to take an account of the incumbrances and charges affecting the said land or lease, that the master shall, without any charge or discharge being filed, report the several sums stated to be due for principal and interest in the second schedule to the said petition; and also the arrear (if any) stated to be due upon the charges therein also mentioned, to the several parties respectively in whom the said incumbrances and charges shall be stated to be vested, together with any additional interest or arrear which may accrue before the signing of the report, unless so far as any error shall be established in said schedule, under the circumstances herein-after stated that is to say—

1st.—Any person in whom it is stated by said schedule that an incumbrance or charge is vested, shall be at liberty to file a charge for the purpose of correcting any error in said schedule, either in respect of the amount of principal or interest stated to be due on such incumbrance, or in respect of the arrear stated to be due on foot of such charge; or in case the said incumbrance or charge is not vested absolutely in the person stated in such schedule, or if any other person or persons is or are entitled to any estate, share, or interest therein, or if the said schedule shall be in any other material particular inaccurate in relation to said incumbrance or charge, a charge may be filed to correct such error; and if it shall appear to the master that it was necessary and proper to file such charge for the purpose of correcting an error in said schedule, he shall in his report correct such error accordingly, and shall be at liberty to allow a sum not exceeding five pounds to the said person for the costs of filing such charge; but if the said schedule was correct, and the charge unnecessarily filed, such person on whose behalf such charge shall be filed, shall pay to the petitioner such sum for costs, not exceeding five pounds, as the master shall direct; which sum shall be deducted from his demand, or paid to the petitioner as the master shall direct. provided always, that in case the said charge shall be contested, the master shall be at liberty to allow such additional sum beyond five pounds, in the cases aforesaid, as he may deem reasonable.

2nd. Any person in whom it is stated by the said schedule that an incumbrance or charge is vested, or any person whose name, or whose charge or incumbrance is not stated in such schedule, who shall file a charge on foot of any incumbrance or charge, save in the case hereinafter-mentioned, provided such charge so filed shall be allowed by the master; and any other person having any estate or interest in such land or lease, with the permission of the master, shall be at liberty [in case such person disputes the right of any party whose name is specified in the schedule, or the sum stated to be due to such party] to file in the master's office a traversing note, to the effect herein-after stated—and thereupon a copy of such traversing note shall be served by the party who shall have filed same upon the party in whom it is stated in such schedule that the said incumbrance or charge is vested; and in case the party upon whom such traversing note shall be served, shall not, within one month after such service, or such further time as the master shall allow, file a charge on foot of his said claim, the master

shall disallow same, and shall allow such sum for costs, not exceeding five pounds, to the person filing such traversing note, as the said master shall think fit, such sum so allowed for costs to be added to his demand; and if the person served with such traversing note shall file a charge on foot of his claim, the party filing such traversing note (but no other person without the leave of the master) shall be at liberty to file a discharge thereto; and such proceedings shall or may be taken on foot of such charge and discharge, as are in such cases usual and if the charge so filed shall be disallowed by the master, the person filing such charge shall be liable to pay to the person by whom the said traversing note shall have been filed, his costs, properly and necessarily incurred in disputing such claim; which costs the taxing master shall tax and certify without any order of the court, upon a certificate signed by the master of the disallowance of such charge; and if the master shall allow the charge so filed, the person by whom such traversing note shall have been filed shall pay to the person whose charge shall be so allowed his costs, properly and necessarily incurred in establishing such claim; and which costs the taxing master shall tax and certify without any order of the court, upon a certificate signed by the master of the allowance of such charge: provided, always, that the master shall be at liberty to name any sum to be paid by either of the said parties ad and for the costs without taxation: and it is further ordered that if any party filing a charge under the said order of reference, shall claim any incumbrance or charge specified in said schedule, or any right, share, or interest therein, and shall dispute the right of the person in whom it is stated in said schedule that the said incumbrance or charge is vested, either in the whole or in part, it shall not be necessary in such case to file any traversing note—but the person in whom it is stated by the schedule that such incumbrance or charge is vested, shall receive notice of such charge, and he shall thereupon be at liberty to file a discharge to such charge—and the master shall decide the rights of the said claimants, and make up his report thereon accordingly, and shall make such order as to the payment of costs by the one claimant to the other as he shall think fit; and the taxing master shall tax said costs without any order of the court for that purpose, upon the certificate of the said master: provided always, that it shall and may be lawful for the master to name any sum to be paid by either of said parties as and for the costs without taxation—provided also, that it shall be lawful for the said master, if he shall so think fit, and if it shall appear that the schedule to the petition was erroneous in stating the name of the person in whom the incumbrance or charge was vested, to direct that a sum not exceeding five pounds shall be paid by the owner of the land or lease to whichever of the said claimants the master shall direct; such costs to be added to the demand against the said owner, or otherwise paid as the master shall direct—and credit shall be given for such sum out of costs awarded as between the claimants, if the master shall so direct: and it is further ordered, that the said traversing note shall be to the following effect, having regard to the circumstances of each case, that is to say—

In the matter of the act to facilitate the sale of incumbered estates in *Ireland*,
Ex-parte
[Name the petitioner in matter.]

A B. a person whose name is included as an incumbrancer [or having a charge] on the land [or lease] in the schedule to the petition mentioned; or A. B. a person who has filed a charge under the order of

reference in this matter, and whose charge has been allowed; or A. B. a person having an interest in said land [or lease,] with the permission of the master, [as the case may be,] disputes the claim of C. D. in the second schedule to the petition mentioned, either wholly or in part, [as the case may be,] and requires the said C. D. to file a charge and establish same.

9. It is further ordered, that if any person who shall be entitled to any charge, not being an incumbrancer, within the meaning of the said act, [including any such apportioned charge as in said act mentioned,] shall be willing under the provisions of the twenty-second section of the said act, to accept a gross sum in satisfaction of such charge, and shall

file a charge under said order of reference for such purpose, and if the master shall include in his report such charge as an incumbrance under the provisions in such section, it shall be lawful for the master to allow such sum, not exceeding five pounds, for the costs of such charge, as the master shall think fit; provided, always, that in case said charge shall be contested, the master shall be at liberty to allow such additional sum beyond five pounds, as he may deem reasonable.

10. And it is further ordered, that if any incumbrancer, or person having a charge to whom an arrear on foot of such charge is due, shall claim priority over any other charge or incumbrance, prior in point of date, under the provisions of the act for the registry of deeds, or the act for the registration of judgments, or upon any other ground, such person shall be at liberty to file a charge for the purpose of claiming such priority, if such priority shall not appear in the second schedule to such petition; and shall in such case be entitled to such costs of proving such claim, not exceeding five pounds as the master shall direct: provided, always, that in case said charge shall be contested, the master shall be at liberty to allow such additional sum beyond the five pounds as he may deem reasonable; and provided also, that the costs of any discharge which may be filed to such charge by any other incumbrancer shall not be borne by the owner of the land or lease.

11. And it is further ordered, that where the owner of land, or of a lease shall present a petition under said act, and such owner shall be only tenant for life, or have some other limited interest therein, and where from the disability of the party entitled in remainder, or for any other cause, the master shall so think right, it shall be lawful for the master to direct a charge to be filed by any person, in whom it is stated by the second schedule to the petition, such charge or incumbrance is vested; and to require such proof as to the said incumbrance or charge as he may think right; and to allow such costs for such charge, and for proving same, as the master shall think reasonable, in case same shall be proved to his satisfaction.

12. And whereas, if the petition by the owner of land, or of a lease, under the second or fourth sections of the said act, be properly prepared, as herein-before directed, the expense of filing a charge thereunder, for the purpose of again stating the uses and limitations, or trusts, if any to which said land or lease is subject, or for the purpose of any of the other enquiries directed by the order of reference, will be unnecessary—it is further ordered, that no charge shall be filed for any such purposes, under said order of reference, unless the master shall otherwise direct; and if the master shall direct a charge to be filed, it shall be confined to such matters as the master shall direct;—and it is further ordered, that the master shall be at liberty, if he shall consider that the petition sufficiently sets forth and puts in issue the documents and other matters necessary to be proved under the order of reference, to proceed to make the enquiries directed by said order upon a summons, without any charge being filed; and if the master shall direct such charge to be filed, no costs thereof shall be allowed to the solicitor as against the petitioner, unless the master shall otherwise direct.

13. It is further ordered, that if proceedings shall be taken before the master upon such petition without a charge being filed; the petition shall be considered as a charge, for the purpose of entitling any person to file a discharge to such petition, who would have been entitled, according to the practice in the master's office, to file such discharge if a charge had been filed; and where said petition shall be proceeded on as a charge, all general orders of the Court shall be applicable to the proceedings on such petition as would be applicable to proceedings on a charge.

14. It is further ordered, that where a petition shall be presented by the owner of land, or of a lease, under the second or fourth sections of the said act, [whether the said owner shall or shall not have previously contracted for the sale thereof,] and an order of reference shall be made thereon, [the advertisement which the master shall cause to be published under the fourteenth section of the said act, in addition to the matters directed by the said section,]

shall, instead of requiring all persons having incumbrances to come in and prove their demands, require all incumbrancers and persons having charges to proceed in the manner directed by the eighth general order herein-before set forth; and in case the master shall cause any notice to be served, under the 16th section of the said act, upon any person in whom it shall be stated, in the second schedule to the said petition, that an incumbrance or charge is vested, such person shall not be entitled to any costs of appearing before the master in pursuance of such notice, other than such costs as are provided for by these general orders, unless the court shall otherwise direct.

15. It is further ordered, that in every report to be made by the master under any order of reference under the said act, the master shall state, in a schedule to his said report, the number of meetings which have taken place under the said order of reference, and the dates of such meetings.

MAZIERE BRADY, C.
T. B. C. SMITH, M.R.

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1843.

A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING NEXT, the 2d February. Chair to be taken at Eight o'Clock precisely.

SUBJECT FOR DEBATE.

"Will an action of Covenant lie against the heir at law, and devisee of the Covenantor for breaches occurring subsequently to his death? 1 W. 4, c. 47; 3 A. & E. 839."

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have failed to propose, are requested to communicate with the Secretary.

JOHN NORWOOD, Esq. 11, Nelson Street.

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EDWARD J. MILLIKEN, 15, COLLEGE GREEN.

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"THOMAS ANTISELL,
Lecturer on Chemistry."

"Mr. Kelly, College-green."

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 44, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, January 27, 1849.

THE Irish Jurist

No. 14.—VOL. I.

FEBRUARY 3, 1849.

PRICE { Per Annum, £1 10s
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARE HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.

Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Queen's Bench, including Civil Bill and Registry Appeals.....	{ FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.
Exchequer of Pleas, including Manor Court and Registry Appeals.....	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, FEBRUARY 3, 1849.

A considerable portion of the present article was prepared for last week's publication, but was obliged to be held over from want of space. It was our intention to have presented, in the same number, our view of the probable working of the Act for the Sale of Incumbered Estates, now that the General Orders have rendered it complete.

Believing that the professions would find those General Orders useful, we had directed them to be printed in *extenso*. Unfortunately, the compositor, after they had been corrected, when arranging the matter into pages, transposed some lines in page 93, which made the first two paragraphs of that page unintelligible, and, when discovered, there was no time to amend the mistake without delaying the publication of our last number, to the disappointment of our subscribers.

We regret that this error was committed, and, as the best *amende* in our power, will present them with a corrected copy, which shall be forwarded to each on Monday next.

We would ask them to remember, that at the outset of the career of every man, and every publication, there are difficulties to be overcome, and early struggles to be borne, and on this occasion to award to us a generous and kindly indulgence.

Some three months ago, we stated our opinion that very few sales would be made out of the Court of Chancery under the Incumbered Estates Act, and we still believe that opinion to have been correct. With reference to sales by order of the court, the act presents two very different aspects; when viewed with respect to incumbrancers, its operation is limited precisely to that class least likely to resort to it; and we adhere to our opinion, that so long as they have the power of selecting their equitable remedies, they will prefer the beaten track of filing bills, *via trita, via tuta*. We have

already pointed out some of our reasons for arriving at this conclusion.

We understand the first five of the General Orders to apply to every petitioner, whether he be incumbrancer or owner. No. 1 directs every petition to be verified by affidavit. Now, a plaintiff in an Equity suit is not required to do this on filing his bill. Whether it would be a better principle that he should be obliged to make such an affidavit, is not the present question; but the *non-necessity* for doing so is certainly a privilege, and in favour of a plaintiff. He is allowed to ransack and lay naked the heart of the defendant—to file fishing bills—to put his case in every imaginable form of language that the ingenuity of his counsel may devise—to make positive assertions for the purpose of discovery, and even, if maliciously inclined, literally to torture his opponent by searching interrogatories, whilst he himself has the privilege of being a non-juror. Wherever, then, there is a question to be litigated, or likely to be in any way disputed, or in which the rights of an incumbrancer can be facilitated by the answer of a defendant, the incumbrancer will still adhere to the old practice.

General Order No. 2 requires that the deponent shall depose not only to the truth of the several matters in the petition, but to the absence of their being any person having any estate or interest, or any incumbrance or charge on the land or lease, other than the persons named in the petition; and in the third order, which applies solely to incumbrancers, the petitioner is directed to state the uses or limitations, and the trusts to which the land stands limited (in fact, the order must have directed this, the act having previously done so), and the name of any person who, to the knowledge or belief of the petitioner, has any estate or interest in the lands or lease in the petition mentioned, but the petitioner is not to be allowed any costs or expenses for searching the registry.

The fourth order applicable to incumbrancers,

directs a statement that the schedule to the petition annexed contains a true and correct list of all incumbrances and charges, and the names of the several persons entitled thereto, and the sums due thereon, and that there is not, to the knowledge or belief of the petitioner, any incumbrance or charge, save those set forth in the schedule. The petitioner is, however, not to be allowed any costs for searches. This and the preceding provision, as to costs, are not to apply to any searches which may be directed by the Master to whom the petition may be referred. Now, an immensity of trouble is thus thrown on the petitioner, which he is not obliged to take if he file his bill. It is sufficient for him to state A. B. C. D. respectively claim some interest in the lands, but what that interest may be, is immaterial to him, provided they are puisne to his claim; it is enough to bring them before the court, and then they may guard their own rights. An incumbrancer will not take trouble without a corresponding benefit. Neither can we see the precise object of requiring the petitioner to make such statements and affidavit. If he does not make searches, the information he gives the court must necessarily be imperfect; if he does, he may not be allowed for them; and he is in this unfair dilemma, either to give the court no information, being in no position to give it—and in that case may have his petition dismissed—or if he give perfect information, to run the risk of paying the cost, of so doing. His petition, if we understand the scope of the orders, will not be adopted by the Master, as in the case of an owner, and therefore is just as useless, when an order of reference has been made on it, as a bill after a decree to account. All the accounts, all the real work, in fact, must be done in the Master's office. How can an incumbrancer be expected to state, not only each incumbrance, but the sum due upon it, with any approximation as to accuracy, or for any useful purpose?

Again, General Order No. 3 regulates that the fees and costs shall be the same as those allowed on similar proceedings in any cause or matter pending in the court. Now, we do not profess to know the practice of the taxation of costs, or the scale of fees, but we believe that no fee is, as a general rule, allowed for the preparation of a petition by counsel. If this be so, the proceeding under this act being by petition, no fee will be allowed on taxation. The petitioner must, therefore, either dispense with the assistance of counsel in the preparation of a petition infinitely more troublesome than the preparation of a bill, or pay the fee out of his own pocket, or trust to the Taxing Master's discretion for its allowance. The fees to solicitors are much less liberal on filing petitions than on filing bills. We believe that most suitors would desire and require the advice of counsel, and so would the solicitor, who would otherwise have much responsibility cast upon him.

General Order No. 5 requires that every petition shall contain an undertaking by the petitioner to submit to such order as the court may think proper to make, in the event of its appearing, on any inquiry to be directed under the petition, that

such petitioner was not a person authorized by the statute to present such petition.

We suspect few incumbrancers will like to give this undertaking, which implied, too, a doubt of the power of the court to make any order it thinks just. Suppose an incumbrancer, who believes himself the first, presents his petition, and suppose the owner of some charge, which has lain dormant so long as to have been believed extinct, suddenly to start from his fabled slumber into living existence, and be reported the first creditor; in such case would the petitioner be a person authorized to present his petition? Would he run the risk of having his undertaking put in force, when he runs no such risk by filing his bill.

We again suppose a case of disputed priority, and the petitioner to be postponed; in such case, would he not run a similar risk, and will he do so? Again, the hardy incumbrancers who venture on the untrodden ground have to remember that it has not yet been smoothed by judicial decision, and that the pioneers must clear the way at much trouble, cost, and expense, for their more fortunate successors.

In making these observations, we mean to find no fault with the Orders, we speak only of their effect. We believe them to have been prepared—an attentive perusal shews us that they have—with great care, but we think that they are obviously framed to facilitate owners rather than incumbrancers, and, considered with regard to the owner, we think both Act and Orders have conferred a most important boon on him; for the first time in the history of our jurisprudence there has been happily devised a judicial course of proceeding which will enable him, if honest, to sell his estate rapidly, cheaply, securely.

We have little doubt—exclusive of the expense of searches, which must vary according to the length and complication of the title—that an owner whose case is straightforwardly stated in his petition can free himself from incumbrances affecting his property by a sale of a portion of it at a very inconsiderable expense. The proceeding by him is as follows—his petition is to state concisely and clearly the nature of his title, and to have annexed in one schedule, the incumbrancers in their priority, and the sums due to each, and in the other a rental of the estate. This petition, carefully prepared, will carry the owner through the court. The Master is at liberty to adopt it, the creditor, if he sees his debt properly scheduled, cannot—except at the risk of paying his own costs—and indeed has no need to disturb or alter it. This was a very happy idea. The business in the Master's office is thus considerably reduced.

Where the owner is seized of an estate of inheritance in possession, the direction of a few advertisements, and the preparation of a report, the echo of the petition may comprise it all.

Where the owner petitioner is tenant for life, we do not observe any General Order regulating the practice as to remaindermen, minors, or persons under disability, and their rights become of extreme importance where the petition seeks to have a previous contract for sale carried into effect. And although in simple cases the adoption of the peti-

tion in the Master's office is an excellent innovation on the present practice; in more weighty ones, where priorities are disputed, the expense of taking out a voluminous document by each disputing creditor will be considerable. An extract from it would not, in many instances, be sufficient, or, at least, culling the precise points would require more time, perusal, and discretion, than a solicitor in extensive practice could afford unpaid to give.

The advantages to the owner are, however, great, the power of apportioning head rent, of having the land sold discharged of unredemable charges are in themselves very important benefits.

The act under our consideration affords abundant evidence of the difficulty of making the transfer of land easy, and, at the same time, of preserving future interests unimpaired. Real property cannot be made to pass from hand to hand like a bale of merchandize, and be also made the subject of family settlement. This act was compiled with great care. The bill was originally introduced into the House of Lords by the Lord Chancellor of England in the session of 1847, and again in that of 1848; the measure underwent considerable discussion in the House of Commons, and was subjected to extensive alteration, and little improvement. Its avowed object was to give "currency to land," to facilitate its transfer, and yet, though it does effect important changes in the law, and confer a boon on incumbered proprietors, its operation will be, as respects them, but partial, and, as respects incumbrancers, almost a dead letter. In seeking to effect the object of simplifying titles, and superseding the present practice of judicial sales, it should not be overlooked that litigation will not be thereby diminished, it will perhaps be increased in a duplicate ratio, first taking its turn at the land, and then at the purchase money.

We would deprecate the idea that we write from a spirit of hostility to the principle of the act, on the contrary we are friendly to it, and lament its necessarily restricted operation. In dealing with a complicated system like ours, with a due and tender regard to existing interests, the wisest and most experienced legislator will find no ordinary difficulties around and about his path, difficulties the largest experience cannot at once devise means to overcome; the end, however, though not yet reached, is attainable, and unquestionably, so far as owners are concerned, this act is a move onwards.

Hitherto the Court of Chancery has been justly feared by proprietors whose estates have been so unfortunate as to require its interference; always appearing there as defendants they have generally sought to baffle and protract the plaintiff, in the vain hope of extricating themselves before a sale. But there was "no luck in leisure," their object, furthered by the tediousness which has hitherto appeared inseparably identified with Chancery proceedings, was gained to their ruin, and the wasting away of their estates, deteriorated and disimproved by an absentee Chancery Receiver, and by the accumulation of costs. The sale came at length, and left them—if their longevity survived it—in their "old age naked to their enemies." Let us hope that a new era has arisen, and that what has

hitherto been an instrument of destruction to proprietors, may be converted into their effective and efficient ally.

THE practice of lodging money in court has been lately considerably modified both in the Courts of Queen's Bench and Exchequer. Formerly a defendant could at any period before trial, or without notice to the plaintiff, pay money into court, and the latter, on the very eve of trial, was often taken by surprise by the service of the rule. The payment was frequently made so late, that litigation was not checked, and the plaintiff had not the opportunity for reflection as to the withdrawal of his record. All his expenses had been incurred, and when he was so far committed—as occurred in the case of *Greene v. Coughlan*, where he only had notice on the very day of trial, at a country assize town—he would most likely proceed to the end. The Court of Queen's Bench, finding that the general rule of 1834 did not provide for such a case, last term made a rule that no order should be given for liberty to lodge money after plea, without the special order of the court, or a judge, upon application for that purpose. The motion must be on notice; at least the practice is so settled in the Court of Exchequer, who, on Thursday, refused an application for liberty to lodge money, where no notice had been served. The notice must also undertake to pay not only the costs of the action incurred at the time of the lodgment, but any further costs the Court may direct.

Whilst the Courts thus guard the plaintiff from being taken by surprise, they are equally stringent in depriving him of costs, if he persevere in his action after the lodgment, and be unsuccessful. In such case he will disentitle himself to the entire costs of the action, whether incurred previously to the payment of money into court, or afterwards.

This point was first decided in the Exchequer, and has been ruled in the same way in the Queen's Bench, in the case of *Kershaw v. Lindsay*, reported in a previous number, p. 31, the discussion of which occasioned the promulgation of the rule to which we have adverted.

The practice now stands on a very intelligible footing; the plaintiff is allowed full opportunity of considering whether he will proceed further, and if he does so advisedly, he must be prepared to lose the costs of the action, if he be unsuccessful, and to consider the cause of action on which the money has been paid, as if it had been struck out of the declaration altogether.

Hilary Term, 11th January, 1849.

At a council of the benchers of the honourable Society of King's Inns, this day holden at their Chamber, at the Four Courts, it was unanimously resolved—"That the call of Richard Dunn to the rank and degree of a barrister-at-law, in this society, be forthwith, and it is hereby vacated, and that he be, and he is hereby disbarred, and that his name be struck out of the books of this society."

Thursday last, Pierce Mahony, Esq., was sworn in Clerk of the Crown, in the room of Walter Bourne, Esq., deceased.

(Continued from p. 88.)

121. That notwithstanding anything herein contained, the Lord Chancellor may appoint any number of persons to act as official managers, and by any general order, or by any special order with reference to any particular company direct that the official managers of any company to be wound up under this act shall be chosen exclusively, or at the discretion of the master, from the list of persons to be so appointed as from a date to be fixed by any such order, and also to direct that such official managers shall be named or selected in rotation or otherwise, and also to determine whether any and what security shall be given by any official managers, and whether they shall exercise the authorities, giving to the official manager, and in all respects to fix and regulate the duties of the official managers; and in default of any such order, all the provisions in this act contained with reference to the official manager, duties, shall apply in all respects to any official manager to be appointed under this present clause.

122. That the Lord Chancellor of Great Britain, with the advice and consent of the Master of the Rolls and any one of the Vice Chancellors for the time being, or with the advice and consent of any two of the Vice Chancellors, may make and prescribe such rules and orders concerning the form and mode of proceeding to be had for settling and enforcing the contribution to be paid by any contributory of any company, and the practice to be observed by the court in or relating to such proceeding, and the form and mode of proceeding to be had and taken before the master, or by reference from the court, in any matter relating to contribution, as shall seem necessary for the advancement of justice, and for adjusting the rights of the parties concerned, and getting in the assets, and for ascertaining and discharging the liabilities of such company, and requiring the creditors to claim their debts, and finally winding-up the affairs thereof with as little delay, expense, and uncertainty as possible, and afterwards to vary, discharge, or alter such rules or orders, by any other rules or orders, although such rules and orders, may repeal or vary the provisions as to procedure contained in this act or may prescribe others in lieu of the same; provided that such rules and orders shall be laid before both houses of parliament within one month from the making, if parliament be then sitting, or, if parliament be not then sitting, within one month from the commencement of the then next session of parliament.

123. That the district commissioners of the court of bankruptcy and the judges of the county courts shall be and they are hereby appointed to be masters extraordinary of the Court of Chancery for the purposes of this act; and the said Lord Chancellor or the Master of the Rolls, on petition to be presented to him in any matter depending under this act, may direct the master to refer all of the said matter to any such district commissioners of the court of bankruptcy or judges of the county court, and by any order direct that such district commissioners or judges shall exercise in the matters referred to him all authorities by this act given to the master; and that the provisions in this act for the making and laying before parliament general rules and orders, shall in all respects apply to any rules or orders to be made for the regulating the authorities to be exercised by any such district commissioners and judges in any proceedings under this act.

124. That the provisions in this act contained for the making and laying before parliament general orders and rules for the purposes of this act by the Lord Chancellor of Great Britain, shall in all respects apply to any rules and orders to be made by the Lord Chancellor of Ireland, with the advice and assistance of the Master of the Rolls in Ireland, for the purposes of this act in Ireland, such rules and orders to be laid before parliament in like manner as any rules and orders by the Lord Chancellor of Great Britain.

125. That any petition for winding-up under this act shall constitute a *lis pendens* within the terms of 2 & 3 Vict. c. 11, provided the same be registered in manner required by such act.

126. That the forms contained in the schedule to this act, with such variations therein as may be expedient in any particular case, may be used in any proceedings under this

act, to which the same shall respectively be applicable, in whole or in part.

127. That this act shall not apply to Scotland, except so far as is by this act provided.

128. That this act may be amended or repealed by any act to be passed in this session of parliament.

Schedule to which the foregoing act refers.

1. *Advertisement of petition for dissolution, or dissolution and winding-up.*

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

A petition for the dissolution and winding-up [or for the winding-up, as the case may be,] of the above-named company was presented to [the Lord Chancellor, Master of the Rolls, &c. as the case may be, specifying whether in England or Ireland,] by [names of the petitioner or petitioners] the day of 18 .

2 *Mandatory part of order absolute.*

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

His lordship [or his honour] doth order, that the company be absolutely dissolved as from this day [or from the day of] and wound up [or be absolutely wound up] under the provisions of the Joint Stock Companies Winding-up Act, 1848, [here insert special directions, if any.] And it is ordered, that it be referred to the master of this court in rotation [or to such master as may be named in the order] to wind up the affairs of the said company under the provisions of the said act.

3. *Advertisement of intention to appoint official manager.*

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

I X. Y., the Master of the High Court of Chancery charged with the winding-up of this company, hereby give notice, that I shall, at my chambers in Southampton Buildings, Chancery Lane, London, on the day of at o'clock in the forenoon, or at such other adjourned time or place as I may then or afterwards fix, appoint an official manager [or official managers] of this company; and I give notice that all parties interested are entitled to attend at such time and place, and to offer proposals or objections as to any such appointment.

4. *Proposal of official manager [and sureties.]*

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

We hereby propose A.B. to be official manager of this company [and C.D., E.F., &c. to be his sureties.]

A.B.

W., Solicitor for C.D.

5. *Order appointing official manager and sureties, and advertisement.*

Wednesday the day of In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

I do order and appoint M.N. of to be official manager of this company, and I direct that within days from the date hereof he do enter into his own recognizance to the amount of nine thousand pounds [or such amount as the master shall fix.] And I do approve of the undermentioned persons to be sureties of the said M.N. for the respective amounts set opposite their respective names in the schedule hereto:—

SCHEDULE.			
Sir O.P. of &c., Bart.	.	.	£5,000
Q.R. of &c.	.	.	2,000
S.T. of &c.	.	.	1,000
V.W. of &c.	.	.	750
X.Z. of &c.	.	.	250

Advertisement.

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

X. Y., the Master of the High Court of Chancery charged

with the winding-up of this company, has this day appointed
M.N. of official manager of this company.
 Dated 184 *X.Y.*, Master.

6. Recognizance of official manager and sureties.

[*M N*] of in the county of [Gentleman,] [Sir
O.P.] of [Baronet,] [Q.R.] of in the said
 county , [S.T.] of [&c.,] *V.W.* of &c.,] and [*X.Z.*]
 of [&c.,] before our Sovereign Lady the Queen appearing,
 have acknowledged themselves, and every of them hath ac-
 knowledged himself, to owe to [*X.Y.*] [the master charged
 with the winding-up,] Master of the High Court of Chan-
 cery, the respective sums of sterling money of the united
 kingdom of Great Britain and Ireland set opposite to their
 respective names in the schedule hereto, to be paid to the
 said [*X.Y.*] his executors and administrators, and in default
 of payment of the said sums the said [*M.N.*, *O.P.*, *Q.R.*,
S.T., *V.W.*, and *X.Z.*] are willing and do agree, and every
 of them is willing and doth agree, for himself, his heirs,
 executors, and administrators, by these presents, that the
 said sums shall be levied, recovered, and received of them
 and every of them, and of and from all and singular the
 manors, messuages, lands, tenements, hereditaments, goods,
 and chattels of them and every of them, wheresoever the
 same shall be found. Witness our Sovereign [Lady Victo-
 ria,] by the Grace of God of the united kingdom of Great
 Britain and Ireland [Queen,] defender of the faith, at West-
 minster, the day of in the year of [her]
 reign, and Anno Domini 18 .

Whereas in the matter of the Joint Stock Companies
 Winding-up Act, 1848, and of the company, [*X.Y.*]
 one of the Masters of the High Court of Chancery charged
 with the winding-up of the said company, has by order
 dated appointed the said [*M.N.*] official manager of
 the said company, and has approved of the said [Sir *O.P.*,
 Baronet, *Q.R.*, *S.T.*, *V.W.*, and *X.Z.*] to be his sureties
 in the amounts set opposite to their respective names in the
 schedule hereto: now the condition of the above-written
 recognizance is such, that if the said [*M.N.*] his executors
 or administrators, or any of them, do and shall account for
 what he shall receive as official manager of the said com-
 pany, at such periods and in such manner as the said mas-
 ter shall appoint, and pay the same as the said master hath
 already directed or shall hereafter direct, then the said rec-
 ognizance to be void, otherwise to remain in full force and
 virtue.

SCHEDULE.

Same as that to order appointing manager and sureties, with
 the addition of the name of the official manager, and of
 the amount of his recognizance.

7. Summons for party or witness to attend before Master.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

These are to will and require you and every of you to
 whom this summons is directed personally to be and appear
 before me [*X.Y.*] the Master of the High Court of Chan-
 cery charged with the winding-up of the said company, on
 the day of next, at o'clock in the
 forenoon, at my chambers in Southampton Buildings, Chan-
 cery Lane, London, then and there to be examined before
 me, pursuant to the statute in that case made and provided:
 and also that you bring with you, and produce at the time
 and place aforesaid, a certain indenture [describe docu-
 ments,] and all other books, papers, deeds, and writings,
 and other documents, in your custody, possession, or power,
 in anywise relating to or other the affairs of the said com-
 pany: and hereof fail not at your peril. Given under my
 hand this day of 18 .

To [X.Y.]

8. Master's warrant.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

I appoint next, at o'clock in the noon,
 at my chambers in Southampton Buildings, Chancery Lane,
 London, to consider [the under-mentioned application,] at

which time and place all parties concerned are to attend
 [and notice hereof is to be given to [*A.B.*] &c.]

Dated the day of 184 .

9. Order for production and deposit of books, &c.

[Monday] the day of 18 .
 In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

I [*X.Y.*] the Master of the High Court of Chancery
 charged with the winding-up of this company, do order, that
 [*A.B.*] do, on or before the day of next, or
 within days after service hereof, produce and leave
 with me [or with the official manager of this estate,] at [my
 chambers in Southampton Buildings, Chancery Lane,] a
 certain indenture [describe it,] and also all deeds, books,
 papers, and writings in his custody, possession, or power in
 anywise relating to the affairs or estate of the said com-
 pany.

10. Master's direction to official manager to bring action against different debtors to company.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

I [*X.Y.*] the Master, &c., on application this day
 made to me by [*A.B.*] the official manager, do hereby au-
 thorize and direct the said [*A.B.*] to proceed by action at
 law against the under-mentioned parties for the sums set
 opposite to their respective names:

<i>G.</i>	.	.	.	.	£
<i>H.</i>	.	.	.	.	.
<i>I.</i>	.	.	.	.	.

11. Order for payment of balance by contributories.

[Tuesday] the day of 18 .
 In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

I [*X.Y.*] the Master, &c., do order, that the several
 parties named in the schedule hereto do forthwith [or
 within days after notice hereof,] at pay to the
 official trustee of this company the several sums of money
 set opposite their respective names in the said schedule, such
 several sums being the balance respectively now appearing
 due from the said several parties on their respective accounts
 with the said company.

12. Advertisement for creditors.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

Notice is hereby given, that all parties claiming to be cre-
 ditors of this company are to come in and prove their debts
 before [*X.Y.*] the Master of the High Court of Chancery
 charged with the winding-up of the said company, at his
 chambers in Southampton Buildings, Chancery Lane; and
 until they shall so come in they will be precluded from com-
 mencing or prosecuting any proceeding for recovery of their
 debts.

13. Advertisement that the master is settling list of contri- butories.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

By direction of [*X.Y.*] the Master of the High Court of
 Chancery charged with the winding-up of this company, no-
 tice is hereby given, that the said master will proceed on
 next, at o'clock in the forenoon, at his cham-
 bers in Southampton Buildings, Chancery Lane, London,
 to settle the list of contributories of this company; and that
 after such list shall have been settled no party affected
 thereby will be allowed to dispute the same without leave
 of the High Court of Chancery first obtained.

14. Advertisement of intended call.

In the matter of the Joint Stock Companies Winding-up Act,
 1848, and of the company.

By direction of [*X.Y.*] the Master of the High Court of

Chancery charged with the winding up of this company, notice is hereby given, that the said master purposes on next, at o'clock in the forenoon, at his chambers in Southampton Buildings, Chancery Lane, London, to proceed to make a call on all the contributories of the said company [or on some special or particular class of them, *as the case may be*, e. g. "on all those contributories of the said company who, having once been shareholders, had sold or transferred their shares within three years previous to the day of 18,"] and that the master purposes that such call shall be for £ per share.

All persons interested are entitled to attend at such day, hour, and place, to offer objections to such call.

15. General order in making call.

[Tuesday] the day of

In the matter of the Joint Stock Companies Winding-up Act, 1848, and of the company.

I [X.Y.,] the Master of the High Court of Chancery charged with the winding-up of this company, do peremptorily order, that a call of [one pound] per share be made on all the contributories of this company [or *as the case may be* :] and I do peremptorily order each contributory, on the day of at o'clock in the forenoon, at [my chambers in Southampton Buildings, Chancery Lane, London,] to pay to the official manager of this company the balance, if any, which will be due from him, after debiting his account in the company's books with such call.

16. Order for issues.

[Wednesday] the day of 18 .

In the matter of [g.c. *as before*.]

I [X.Y.,] the Master of the High Court of Chancery charged with the winding up of this company, being desirous of having the following questions of fact decided by a jury; namely, first, whether, &c. second, whether, &c.

do order as follows; (that is to say,) I order that a writ of summons be issued out of Her Majesty's court of at Westminster by [A.B.] against [C.D.,] pursuant to the provisions of the statute in that case made and provided; and I do order that the parties proceed to a trial under the said writ of summons at the next assizes for and I do order that [A.B.] be the affirmant in the first of the said issues, and that [C.D.] be the affirmant in the second of the said issues; and I do order that the said issues be tried at the next assizes at and that [A.B.] be at liberty, if he shall think fit to examine [E.F.,] one of the contributories of the said company, as a witness upon the trial of the said issues; and I do order that [E.F.] do attend and be examined accordingly, upon receiving notice that [A.B.] intends to avail himself of the liberty hereby given; and I do order that [A.B.] and [C.D.,] and the official manager of the company, produce at the trial of the said issues, for all necessary purposes, as [A.B.] or [C.D.] shall respectively require, all the documents relating to [the affairs of the said company] in their respective possession or power; and both parties are to admit upon the trial of such issues that such documents as shall be produced by the said official manager are the documents of the said company.

CAP. XLVI.

An Act for the removal of defects in the administration of criminal Justice. [14th August, 1848.]

Sec. 1. *Accessories before the fact to any Felony may be punished in the same degree as the Principal.*

2. *Trial and conviction of Accessories after the fact.*

3. *As to additions of counts in Indictments for stealing and receiving stolen property.*

4. *Courts of Oyer and Terminer may cause Indictments to be amended.*

5. *Not to extend to Scotland.*

6. *Act may be amended, &c.*

'Whereas the technical strictness of criminal proceedings might be further relaxed, without depriving the accused of any just means of defence: and whereas, it is expedient to make further provision for the more effectual prosecution of accessories before and after the fact to felony: and

'it is also expedient that any accessory before the fact to felony should be liable to be indicted, tried, convicted, and punished in all respects like the principal, as is now the case in treason, and in all misdemeanours: be it enacted, that from and after the passing of this act, if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principle felon.

2. 'And whereas, an accessory after the fact to felony can at present be tried only along with the principal felon, or after the principal felon has been convicted, which is 'sometimes productive of a failure of justice: be it enacted, that from and after the passing of this act, if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, he may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, and may thereupon be punished in like manner as any accessory after the fact to the same felony if convicted as an accessory may be punished; and the offence of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

3. 'And whereas, according to the present practice of courts of criminal jurisdiction, it is not permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property knowing it to have been stolen to add a count for stealing the same property, and justice is hereby often defeated: be it enacted, that from and after the passing of this act, in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen, and in any indictment for feloniously receiving property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same property; and where any such indictment shall have been found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property or of receiving it, knowing it to have been stolen; and if such indictment shall have been found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.

4. 'And whereas a failure of justice frequently takes place in criminal trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial, except in cases of misdemeanour: for remedy thereof, be it enacted, that it shall and may be lawful for any court of Oyer and Terminer and general gaol delivery, if such court shall see fit to cause the indictment or information, when at variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.

5. Provided always, and be it enacted, that nothing in this act contained shall extend to *Scotland*.

6. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

CAP. XLVII.

An Act for the protection and relief of the destitute poor evicted from their dwellings in *Ireland*.

[14th August, 1848.]

- Sec. 1. *After passing of Act, no Writ, &c. for taking possession of Land in Ireland shall be executed on the days or within the times herein mentioned.*
2. *Notice of execution of Writ to be given by Landowner, &c., to the Relieving Officer of the Electoral Division in which the same shall be situate.*
3. *Notice how to be given.*
4. *Persons becoming destitute by being dispossessed, may apply to Relieving Officer, who shall provide shelter, &c. Relief not to be given after one month, except under acts for relief of destitute poor.*
5. *Notice to be given where an occupier of a dwelling-house has not had notice in the Action, &c.*
6. *Penalty on executing Writ without notice.*
7. *The unroofing, &c., of dwellings for the purpose of expelling the occupier, a misdemeanour.*
8. *Provisions of Act to apply to Estates, and possessions of the Crown in Ireland, &c.*
9. *Interpretation of Act.*
10. *Act may be amended, &c.*

Whereas it is expedient to regulate the time of executing process for taking possession of land, and to provide for the better relief of the destitute poor evicted from their dwellings in *Ireland*: be it enacted, that from and after the passing of this act, no writ of habere facias possessionem, decree, order, or other process for the delivering up or taking possession of land in *Ireland*, shall be executed on any *Christmas day* or *Good Friday*, nor on any day within two hours next before sunset, and before sunrise, or six o'clock in the morning, whichever shall be latest.

2. That not less than forty-eight hours before any such writ, decree, order, or process, as aforesaid, for delivering up or taking possession of land on which there shall be any inhabited dwelling-house, or building used as a dwelling-house, shall be executed in any county in *Ireland*, the landowner, or other person by whom such writ, decree, order, or other process as aforesaid, shall have been sued out or his agent shall give notice in writing to the relieving officer of the electoral division in which such land shall be situate, and such notice shall set forth the parish or barony, electoral division, and townland in which the land of which possession is so to be delivered up or taken is situate.

3. That every notice to be given to any relieving officer under this act shall be given by delivering the same to such relieving officer, or by leaving the same, directed to such relieving officer, at his dwelling-house or office, or by letter sent by the post directed to the relieving officer at such dwelling-house or office; and in case the same shall be so sent by the post, such notice shall be delivered directed, open and in duplicate, to the postmaster of any post office, and the postmaster shall compare the notice and the duplicate, and on being satisfied that they are alike, shall forward one of them to its address by post, and shall return the other to the party bringing the same, stamped with the stamp of the said post office; and such postmaster shall be entitled to have and receive from the person delivering such letter, the rate of postage, and the sum of sixpence; and such stamped duplicate shall be evidence of the notice having been given on the day on which such notice would in the ordinary course of post have been delivered at such dwelling-house or office of the relieving officer.

4. That it shall be lawful for persons who shall become destitute by reason of their being dispossessed of any dwelling-house, by or under such writ, decree, order, or other process, to apply for relief to the relieving officer of the electoral division in which the said land or house shall be situate; and such relieving officer shall, on the receipt of

such application, take order for providing shelter for any such applicants, being destitute persons, by an order of admission into the workhouse of the union, if there be room, by conveying such destitute poor person thereto, or by affording such temporary relief in food, lodging, medicine, or medical attendance until the next ordinary meeting of the board of guardians, at which meeting he shall report the case and the nature and cost of the relief so afforded, in such form and manner as the poor law commissioners shall prescribe, and after such report shall give no further relief otherwise than by direction of the board of guardians, and the guardians shall furnish the relieving officer with funds for affording such relief, in the same manner and subject to the same rules and conditions as are or may be provided for all other relief granted by the relieving officer under and by virtue of 10 Vic. c. 31, s. 8; and it shall be lawful for such guardians, to provide every such destitute poor person with relief to the same extent as destitute poor persons permanently disabled from labour by reason of old age, infirmity, or bodily or mental defect, are by law entitled to relief in *Ireland*: provided, that it shall not be lawful for the guardians to relieve such destitute poor persons after the period of one calendar month from the date of such temporary relief being afforded, except in the manner by which such poor persons could be relieved under the acts now in force for the relief of the destitute poor in *Ireland*.

5. That in case there shall be upon any land of which possession is to be delivered up or taken under such writ, decree, order, or process as aforesaid, any inhabited dwelling-house, or building used as a dwelling-house, the occupier of which shall not have received notice for the determination of his tenancy, or shall not have been served with notice of the action, civil bill, or other proceeding in which such writ, decree, order, or process shall have been sued out, such occupier shall be served with notice in writing of the intention to execute such writ, decree, order, or process, not less than seven days before the same shall be executed, and such notice may be served by delivering the same to such occupier, or by leaving such notice at such dwelling-house, or other building, or affixing the same to some conspicuous part of such dwelling-house or other building: provided, that it shall not be necessary to name in such notice the occupier to or for whom such notice shall be delivered, left or affixed, or to serve any such notice on any occupier who shall have become such occupier less than twenty-one days before the execution of such writ, decree, order, or other process.

6. That in case the landlord or person by whom such writ, decree, order, or other process shall have been sued out shall neglect to serve the notice required by this act to be served on the relieving officer, he shall forfeit the sum of twenty pounds to the guardians of the union in which the land shall be situate; and such sum may be recovered by civil bill, and shall be applied in aid of the rates of the electoral division in which such land shall be situate, and in case such landlord shall be resident out of *Ireland*, may be recovered from him by action at law; and the service of process in such action on the attorney or agent by whom such writ, &c. may have been sued out shall be good service on such landlord or other person as aforesaid.

7. That whosoever, with intent to dispossess any person dwelling in a house, (whether such person shall be so dwelling under a continuing tenancy, or holding over, or otherwise,) shall pull down, demolish, or unroof, in whole or in part such dwelling-house or building used as a dwelling-house, whilst such person or any of his family shall be within the same, shall be guilty of a misdemeanour.

8. That all the provisions in this act contained shall apply and shall be construed to apply to all the estates of the Crown in *Ireland*, and to all proceedings taken on behalf of her Majesty, under the authority of the Lords Commissioners of the Treasury, or the Commissioners of Woods and Forests, or the Clerk of the Quit Rents, for recovering the possession of any part of such crown estates, whether by writ of intrusion, ejectment, or otherwise, in as full and ample a manner and subject to all the enactments herein contained in respect to all private parties recovering the possession of lands not being the property of the Crown.

9. That in the construction of this act, words import-

ing the singular number shall extend to and include the plural, and words importing the masculine gender shall include females as well as males.

10. That this act may be amended or repealed in the present session of parliament.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 43, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, February 3, 1846.

THE Irish Jurist

No. 15.—VOL. I.

FEBRUARY 10, 1849.

PRICE {Per Annum, £1 10s.
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DUBLIN, FEBRUARY 10, 1849.

Our columns of this week contain the names of several members of the bar who have been promoted to the dignity of Queen's counsel, and we believe a still further addition will be made to the Inner Bar in a few days.

Death has, within the last year, taken from that body one of its most distinguished members, one whose loss the public and the profession have equally had cause to mourn. By his death the Equity Bar of Ireland has been deprived of one of its brightest ornaments, and of one of the most conscientious advocates that ever lived. In the largest practice in this country, he was yet never unprepared; his manner, generally quiet, was always impressive; respectful to the court, but firm in the discharge of his duty to his client. Good-natured and encouraging to his juniors—affable and accessible to his clients, he closed a long, laborious, and spotless career without, it is true, having ever attained office, but leaving to his successors a bright example of personal industry and political integrity.

Promotions have likewise taken place, and created vacancies amongst her Majesty's counsel, but the present and contemplated accession much more than counterbalances the number of the departed or promoted. We are far from using one disparaging word towards any one of those to whom patronage has been, or is about to be, extended; on the contrary, we congratulate them sincerely on their elevation, and we have no doubt that the most judicious selection has been made of those best adapted to the change of business which should follow their new position at the bar, having regard both to professional standing, ability, and the necessity for leaders, which unquestionably existed on two, and perhaps three of the Circuits—Leinster, Connaught, and North West.

What, we candidly confess, we dread as the result of this large inundation is this, lest Queen's counsel, becoming too numerous as advocates, should break through the line of demarcation which has existed from usage and time immemorial, and, whilst retaining the robe of silk, should undertake, or rather accept, that class of business which has always been considered as properly belonging to members of the Outer Bar.

The dignity and position of King's counsel, though not so ancient as that of Serjeant, is still of very respectable origin and antiquity.

The first King's counsel under the degree of Sergeant was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee; so, the first of the modern order, who are now the sworn servants of the Crown, with a standing salary, (which, however, amounts only, we believe, to about 40s. a-year, and is, of course, never demanded,) seems to have been Sir Francis North, afterwards Lord Keeper to Charles II.* These Counsel must not be employed against the Crown, without special license, but which is never refused, and costs about £9. A custom now prevails, of granting letters patent of precedence to such barristers as the Crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and precedence as are assigned in their respective patents, sometimes next after the King's Attorney-General, but usually next after his Majesty's Counsel. These receive no salaries, and are therefore at liberty to be retained against the Crown. The late Mr. O'Connell, for example, having been for very many years a member of the Outer Bar, was at length called to the Inner, with a patent of precedence. In England, the pre-audience of counsel, to use the technical phrase, was anciently established thus :—

1. The King's Premier Serjeant,
2. The King's Ancient Serjeant,

* See his life by Roger North, p. 37.

3. The King's Advocate-general,
4. Attorney-General,
5. Solicitor-General,
6. King's Sergeants,
7. King's Counsel:

However, George IV., either at the request of the Attorney-General for the time being, or from his own ideas of propriety, altered the order of precedence so far as relates to the Attorney and Solicitor-General, as appears from the following directions to Lord Eldon in the year 1814:—"Whereas our Attorney and Solicitor-General now have place and audience in our courts next after the two ancientest of our Sergeants-at-law for the time being, and before our other Sergeants-at-law. We, considering the weighty and important affairs in which our Attorney and Solicitor-General are employed, do direct that the Attornies and Solicitors-General of us, our heirs and successors, shall have place and audience as well before the said two ancientest of our Sergeants-at-law, as also before every other person who is now one of our Sergeants-at-law, or shall hereafter be one of the Sergeants-at-law of us, our heirs and successors; and we do hereby will and require you not only to cause this our direction to be observed in our Court of Chancery, but also to signify to the judges of all our other Courts at Westminster, that it is our express pleasure that the same course be observed in all our said Courts."

The Attorney and Solicitor-General occupy the first and second places at the Irish Bar; next in precedence come the three Queen's Sergeants; our Court of Common Pleas, unlike that in England, being open to all barristers; next come the Queen's Counsel, taking precedence among themselves by seniority; the two first classes are always chosen from the latter, who are themselves called from amongst those whom success has distinguished from the crowd of the outer Bar—prohibited, except when licensed, from being employed against the Crown, and by seniority and position from undertaking junior business; the old etiquette of the profession, whilst it entitled them to larger fees, precluded them from taking the very lowest.

So far as Court business is concerned, the province of the two classes of lawyers is well defined, and the present members of the Bench have at all times shewn the utmost willingness to guard and preserve the privileges of the outer Bar; nor does this arise from their desire to favour one section of the profession more than another, but from public grounds, seeing that it is important that there should be a succession of able and intelligent men trained to the science and practice of the law, who may be ready to fill vacancies which death, promotion, or other causes may occasion in the inner Bar. A certain class of business has been exclusively assigned to stuff gownsmen, at once to test their qualifications and discipline them for those weightier matters of the law which they may hereafter be called on to conduct. In England, also, the Judges have exercised the utmost liberality, and allow costs to be taxed for a junior in every motion in which it is proper to engage a senior; for example, to take a bill *pro confesso*. In that country the rule is also firmly established, and it is

the rule here likewise, though it has unfortunately in a few instances been departed from, that a Queen's Counsel should never settle pleadings which had not previously been prepared by junior counsel. If there be any doubt about this rule, there should be a Bar resolution either to rescind or confirm it. So long as it exists—as unquestionably it does—there should be no violation of it; it is an honourable compact which exists amongst the members of the profession. It originally was not established, but it sprang up from the paucity of the numbers of King's Counsel, who were so occupied as advocates, as to spurn the drudgery of drafting. It would be but just also to those high-minded members of the inner Bar, who—though knowing that the old usage has been violated by others—have scorned to infringe it themselves, that some fixed rule should be established; it would be just also to the profession, that it might hereafter be known that a silk gown would cease to be the honourable distinction of the comparatively few men who had gained the summits of the professional tree, or were prepared to relinquish in favour of their successors those emoluments which smoothed their own earlier difficulties, and that henceforward the position of one of her Majesty's counsel demanded no sacrifice of business, and required no qualification except that of professional standing.

ACCORDING to the statute law of this country there is at present no act in force which renders it illegal for a clergyman directly to charge his benefice during his own incumbency. Without pausing to inquire whether it would not be salutary to place the law in this respect on the same footing as it is in England, we have been led, by a recent decision in the Court of Queen's Bench, to consider some of the peculiarities connected with the indirect jurisdiction of courts of law over ecclesiastical livings; for benefices—though protected from their direct operation—are by indirect means brought within their jurisdiction, and the priority among the different classes of incumbrancers, is dissimilar to that existing in all cases where charges are made available against freehold property in the hands of laymen.

The priority of judgment creditors ranks not from the lodging of the writ with the registrar of the bishop, and directing him to issue sequestration thereon, but from its publication. Lodging of the writ, without subsequent publication, is of no effect in charging the benefice. (*Waite v. Bishop*, 1 Cr. Mee. & R. 518). In the same case it is settled that the effect of the sequestration is not retrospective. The title of the sequestration creditor does not accrue till the sequestration is published. Therefore—as between judgment creditors—the law is on the same footing, with respect to a freehold interest, as it is in all other cases with respect to a chattel, the priority ranking, not from the priority of the judgment, but from the date of publication, which is thus made analogous to an execution lodged with the sheriff.

With regard to annuitants, it is settled in the case of *Wiss v. Beresford*, (5 I. E. R. p. 407.) that a party claiming under an annuity charged on a

benefice, is entitled to priority over a judgment creditor of the incumbent, although the latter be prior in point of time, but not having obtained sequestration until after the date of the charge. Hence annuitants rank from the date of the deeds creating them, ousting judgment creditors, who may have obtained their judgments years before.

This is far from being a satisfactory state of the law, as it leaves it in the power of the incumbent to give an undue preference to a subsequent, over a prior creditor. The judgment and annuity, however, were prior to the 9 & 4 Vic. c. 105.

But though thus the estates of incumbents, or their benefices, are rendered liable to the payment of their debts, yet the security they offer is far from being satisfactory. Not only is it liable to fail from the uncertainty of life, but it may be destroyed by the sequestration of the bishop, under 5th Geo. 4, c. 91, for non-residence, or other ecclesiastical misdemeanours—this sequestration affecting the very right of the incumbent to the benefice, and consequently the right of any creditors deriving under him. The decision to which we have adverted will illustrate this position. The facts of the case were:—a judgment creditor issued sequestration against the benefice of the Rev. H. Maxwell, and while his sequestrator was in possession of the rents, issues, and profits of this living—the amount of the judgment being yet not fully paid—the Bishop of Tuam issued his sequestration for non-residence. It was contended for the judgment creditor, that being in possession he could not be disturbed by a subsequent sequestration till his demand was paid—if the right of the incumbent to the benefice so long lasted—however, it was held by the court, that the bishop, from the moment of the publication of his sequestration, became entitled to the rents, issues, and profits of the benefice, the sequestration of the judgment creditor being from that moment entirely displaced by the superior character of the proceedings by the bishop.

The enactment conferring this authority on bishops, and on which this decision is grounded, is as follows:—(5 Geo. 4, c. 91, s. 25.)

“That in every case where it shall appear to any such bishop that any spiritual person does not sufficiently reside, it shall be lawful for such bishop to sequester the profits of such benefice of such spiritual person as aforesaid, until such order shall be complied with, or such sufficient reasons for non-residence stated and proved as aforesaid, and to direct, by any order to be made for that purpose under his hand, and filed as aforesaid, the application of such profits, after deducting the necessary expenses of serving the cure, either in the whole, or in such proportion as he shall think fit, in the first place, to the payment of such reasonable expenses as shall have been incurred in relation to such monition and sequestration, and, in the next place, towards the augmentation or improvement of any such benefice, or house of residence thereof, or any of the buildings or appurtenances thereof, or towards the improvement of any of the glebe or demesne lands thereof, or to order and direct the same, or any portion thereof, to be paid to the Trustees and Commissioners of First Fruits in Ireland, for the augmentation and maintenance of the

poor clergy, to be applied for the purposes of such augmentation as such bishop shall in his discretion, under all circumstances, think fit and expedient. And it shall also be lawful for any such bishop, within six months after such order for sequestration, or within six months after any money shall have been actually levied for such sequestration, to remit to any such spiritual person any part or proportion of such sequestered profit, or cause the same, or any part thereof, that shall have been paid, or directed to be paid to the said trustees and commissioners, to be repaid to such spiritual person, which repayment the said trustees and commissioners are hereby authorized and required, upon an order under the hand of any such bishop, to make out of any money then in their hands, or, if no money shall be in their hands, then out of the next money that shall come to their hands, in any case, where by reason of the subsequent obedience of any such spiritual person to any such monition or order, or the stating and proving such sufficient reasons as aforesaid, such bishop shall think the same proper.”

In the corresponding English enactment, 1 & 2 Vic. c. 106, there is, in addition to the provisions of the Irish act, one directing that in case a sequestrator was displaced by the issuing of a sequestration under the statute, that after providing for the service of the cure, &c., the profits of the benefice should be applied to the payment of the debt, on account of which the prior sequestration was issued, and then comes the permission to the bishop to remit any part or proportion of the sequestered profits to the incumbent, in case of his subsequent obedience, or rendering of sufficient reasons, taking care, in fact, that although the sequestration of the creditor was displaced, yet that he should suffer no injury which could be avoided, consistently with the proper service of the church.

The omission of this provision is a great defect in the Irish act, and places it very much in the power of bishops, if disposed to collude with incumbents, to defeat the rights of bonâ fide creditors. The bishop is the sole judge of insufficiency of residence, and so can at once displace the sequestration of any creditor. He is also the sole judge of the sufficiency of the subsequent obedience of the incumbent, or of his reasons for not obeying. And though—before he can remit any part or the whole of such sequestered profits to the incumbent—he must, if a bishop, transmit to the archbishop, and, if an archbishop, transmit to the Lord Lieutenant, a statement of the nature and special circumstances of each case, and the reason for the remission of any such penalty, yet this can, under no circumstances, be of any benefit to the creditor, nor is there any reason why, if the bishop or archbishop did not report the circumstances of the prior sequestration, that the creditor should do so, as in no instance could he get any part of the proceeds, their application being specially provided for in the act; so that the non-satisfaction of the prior sequestration would be no reason for not remitting to the incumbent the sequestered profits, if the bishop or archbishop thought proper so to do.

The 30th section of the Irish statute enacts—“That if the benefice of any spiritual person shall continue for the space of two years under any

sequestration, and under the provisions of this act, for disobedience of the bishop's monition, requiring such spiritual person to reside on his benefice, or shall, under the provisions of this act, incur three such sequestrations in the space of two years, the spiritual person not being relieved, with respect to such sequestrations, on appeal; the benefice, in relation to non-residence upon which such sequestration shall have been made, shall become *ipso facto* void, and the bishop of the diocese shall therefore give notice thereof to the patron or person entitled to present, who shall thereupon present or nominate some clerk thereto, other than the spiritual person whose benefice shall have so continued under such sequestration, or who shall have caused such sequestration as aforesaid, as if the same had been avoided by the natural death or resignation of such spiritual person."

And there is a similar section in the English act, so that even in England the extension of protection to the creditor by providing that the profits should go to the satisfaction of his sequestration, is but short-lived. However, short-lived as it is, it closes the door against collusion, such as we have pointed out as possible; and, as it renders the incumbent only ineligible to be presented to the *same benefice* again, it is no bar to his being presented to *another*, in which the same course might be pursued, and with the same success.

It was pressed in argument, in the case to which we have adverted, that until the forfeiture was incurred, or the two years had elapsed, the sequestration of the bishop should not deprive the creditor of those profits which his debtor might be entitled to, and that the title paramount of the bishop did not accrue until a forfeiture, and of this opinion was Mr. Justice Crampton, but the majority of the Court decided otherwise.

Court Papers.

Chancery.

February, 7.—The following gentlemen took the usual oaths on being appointed Her Majesty's Counsel.

James Doherty, William Boyd, Henry Hutton, Robert Andrews, James Plunkett, Walter Bourke, R. Chambers Walker, Francis W. Fitzgerald.

ROLLS MOTIONS—LONG LIST.

First Fifty.

Abbott v Thompson	Bond v Tatlow
Acheson v Acheson	Butler v Glengall
Adams v Adams	Byrne v Carew
Ahern v Curtin	Black v Atkinson
Allman v Crofts	Blackley v Sall
Archdall v Irwine	Brady v De Dancloek
Armstrong v Armstrong	Bradley v Bradley
Armstrong v Taaffe	Brannick v Reynolds
Aston v Bennett	Briscoe v Hoare
Bannatyne v Alton	Browne v Browne
Bentley v Pilkington	Same v Same
Bernard v Donoughmore	Browne v M'Cintock
Beytagh v Concannon	Campion v Campion
Same v Same	Carberry v Cox
Biggs v Biggs	Carpenter v Carew
Bissett v Swiney	Carroll v Twiss

Carroll v Hackett
Carroll v Darcy
Carson v Allingham
Cassidy v M'Guinness
Clarke v Jessop
Clarke v Gildea
Clarke v Austin
Clayton v Falkiner
Clendinning v Oranmore

Cochrane v Taaffe
Connolly v Grattan
Connolly v Hamill
Connolly v M'Carthy
Conry v Conry
Coote v Whaley
Corneille v Wilton
Cosby v Ashwort
Cotton v Lane

Second Fifty.

Cremen v Johnston
Cromie v Peyton
Cronin v M'Carthy
Curtayne v O'Connor
Curtis v Swiney
Daniel v Costello
Darcy v Dolphin
Darcy v Crowe
Davis v Parker
Same v Same
Day v Gibbings
Delacour v Freeman
Donegal v Cunningham
Donelan v Lynch
Dowling v Belton
Dunne v Onge
Dwyer v Cormick
Same v Same
Edgeworth v Moran
Edgeworth v Edgeworth
Ellis v Ferrall
Fallon v Somers
Farrell v Lambert
Ferrall v Bournes
Fitzgerald v St. Leger

Fitzpatrick v Knareboro'
Fleming v Good
Fleming v O'Brien
Flynn v Flynn
French v Maunsell
French v French
French v Dennis
Galway v O'Driscoll
Geran v Somers
Gibson v Johnson
Good v Holmes
Grannell v Jackson
Greene v Concannon
Hall v Williams
Hamilton v Burgoyne
Hamilton v Nagle
Hamilton v Syngé
Hamilton v West
Harding v Ashe
Harkin v M'Dermott
Harris v Daunt
Harris v Harris
Hatchell v Sutton
Hayden v Hearne
Hayes v Moore

Third Fifty.

Hayes v Hendley
Heffernan v Farrell
Hemsworth v Eyre
Heron v M'Nevin
Higgins v Mitchell
Hill v Cuppage
Hogan v Hanlon
Hoops v Kingston
Howell v Henchy
Same v Same
Hutton v Mayne
Irvine v De Massey
Jackson v Mitchell
Jackson v Graves
Jacob v Taylor
Jessop v Atkin
Joyce v De Moleyns
Keane v Barry
Keamey v Foley
Same v Same
Keating v Bagwell
Keller v Emery
Kelly v Dillon
Kenny v Colclough
Kidd v Ferrier
Lauder v Hoare

Lawlor v Lawlor
Leonard v Brien
Lewen v Lewen
Lindsay v Spotswood
Little v Norris
Locke v Goldsmid
Lombard v Lombard
Lowe v Lowe
Lynch v Tennison
Lynch v Lynch
Lloyd v Johnson
Lloyd v O'Neill
M'Alpine v Baldwin
M'Caul v M'Caul
M'Carthy v M'Carthy
Same v Same
M'Cance v Robinson
M'Cormack v Dawson
M'Dermott v O'Connell
M'Dermott v O'Neil
M'Fall v Locke
M'Morran v Fitzgerald
M'Cartney v Dickey
Madden v Madden
Madsette v Dillon
Mahony v Glengall

Fourth Fifty.

Mannix v Drinan
Martyn v Blake
Mason v Monck
Maxwell v Rose
Mayne v Taylor
Miller v Gibbons
Molony v Molony
Same v Same
Moore v Bennett
Moore v Blake
Moore v Barton
Muldowney v Shortall
Murphy v Murphy

Murphy v Levinge
Murphy v Balfe
Murray v Darcy
Murray v Westens
Murray v Skelington
Same v Same
Neville v Fitzgerald
Same v Same
Newcombe v Young
Newport v Scott
Nolan v O'Connor
Nolan v Bourke
Nugent v Piers

O'Brien v Creagh
 Same v Same
 O'Brien v Byrne
 Same v Same
 O'Brien v O'Brien
 O'Connor v O'Flaherty
 O'Flaherty v Burke
 O'Ferrall v Arthur
 O'Grady v Atkin
 O'Hara v Brennan
 O'Hara v Chaine
 Same v Same

Fifth Fifty.

Richards v Goold
 Same v Same
 Same v Same
 Richardson v Austin
 Roberts v Prior
 Robinson v Kent
 Rolleston v Morton
 Rynd v Johnson
 St. George v St. George
 St. John v Rowan
 Saunderson v Darcy
 Savage v O'Connor
 Scully v O'Regan
 Seale v Behan
 Sherlock v Roe
 Sherlock v Dissey
 Simpson v Synges
 Same v Same
 Same v Same
 Singleton v Dudgeon
 Smith v Butler
 Smyth v Pratt
 Sproule v Sproule
 Spunner v Walsh
 Stamer v Nesbitt
 Stannus v Tipping
 Steele v Davenport

O'Keeffe v Lanigan
 O'Neill v French
 O'Sullivan v O'Sullivan
 Palmer v Palmer
 Parr v Bell
 Perry v Irwin
 Phelan v Byrne
 Phibbs v Phibbs
 Phibbs v Ferrall
 Pike v Martin
 Purcell v Gibbings
 Richards v Bayley

Stewart v Daniel
 Stratford v Aldboro'
 Sugrue v Nash
 Swan v Disney
 Swift v Pole
 Taaffe v Lynch
 Tangney v Holmes
 Same v Same
 Tisdall v Cuffe
 Tuthill v Bateman
 Todd v Chichester
 Vessey v Fry
 Same v Same
 Vignolles v Bowen
 Walcott v Smyth
 Walcott v Condon
 Walker v Walker
 Wall v Byrne
 Wall v Despard
 Walmsley v Walmsley
 Watson v Pym
 Watson v Giles
 Watters v Lidwell
 Watters v Poole
 Watts v Busted
 Wildridge v Wildridge

(Continued from p. 104.)

CAP. XLVIII.

An Act to facilitate the Sale of Incumbered Estates in Ireland.
 [14th August 1848.]

- Sec. 1. *Construction of terms, &c. in this act.* "Land." "Estate." "Lease." "Lease in perpetuity." "Incumbrance." "Incumbrancer." "Possession." "Owner." "Person" and "Owner." "Month." "Court." "Master." "Number." Gender. Sale and selling.
- Where land, &c. in Ireland is subject to incumbrance, owner may, subject to approbation of court, contract to sell the same.
 - Lands not deemed subject to incumbrance unless same affect a term of not less than 50 years unexpired, &c.
 - Where leases in perpetuity and long terms subject to incumbrance, owner may, subject to approbation of the court, sell same.
 - Leases in perpetuity, &c. to be subject to incumbrances only in certain cases.
 - Owner, &c. having contracted for sale may apply to the Lord Chancellor of Ireland to confirm the sale or contract for sale.
 - Petition to set forth incumbrances, &c., and to be verified.
 - Lord Chancellor, &c. of Ireland may make rules, &c. for carrying this act into effect. Rules, &c. to be laid before parliament.
 - Lord Chancellor, &c. may alter rules from time to time.
 - Upon presentation of petition for sale, the court may refer the same to a master in Chancery, who shall inquire into the particulars, and report.
 - Rules, &c. in force with respect to certain proceedings for payment of incumbrances, &c. not inconsistent

with this act, shall apply to proceedings under this act. Court to apportion costs as it may think fit. All persons becoming parties to be subject to the jurisdiction of the court, &c.

- Persons feeling aggrieved by report of the master not compelled to take exceptions to the same.
- In case of death, &c. parties interested may apply to the court to carry on proceedings.
- When, upon a petition, &c. a reference shall have been made to the master, he shall cause the same to be published by advertisements.
- Error in advertisement not to vitiate proceedings.
- Master, before proceeding, &c. shall cause notice to be given to all persons who shall appear to have interest in the subject of inquiry.
- Persons claiming an interest in any land, &c. may enter a caveat in the registrar's office, and shall be thereby entitled to notice.
- All persons claiming under reference to appear before the master, who shall in his report state by whom he has been attended, &c. Omission of the master to give notice not to vitiate proceedings.
- Persons who have been disallowed from attending before the master, or complaining of any certificate, &c., may apply to the court against such disallowance, &c.
- Directions of this act as to proceedings to have the force of orders of the court.
- When incumbrance shall be subject to limitations, the first person entitled, &c. is to make application.
- Where any person shall be entitled to any charge, &c. master may treat such charge as an incumbrance. As to the sale of any land, &c. a part only of which shall be desired to be sold.
- Report of the master and all other reports, &c. to be filed according to the rules of the court.
- Order for sale may include the whole or part of the incumbered land, &c.
- Court may order the whole of an estate to be sold, although master shall have approved of the sale of a part only.
- Previously to making order for sale, court may confirm the report nisi, and direct service of the same, &c.
- Assurance of land sold to be made in such form as the master shall direct, &c., and to vest the estate absolutely in the purchaser.
- Saving of rights of lessees, &c.
- Purchase money arising on any sale to be paid into the bank of Ireland.
- Owner of land subject to incumbrances may sell without order of the court, unless restrained by order after publication of notices.
- Incumbrancer after notice and neglect of owner may sell in like manner.
- Where several incumbrancers give notice, the first of such incumbrancers may sell.
- Notices to owners how to be given.
- Notices of proposed sales without order of the court.
- Where land or lease sold without order of court, notice to be served personally on persons having future estates.
- Saving of the rights of mortgagees.
- No land or lease sold without order of the court to be sold below selling value certified by surveyor appointed by Lord Lieutenant.
- Where required by caveat, notice to be given of the price at which land or lease sold without order of the court is contracted to be sold.
- Affidavit to be filed.
- Purchase money to be paid into court.
- Separate register of affidavits to be kept, and to be open to inspection.
- Defect in notices, &c. not to invalidate sale where purchase money paid into court.
- Operation of a conveyance upon a sale without order of the court.
- Rights prosecuted within five years not to be affected.

45. Sales without order commenced by owner or incumbrancer dying, &c. may be proceeded with by the person becoming entitled.
46. Purchase money on sale without order of the court to be applied according to the rights in the land.
47. Receipt of accountant general to be a sufficient discharge.
48. Where it shall appear that there is more than one incumbrance, court may direct proceedings to be instituted to ascertain priority of the same.
49. Application of surplus of purchase money.
50. Money paid into court may be invested in the funds.
51. Usher's poundage.
52. Appointment of new trustees.
53. Where any annual charge, not being an incumbrance under this act, shall affect any land to be sold, the person entitled to such charge may release the same, &c.
54. Parties to whom the surplus of purchase money is paid out of court liable to repay the money to parties proving a better title to the estate sold. Court may require security for such repayment.
55. Sale without order of the court not made *bona fide* for discharge of incumbrances to be treated as a breach of trust.
56. No payment towards discharge of incumbrance, not being payment in full, shall affect right of incumbrancer for balance.
57. Where incumbrancer shall be satisfied by payment out of any sale, &c., and other persons or lands are liable, court may order proceeding to be instituted on such terms as it may think fit, &c.
58. No payment in respect of any incumbrance to impair any right of any persons out of whose estate the same shall be made.
59. Where an estate shall be ordered to be sold court may empower the master to include in his report other interests in the same estate.
60. If land sold shall be subject to a lease, &c., comprising other land, master may apportion the rent, &c.
61. No person entitled to incumbrance shall be bound to accept payment without six months notice, &c.
62. Where incumbrance included in the order for sale shall not be payable or not ascertained, court may order a sum to be carried to the credit of same, &c.
63. Pending proceedings court may appoint a receiver, who shall be subject to jurisdiction of the court.
64. Court may appoint guardians of infants to act for them for the purposes of this act.
65. Court may appoint persons to act on behalf of lunatics, &c.
66. As to payment of costs.
67. No petition for sale without consent where an incumbrancer is in possession, or during pending suits. Power to stay pending suits. No suits to be commenced pending proceedings under this act, without leave of the court.
68. Proofs of debts, &c. in a discontinued suit may be used in a reference upon a petition.
69. Consent where necessary may by leave of the court be given subsequently.
70. Power to second or subsequent incumbrancer to redeem the prior incumbrances.
71. No petition for sale by assignees of bankrupts or insolvents, without consent of major part of creditors.
72. Release of a portion of lands not to affect the validity of a judgment as regards the residue of such lands.
73. Annual returns to be laid before parliament.
74. Short title.
75. Act to extend to Ireland only, &c.

Whereas it is expedient to grant facilities for the sale of estates in Ireland charged with incumbrances, be it enacted that in this act the word "Land" shall extend to manors, advowsons, rectories, messuages, lands, tenements, rents, and hereditaments, whether subject to any fee farm or other perpetual rent, with or without condition of re-entry, or otherwise, and whether corporeal or incorporeal, and the word "Estate" shall extend to an estate in equity as well as

at law, and to any covenant or contract for or right of renewal; and the word "Lease" shall include an agreement for a lease, and the estate or interest created or to be created by such lease or agreement, and the expression "Lease in perpetuity" shall mean any lease or grant for one or more life or lives, with or without a term of years, or for years determinable on one or more life or lives, or for years absolute, with a covenant or agreement in any of such cases, whether in the same or in any other instrument, for the perpetual renewal of such lease or grant, whether such lease shall be derived out of the inheritance or by way of underlease out of any lease or other estate; and the word "Incumbrance" shall mean any legal or equitable mortgage in fee, or for any less estate, and also any money secured by a trust, or by judgment, decree, or order of any superior court of law or equity duly registered, and also any legacy, portion, lien, or other charge whereby a gross sum of money is secured to be paid on an event or at a time certain, and also any annual charge which by the instrument creating the same, or by any other instrument, is made re-purchaseable on payment of a gross sum of money; and the word "Incumbrancer" shall mean any person entitled to such incumbrance, or entitled to require payment thereof; and the word "Possession" shall include the receipt of the rents and profits; and the word "Owner," as applied to land, shall include any person entitled in possession in fee simple or in tail, or quasi in tail, and any person entitled in possession for a life or lives, or for a term of years determinable on the dropping of any life or lives, or for a term of years of which not less than ninety-nine years are unexpired, not being a lessee at a rent, and also any person entitled in possession as tenant by the curtesy, and any person entitled in possession to the equity of redemption or the property subject to the incumbrance, or to a trust for payment of the incumbrance, whether in fee or for any lessor estate, and any feeoffees or trustees for charitable or other purposes, entitled in possession; and the word "Owner," as applied to a lease in perpetuity or other lease, shall include any person entitled in possession to the land comprised in such lease for the whole estate created or agreed to be created by such lease, or for any derivative estate (created by settlement, or testamentary or other disposition thereof), quasi in tail, or for life or lives, or for years determinable on the dropping of a life or lives, or for years of which not less than fifty years are unexpired, not being an underlease at a rent derived out of such lease, and any person entitled in possession to the equity of redemption or the property subject to the incumbrance, or to a trust for payment of the incumbrance, in any such lease in perpetuity or other lease absolutely, or for any such derivative estate; and the word "Person," and the word "Owner" shall extend to a body politic or corporate as well as to an individual; and the word "Month" shall mean calendar month; and the word "Court" shall mean the High Court of Chancery in Ireland; and the word "Master" shall mean the master for the time being having the conduct of the reference; and every word importing the singular number only, shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing; and every word importing the masculine gender only, shall extend to a female; and words importing sale shall include the carrying into execution any contract for a sale under this act; and where any act is directed to be done by or with respect to any person, or any consent to be given by any person, such act or consent may be done or given by the guardian of such person being an infant, or by the committee of the estate of such person being an idiot or lunatic, or by the husband of such person being a married woman (except that a married woman entitled to any land, estate, or incumbrance for her separate use for life, or for any greater estate, with or without power of anticipation, shall for the purposes of this act be considered as a feme sole); and this act shall operate as well with respect to any estate or incumbrance created before the passing of this act as with respect to any estate or incumbrance to be hereafter created.

2. That where land in Ireland shall be subject to any incumbrance the owner of such land may contract (subject

to the approbation of the court) for the sale thereof, freed from all incumbrances, and such sale, if approved by the court, shall be carried in effect under this act; and such owner or person being the first incumbrancer on such land, or any person being an incumbrancer on such land in possession of the title deeds relating thereto, without having so contracted, may apply to the court for the sale of such land under this act.

3. That for the purposes of this act the land shall not be deemed subject to an incumbrance unless the same shall affect a term of fifty years unexpired, or a greater estate in such land, nor unless such incumbrance shall have been created by the owner of an estate of inheritance, but an incumbrance charged under a power created by the owner of an estate of inheritance shall be deemed to have been created by such owner.

4. That where any lease in perpetuity, or any lease of land for a term whereof not less than sixty years shall be unexpired at the time of such application as herein-after mentioned, shall be incumbered, the owner of such lease in perpetuity or other lease as aforesaid, may contract, subject to the approbation of the court, for the sale thereof, freed from all incumbrances, and such sale, if approved by the court, shall be carried into effect under this act; and any such owner of a lease in perpetuity or other lease, and also any person being the first incumbrancer on any such lease in perpetuity or other lease, or any person being an incumbrancer on such lease in perpetuity or other lease as aforesaid, and being in possession of the title deeds relating thereto, without having so contracted, may apply to the court for the sale of such lease in perpetuity or other lease under this act.

5. That such lease in perpetuity or other lease, shall not be deemed subject to an incumbrance where the same shall affect a derivative estate or interest only, or less than the whole estate created or agreed to be created by such lease in perpetuity or other lease, unless such incumbrance shall have been created by the owner of or person entitled to the whole estate created or agreed to be created by such lease in perpetuity or other lease as aforesaid, but any incumbrance charged under a power created by the owner of, or person entitled to such whole estate as aforesaid, shall be deemed to have been created by such owner or person so entitled.

6. That every owner having contracted for sale, and every owner, or first or other incumbrancer being desirous to sell, may apply by petition to the Lord Chancellor, for carrying into effect such contract for sale, or for the sale of such land or lease; and every such petition, and every subsequent petition; and other proceeding arising out of the same, shall be entitled "In the matter of the act to facilitate the sale of incumbered estates in Ireland," *ex parte* the person presenting such petition.

7. That every petition for the carrying into effect such contract for sale, or for the sale of such land or lease in perpetuity or other lease, shall set forth the estate or interest of the petitioner in such land or lease in perpetuity or other lease, and the uses or limitations, and the trusts to which the land or lease stands limited or settled, and the incumbrances and other charges affecting the same, including the crown rents and quit rents, subject to which such land or lease is contracted to be sold, and such petition shall be verified as the court shall direct.

8. That the Lord Chancellor, with the advice of the Master of the Rolls, from time to time may make any rules or orders for the better carrying this act into effect, and for the conduct of the proceedings under this act, and that the same may be done with the least cost, and as may be consistent with a due observance of the provisions hereof, and also for fixing the fees to be paid upon any proceedings, and the cost thereof, so that such fees and costs shall never exceed such as are lawfully received on similar matters: provided, that such rules and orders shall be laid before both houses of parliament within one month from the making thereof, if parliament be then sitting, or, if parliament be not then sitting, within one month from the commencement of the then next session of parliament; and any rule and order so made, shall, from the making

thereof, for all purposes be deemed and taken to be a general rule and order of the court.

9. Provided, and be it enacted, that the Lord Chancellor, with the advice aforesaid, in like manner as aforesaid, may make rules or orders rescinding or altering former rules or orders.

10. That upon the presentation of such petition, the court, either by an *ex parte* order, or on notice to such parties as ought to have notice, may refer it to one of the masters to inquire as to the estate or interest of the petitioner in such land or lease, and as to the uses or limitations and trusts to which such land or lease stands limited or settled, and as to the incumbrances affecting the same (including such as are claimed by the parties who come in under the said order as all others, as shall appear from the title deed or on search or otherwise, and including also debts and incumbrances due to Her Majesty, her heirs and successors), and as to the persons entitled under such uses or limitations and trusts, and the persons in whom such incumbrances shall be vested, and as to the order and priority of such incumbrances, and the amount due thereon respectively, distinguishing principal monies from interest, and in case of a mortgagee or other creditor in possession taking all just accounts, and with or without rests, as shall be just, and as to the value of the land or lease which shall have been contracted to be sold, and also, whether any such incumbrances shall affect any land or estate other than the land or lease contracted to be sold, and whether such other land or estate shall be liable in priority, or in equal degree, or in posteriority, and as to the title to the land or lease contracted to be sold, and to the incumbrances, and as to the expediency of sale, and if a part only, of any incumbered land or lease shall have been contracted to be sold, whether such part be proper to be sold, and to make such inquiries relating to or affecting such land or lease, and the incumbrances and charges thereon, as the court shall think requisite, and to report upon the same; and the master shall have authority to direct searches to be made for judgments, and searches of the registry, and in all other places, and inquiries as to the identity of any person or property; and in such report the master may state any circumstances specially as the court shall direct, or as he shall see fit; and the master shall be at liberty to make a separate report as to any of the matters referred to him; and for any of the purposes of this act the said court shall have power to compel the production before the master, of all deeds and other writings relating to any property in question: provided that no incumbrancer, or other person being in possession of any title deeds of, or relating to any property (and shewing right to hold the same as a security for a debt or charge), or lien shall be compelled to produce the same, unless it shall have been ascertained by the report of the master that the money to be produced by the sale of the property, and applicable to the payment of such debt, will be sufficient to pay the same; but such incumbrancer or other person shall, on the order of the court, furnish copies or abstracts of such deeds; and in every case in which such incumbrancer, having such right, shall be required to produce such deeds or writings, or to furnish such copies or abstracts, the costs and charges of such production, or such copies or abstracts, shall be paid by the party requiring the same, or otherwise, as the court shall direct; and all orders for the production and for the furnishing of copies and abstracts of any such deeds, may be made on persons residing out of the jurisdiction of the court; and all notices to be given under this act, may be given and served out of the jurisdiction of the court; and the powers, provisions, and directions of an act passed in the 41 G. 3 c. 90, shall extend to all orders to be made under this act.

11. That all the laws, rules orders powers, and practice in force, with respect to proceedings in the court in a suit for foreclosure or redemption of a mortgage, or for sale of estates for payment of incumbrances or debts, shall apply to the proceedings under this act; and all such proceedings, by way or in the nature of further directions and otherwise, in case of a sale under this act, may be had and taken as in case of a decree for sale; and in every proceeding under this act, the court shall (except in the case herein-before

mentioned and provided for) have full discretion as to the giving or withholding costs and expenses, and as to the persons by whom, and the funds out of which the same shall in the first instance, or ultimately be paid, repaid, and borne, and shall and may apportion the same amongst such parties, and in respect of interest or principal, and in respect of rents, or income and corpus, as it shall see fit; and that under every reference to the master under this act, he shall proceed in like manner, and with the like powers and authorities in all respects, and all orders and proceedings of, and before the master shall be enforceable in like manner, as in case of a reference under such decree as aforesaid; and all persons parties to any proceedings under this act, by contracting for the purchase of any land or lease, or by making any application to the court, or by submitting to the jurisdiction of the court, or by attending before the master in the course of such proceedings, or by otherwise concurring in any such proceedings, and the representatives of such persons, and all persons claiming under them, by their act, or by act of law subsequent to their becoming subject, as next herein-after mentioned, shall for the purposes of this act, be subject to the jurisdiction of the court, and to all orders of the court and of the master, in the course of any such proceedings, in like manner, and as fully as parties to a cause pending in the court are subject to the jurisdiction of the court in such cause.

12. That it shall not be necessary for any person thinking himself aggrieved by any report of the master to take exceptions; but it shall be incumbent on all persons parties to proceedings, or coming in before the master, to carry in objections in the usual manner, to the draft of the report; and any such person omitting so to object, shall not afterwards be heard against the report, without special leave of the court; and every proceeding before the court shall be carried on by petition or motion, in a summary way, or as the court may order; and proceedings under this act shall not abate, nor be suspended by any death, transmission or change of interest, except so far as it shall be necessary for the carrying on of any such proceedings, that any person not before the court shall have notice of, or be required to attend such proceedings.

13. That in case of death, or transmission, or change of interest, and wherever, after the presentation of a petition for confirming and carrying into effect a contract for sale, or for a sale, the direction of the court shall be requisite for carrying on the proceedings, or for effecting the objects thereof, it shall be lawful for any person interested in such proceedings, to apply to the court for an order for any such purpose, and the court may thereupon make such order as it shall see fit.

14. That when, upon a petition for confirming and carrying into effect a contract for sale, or applying for a sale, any reference shall have been made to the master, he shall cause an advertisement to be published, at least once in two successive weeks, in the *Dublin Gazette*, and in such daily, or other journals or newspapers in *Ireland* or *England*, or both, as the master shall think fit, stating the name or title of the petitioner; and in case the petitioner shall not be the owner, the name or title of the owner, and the denomination or short description of the land or lease contracted to be sold, and the county wherein the same shall be situate, and any other matters the master may think fit; and fixing a day whereon the master will enter upon the consideration of the matter referred to him, and requiring all persons having incumbrances to come in and prove them.

15. That no error or imperfection in any such advertisement shall vitiate the proceedings under such reference, unless the court, upon application or otherwise, shall determine that it ought to do so.

16. That the master, before proceeding upon any of the inquiries directed by such reference, and also from time to time under such reference, or under any further reference in the same matter, as, and when it shall seem to him fitting, shall cause notice to be given in such form as he shall think proper, to all persons who shall appear to him to have any interest in the subjects of such inquiries, and whose attendance shall appear proper, that he is about to proceed or that he is proceeding in the matter of such reference;

and all notices under this act may be served out of the jurisdiction of the court, and the court may direct substituted service thereof in any case; and in case any incumbrancer or party interested, having been served with any such notice, neglect to appear in the master's office, or to file a charge, the court, on the application of any party, may make an order on motion of course, that such incumbrancer shall be bound by the proceedings as if he had been a party thereto, or such other order as the court shall think fit, and thereupon it shall be lawful to proceed notwithstanding the absence of such party; and if it shall appear to the satisfaction of the master, that any person to whom notice ought to be given, cannot be found, or cannot be served with notice, the master may state in his report the name of such person, and the circumstances under which notice was not or could not be given to him: provided that after such order, it shall be lawful for the master, at any time in his discretion, to admit, and for the court, on such terms as it shall think proper, to order him to admit, any party against whom such order shall have been made, to attend and proceed before him as if no such order had been made: provided, that the parties against whom such order shall have been made, shall not thereby be excluded from sharing in the proceeds of such sale, under the direction of the court, or from any other benefits of this act, consistent with effect of such order, or with such discretions as the court may make.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 5s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6, FLEET STREET, in the Parish of St. Andrew, and published at E. COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, February 10, 1846.

THE Irish Jurist

No. 16.—Vol. I.

FEBRUARY 17, 1849.

Price { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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DUBLIN, FEBRUARY 17, 1849.

In discussing the question as to the policy of rendering each estate responsible for the support of the pauperism existing upon it, there are two conflicting interests to be considered—the interest of the owners and the interest of the occupiers. There is also the effect of the system on the country generally. In every statement we have seen on this subject, the interest of the proprietors has been too exclusively considered. As to them, a large class would, no doubt, be decidedly benefited—owners who have resources at command, whose properties are unencumbered and not over-peopled.

There is another, and a still larger class who would be ruined—men who have no resources—whose properties are incumbered, and whose estates are over-peopled.

The first class of owners would feel but lightly the onus of employing or supporting the poor on their estates—their estates would be benefited by the employment given, and their people fed.

The estates of the second class of owners are generally unequal, at present, to support their population, and even the few which can yet do so, if burthened with individualized responsibility, will rapidly deteriorate. No farmer would cultivate land, the profits being absorbed in poor-rate; thus on these estates no employment would be afforded—they would go out of cultivation, and the population starve.

A rigid adherence to making each estate responsible for the support of its own poor, would soon get rid of the “Irish difficulty;” as the population of the distressed districts would rapidly be reduced to what each estate could support; and the expense of supporting an unprofitable population being removed, the estates themselves might be expected to improve. However, we do not anticipate that

it will be deliberately contemplated, when legislating on this question, to improve Ireland by consigning a third of her inhabitants to starvation.

If the legislature will not permit this result to ensue, provision against it must be made, either by grants from the imperial treasury, or by a rate in aid.

The result of grants from the treasury would be, to benefit the estates which could support themselves, by freeing them from contributing, through a rate in aid, towards the support of their poorer neighbours on the distressed estates. If the grant only supplied what the estate could not, the population of a distressed estate would be kept alive, but the estate not benefited.

A rate in aid would lead to a tax over the whole surface of the country, and which—if a very moderate limit were not fixed as the maximum of taxation—would, by throwing the distressed districts out of cultivation, have a tendency to increase. This tax would, at the very first, be not very different from a general tax, irrespective of localities.

The consequence to the country generally, of individualising responsibility would necessarily be a law of settlement of the strictest possible character. As to the effect of such a law on the prosperity of a country, it is useless to theorise; it has existed in England for centuries, and every writer of eminence bears testimony to the evils it has wrought upon the prosperity and morals of the poor.

Sir William Blackstone (vol. 1, p. 361)—no mean authority—in the eighteenth century, after stating that the object of the statute of 43 Eliz. c. 2, was, first, to relieve the impotent poor, and then only; secondly, to find employment for such as are able to work, observes, “the only defect was confining the management of the poor to small parochial districts, which were frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty

to seek employment wherever it was to be had, none being obliged to reside in their places of settlement but such as were unable or unwilling to work." And a little farther on—"After the Restoration, a very different plan was adopted, and which has rendered the employment of the poor more difficult, by authorising the *sub-division of parishes*; *has greatly increased their number by confining them all to their respective districts*; has given birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive lawsuits between contending neighbourhoods, concerning these settlements and removals."

Notwithstanding numerous attempts made from time to time to remedy the defects of the English poor law, the evils of the system reached such a height in 1833, that a commission of inquiry was issued—the evidence is condensed in a volume entitled, "Extracts from the Information received by his Majesty's Commissioners as to the Administration and Operation of the Poor Law. Published by authority." The evidence as to the tendency of a strict law of settlement for paupers, is to the following effect—that the general effect of the system is, to stop the circulation of labour (p. 267)—that the consequence of a labouring man having been frugal, and having saved money, was, that no one would employ him—"he must be reduced to a state of beggary before any one would employ him"—"he cannot get work in his own parish, and he will not be allowed to get work in other parishes." The witness says—"A labouring man who saves, where such an abominable system prevails, is foolish in doing so"—"as far as the circulation is concerned, the evil can only be put a stop to by utterly abolishing the law of settlement, and establishing an uniform national rate, so as to allow a man to be relieved at the place where he is in want, instead of being pinned to the soil."

Now, all through this evidence—though many witnesses find fault with the system of confining paupers to parishes—there is not one who views this restriction as encouraging to enterprise; and would not the individualizing of responsibility effect this "pinning to the soil," which in England was complained of so universally?

Besides instances of labourers who would have removed, if they could, before they became paupers, there is evidence, also, of another and more numerous class—where labourers would not remove, even where advantageous opportunities for so doing offered, lest, by so doing, they might lose their settlement.

The Rev. R. Bailey, Chaplain to the Tower, and who is stated as having had extensive opportunities of observing the operation of the poor laws in the rural districts, states, that he considers "the present law of settlement renders the peasant, to all intents and purposes, a bondman; he is chained to the soil by the operation of the system, and it forbids his acquiring property, or enjoying it openly or honestly." "There is no doubt that if the labourers were freed from their present trammels, there would be such a circulation of labour as would relieve the agricultural districts"—

"that the labourers of the parishes with which he was connected were fully aware that it was not their interest to advance their condition by the acquisition of property"—that "when the gentlemen in the neighbourhood of Henley contemplated the establishment of a savings' bank, he thought it his duty to address the young men on the subject, after morning service, and urge upon them the propriety of saving, for their protection against the contingencies of sickness and old age. He was listened to attentively, and asked, whether he honestly thought it would not be for the benefit of the parish, more than of themselves, if they saved? and that, on consideration, he could not state that it would be for their benefit to save." "The decided conviction of the whole body of the labourers was, that any saving would be for the benefit of the parish and the farmers, and not for the benefit of the individual saving."

Here is an exhibition, in practice, of the natural result of confining labourers to a small district or parish, and, at the same time, requiring the farmers and owners of property to relieve its pauperism. And is not this what is meant by property supporting its poverty?

The evidence contains the most disgusting instances of immorality, both in the rate-payer and in the pauper, from the endeavour of the first to prevent, and the second to gain, a settlement—for these we must refer our readers to the book itself.

The report of the Rev. H. P. Jeston, Rector of the parish of Cholesbury, representing the state of his parish, gives a picture so similar to the present state of many of the distressed localities in Ireland, that we cannot avoid transcribing it: "The present state of the parish [January, 1833] is this, the land almost wholly abandoned (sixteen acres only, including cottage gardens, being now in cultivation)—the poor thrown upon the rates, and set to work upon the roads and gravel pits, at the expense of another parish;" and he observes, "so long as it continues a parish of its present small extent, with its present number of poor, the property must be an incumbrance to the proprietor; for he can expect no rent, the rates assessed upon the land far exceeding its value." On this communication, the Assistant Poor Law Commissioner made the following observations:—"It is obvious that the instant the poor rate exceeds the nett surplus produce, the existing cultivation becomes not only unprofitable, but a source of absolute loss; and that as every diminution of cultivation has a double effect in increasing the rate on the remaining cultivation—the number of unemployed labourers being increased at the same instant that the fund for the payment of rates is diminished—the abandonment of property, where it has once begun, is likely to proceed in a constantly accelerated ratio."—p. 89.

Must we never profit by the experience of others? Must Ireland go through years of misery, as England did, to learn that a stringent law of settlement is ruinous to the proprietor and to the farmer, and demoralizing to the pauper? Ireland is not yet entangled within the meshes of this system—she may yet avoid it—but let her proprietors and great ones reflect, that if they once

get in, they will find it very difficult to disentangle themselves.

—Facilis descensus averni est,
Sed revocare gradum,
Hoc opus hic labor est.

It may be said, that the evils detailed in the evidence alluded to, were removed by a subsequent act, but it must not be forgotten that these evils were the consequence of, and attributed to, a stringent law of settlement, and yet not so stringent as that now demanded by that body of the Irish proprietors who insist that each *estate* must support its own poor.

To remedy those evils, the 4th & 5th Wm. 4, c. 76, was passed. On this occasion, as the Roman senate had recourse to dictators in cases of great emergency and danger, so the legislature had recourse to the Poor Law Commissioners to extricate them from the difficulties in which they found the country involved. However, there is this great difference between the two appointments—the Roman dictator was called into power for a very limited period, to put an end to the difficulties of his country, whilst the Poor Law Commission bids fair to be perpetual; and there is no anticipation of its putting an end to the embarrassments which called it into existence.

In the act, likewise, the legislature has declared its opinion as to the effect of confining the labouring poor within very confined districts; far from allowing parishes to be still further subdivided, it enacts in the 26th section, "that it shall be lawful for the Poor Law Commissioners, by order made under their hand and seal, to declare so many parishes as they may think fit, to be united for the administration of the law for the relief of the poor, and such parishes shall thenceforth be deemed a union for such purposes." Again, in the 33d sec. it enacts "that it shall be lawful for the guardians of parishes to agree that, for the purposes of settlement, such parishes may be considered as one parish, and the settlement of a poor person in any one of the parishes of said union shall be considered, as between the parishes, a settlement in such union." A plain intimation that the parliament of England, who were well acquainted with the effect of a stringent law of settlement, thought it would be for the advantage of the country to facilitate the circulation of labour—a salutary principle, which has obviated many of the evils it was introduced to counteract, and which is regarded with such apprehension by the majority of Irish proprietors.

Amongst the many evils incident to the law of settlement, the amount of litigation occasioned by it must not be considered as unworthy of notice. This arose to such a height as in the 11 & 12 Vic. to call forth a special act of parliament to check it. And though, since then, litigation may have been diminished, there is yet quite enough, arising from disputes as to settlement, to occupy the almost exclusive attention of the English Quarter Session Courts.

Does any one deny that individualizing responsibility will lead to a law of settlement? If each proprietor be held responsible for the support of the poor on his own estate, he will, doubtless,

take care that no additional families shall intrude on him; he will also employ or feed only his own poor. Here we recognize the features of a most stringent law of settlement; each pauper is fixed to a particular estate, and confined within its limits as completely as if it were bounded by an impassable barrier. The universal operation of such a system would lead to a total stagnation of labour, and reduce the pauper to a serf—he might well envy the beast of the field—who would pass into richer hands when his owner became unable to feed him.

Who are those who demand this individualizing of responsibility? Surely not the owners of property who have no capital, whose estates are embarrassed and overpeopled. Let the rich owners of unembarrassed property beware, lest, lured by the prospect of a transient advantage, they may place themselves within a system of machinery which will eventually crush them. Individualizing responsibility will ruin many estates, rates in aid will follow—

"Eheu!

Quam temere in nosmet legem sancimus iniquam."

Do they expect that Irish peasants and labourers will be less slow than English in discovering that, by improving their circumstances, they are not benefitting themselves, but the proprietor? Do they expect that Irish landowners will be less astute than English in discovering reasons why they should not be burthened with a particular pauper, or less strenuous in asserting their supposed or invented legal rights? Do they imagine they will get Irish paupers to work without an object to gain, and Irish landlords to refrain from litigation when they have something to litigate for?

The framers of the Irish Poor Law might, with much advantage to the public, have studied the following passages from Blackstone:—

"A plan was formed in the reign of Queen Elizabeth more humane and beneficial than even feeding and clothing of millions, by affording them the means, with proper industry, to feed and clothe themselves; and the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable, and even pernicious, their visionary attempts have proved."

"There is not a more necessary or more certain maxim in the frame or constitution of society, than that every individual must contribute his share in order to the well being of the community, and surely they must have been deficient in sound policy who suffer one-half a parish to remain idle, dissolute, and unemployed, and are at length amazed to find that the industry of the other half is not able to maintain the whole."

—◆—
A Treatise of the Law of Property, as administered by the House of Lords. By SIR EDWARD SUGDEN. London, Sweet.

A MIND so active as that of the author could not rest happy without occupation, and our Ex-Chancellor has employed the period of his judicial leisure in the production of the work, the subject of our notice. It speaks well for that constitution of mind,

which, after a life of no ordinary mental activity, can find itself so braced to labour and intellectual exercise, as still to devote itself to toil, and, without the necessity of exertion, to exert itself.

The author brings to his task qualifications peculiarly adapted to its successful accomplishment. His work, above all others, is not "written to-day from the learning of yesterday;" neither is his knowledge gained as he writes—as is the case of many a literary journeyman, who commences his subject trusting to readiness of perception rather than profundity of knowledge, and when it is completed, only then begins thoroughly to understand it; but the criticisms of Sir Edward Sugden are the result of thorough familiarity with the matter criticized—a familiarity derived from the study of a long life, quickened by the knowledge acquired as Advocate, sobered by that gained as Judge, and stimulated by a sense of self-love; for no one likes a decision to be reversed by a tribunal which is not acquiesced in as the most competent.

The first part of the work is devoted to a brief historical sketch of the history of the jurisdiction of the House of Lords, and a very meagre statement of the various plans proposed for its amendment. The writing is always perspicuous, a characteristic which attaches to all the other works of the author. Without being an original or bold thinker, he is an excellent workman; he arranges his materials skillfully, with great regard to order, method, and arrangement; and his compositions are always well finished.

We pass over the well-known historical fact, that the House of Lords had no inherent jurisdiction either to hear causes or appeals, and that the right to the latter, after violent contests with the House of Commons, was at length established in 1675, in Dr. Shirley's case. The bounds of that jurisdiction are now pretty accurately defined; the House possesses no appellate jurisdiction over ecclesiastical, maritime, colonial, bankruptcy, or lunacy cases; but there is an appellate jurisdiction for the United Kingdom, for all cases at law or in equity, as to the latter, even—on interlocutory orders,—except those cases at law where a statute prescribes a particular mode of adjudication, and does not reserve the right of appeal. It was, indeed, doubted by Lord Eldon—and on what subject did he not doubt?—and by Lord Redesdale, that there was jurisdiction over cases disposed of summarily by the Courts below. An Irish case, *O'Neill v. Fitzgerald*, (3 Bli. N. S. 24,) so late as the year 1829, gave rise to the doubt. A clerk of the Court of Exchequer having forged cheques, transfers were fraudulently made of sums standing to the credit of one cause to the credit of another. The despoiled creditors moved that the Accountant-General should replace the stock; the contest by motion was between him and the Bank of Ireland. The Court decided against the Accountant-General, from which decision there was an appeal. The point of jurisdiction was started by Lord Redesdale, and was subsequently argued with distinguished ability by Mr. Hart, and also by Mr. Shadwell. To our minds, their arguments were convincing; there was, however, no direct adjudication; the case was sent back to the court of

Exchequer, who declined to make any other order, and on its coming back to the House, that order was reversed without argument.

Such being the limits of the jurisdiction, has it been, or is it satisfactorily exercised?

We give the quotations of our author, which prove that in the mean, low, and profligate age in which Charles the Second reigned, it was not. Sir Mathew Hale observes, "Whatever the extraction of men be, yet they were not born with the knowledge of the municipal laws of a kingdom, nor could be supposed to be inspired with the knowledge of the law by the acquiescent or descent of a title of honour..... They daily observed that in particular cases when they came before a multitude of judges, especially that were great men, and therefore not easily controllable, persons concerned in suits met with some that were their kindred, friends, favourers, landlords, tenants, or relatives, and it was grown a fashion in the Lords' House, for lords to patronize petitions—a course that, if it were used by the judges in Westminster Hall, would be looked on even by parliament itself, as undecent. Such addresses were undecent, indeed intolerable to be found among judges, who must not know persons in judgment, nor be *sweetened* by such kind of applications."

And Lord Shaftesbury, in his speech in Dr. Shirley's case, "prayed the lords to forgive him if, on this occasion, he put them in mind of committee dinners, and the scandal of it, those drives of ladies that attended all causes; it was come to that pass, that men, even hired or borrowed of their friends, handsome sisters or daughters to deliver their petitions. But yet, for all that, he must say, that their judgments had been sacred, unless in one or two causes."

We shall probably be excused for our incredulity, if we doubt the truth of the last sentence, more especially when we quote the further influence brought to bear. Burnet mentions that Charles the Second went commonly to the House of Lords, and "became a common solicitor, not only in public affairs, but even in private matters of justice. He would in a very little time have gone round the house, and have spoken to every man that he thought worth speaking to, and he was apt to do that upon the solicitation of any of the ladies in favour, or of any that had credit with them. He knew well on whom he could prevail; so being once, in a matter of justice, desired to speak to the Earl of Essex, and the Lord Holles, he said they were stiff and sullen men; but when he was next desired to solicit two others, he undertook to do so, and said 'They are men of no conscience, so I will take the government of their conscience into my own hands.' Yet when any of the lords told him plainly that they could not vote as he desired, he seemed to take it well from them."

Now, however, the case is very different; then the lay lords attended numerously, now they altogether abandon this branch of their duties, and delegate them to the few law lords who have been honoured with a peerage. The instances in which

* Hale, as judge on circuit, was by custom entitled to six loaves of sugar from a corporation, which he insisted upon paying for, because the corporation had a case before him for trial.

the lay peers have attended and voted on law questions, are remarkably few. For the last hundred and fifty years, as collected by our author, and in the note to *O'Connell and others v. the Queen*, (11 Clark & Finelly, 425), they do not exceed eight, some of them cases of fact, or involving a question of public right and importance. *Reeve v. Long* was the first, and there the judgment was reversed, against the opinion of all the judges, and on general principle and common sense, very properly reversed—it having been decided by the court below, that in the case of a contingent executory limitation, a posthumous son deriving under a will, could not take, where the particular estate determined before he came into *esse*.

The next was that of *Cary v. Bertie*, which was an appeal from the Chancellor, and where there was a limitation over in the event of the lady not marrying a particular individual within a limited time, which she did not do. The parties interested were both of high birth, and a pamphlet was written against the Chancellor, by Mr. Bertie, the husband of the lady.

The third, *Ashby v. White*, was a very proper case for the lay lords to vote upon. The judges were as nearly as possible divided, the question being whether an action on the case would lie against the sheriff, for refusing the vote of a burgess. It was held in the court below it would not, and this decision was reversed.

The next great case was the celebrated Douglas one, where the question was one of legitimacy, purely one of fact, and on which a lay lord was quite competent to form an opinion.

The cases of *Fitzgerald v. Fauconberge*, *Alexander v. Montgomery*, and *Hill v. St. John*, were legal questions, and which probably had been better left to the law lords. The last was that of the *Bishop of London v. Ffytche*, where the question arose as to the illegality of a general resignation bond. The House of Lords, contrary to the settled law, and to the opinion of all the judges, on the general question, held such a bond to be illegal. They were, perhaps, right on general principle, but the better course would have been, to have legislated, as they subsequently did, upon the subject, and not to have run counter to the universal opinion of the judges.

The last important general case was that of the *Queen v. O'Connell*, and in that case—in our judgment, very weakly—the lay lords abandoned one of the highest functions with which they have been entrusted by the constitution of this country.

We shall, in a future number, return to the interesting work we have been, more extracting from than reviewing.

Court Papers.

Chancery.

February, 14.—The following gentlemen took the usual oaths on being appointed Her Majesty's Counsel.

Henry Joy, Mathew Sausse, Oliver Sproule, Charles Rolleston, David Lynch, Vincent Scully, Richard Deasy, Thomas O'Hagan.

CIRCUITS OF THE JUDGES.

SPRING ASSIZES, 1849.	HOME.	MUNSTER.	NORTH-EAST.	NORTH-WEST.	LEINSTER.	CONNAUGHT.
	L C J Blackburne L C J Doherty.	Baron Richards, Justice Ball.	L. C. B. Pigot, J. Crampton.	B. Pennefather, Justice Torrens.	Justice Perrin, Justice Jackson.	Baron Lefroy, Justice Moore.
Monday, Feb. 26	Trim.	... ..	... ..	... ..	... ..	... ..
Tuesday, ... 27	... ..	Ennis	Drogheda	Longford	Wicklow	Roscommon
Thursd. March 1	Mullingar	... ..	Dundalk	... ..	... ..	... ..
Friday, ... 2	... ..	... ..	... ..	Cavan	Wexford	... ..
Saturday, ... 3	... ..	... ..	... ..	... ..	... ..	Carrick-on-Shan-
Monday, ... 5	Tullamore	... ..	Monaghan	... ..	... ..	[non
Tuesday, ... 6	... ..	... ..	... ..	... ..	Waterford and	... ..
Wednesday, 7	... ..	Limerick & City	... ..	Enniskillen	[City	Sligo
Thursday, ... 8	... ..	... ..	Armagh	... ..	... ..	... ..
Friday, ... 9	Maryborough	... ..	... ..	... ..	... ..	... ..
Saturday, ... 10	... ..	... ..	... ..	Omagh	Clonmel	Castlebar
Tuesday, ... 13	... ..	... ..	Downpatrick	... ..	... ..	... ..
Thursday, ... 15	Carlow	... ..	... ..	Lifford	... ..	... ..
Friday, ... 16	... ..	... ..	... ..	... ..	... ..	Galway & Town
Monday, ... 19	... ..	... ..	Carrickfergus &	Londonderry and	... ..	... ..
Tuesday, ... 20	Nas	Tralee	[Town	[City	Kilkenny & City	... ..
Saturday, ... 24	... ..	... ..	... ..	... ..	Nenagh	... ..
Monday, ... 26	... ..	Cork and City	... ..	... ..	... ..	... ..

(Continued from p. 112.)

17. That after the passing of this act any person claiming any interest in any land or lease may enter a caveat in the office of the registrar of the court against the sale of such land or lease, by order of the court or otherwise, and in such caveat shall be mentioned the place of abode of such person, or some place of address to which notices may be sent; and such person shall be entitled to and shall have notice of all subsequent proceedings to be taken upon any reference under this act relating to the land or lease mentioned in such caveat; (that is to say,) where the place of abode or address mentioned in such caveat shall be in the city of *Dublin* such notice shall be served on such person personally or left with some inmate of such place of abode or address, being of the age of sixteen years or upwards, and where such place of abode or address shall be elsewhere than in the city of *Dublin*, such notice shall be transmitted through the Post Office, addressed to such person at such place of abode or address.

18. That all persons claiming any interest in such inquiries in the usual manner may appear before the master under any reference under this act, and claim to take a part in the proceedings under the reference, and the master shall have power to determine what parties may attend before him and take a part in the proceedings under the reference, and upon what terms; and the master in his report under any reference shall state by what persons he has been attended, and also what (if any) persons, and in respect of what inquiries, he has prohibited from attending before him, and also what (if any) persons shall after notice to them have neglected to attend; provided that no omission of the master to cause any such notice to be given shall vitiate any proceedings before the master, unless the court, upon application, or otherwise, in the course of proceedings in the matter in which such reference shall have been made, shall determine otherwise.

19. That any person whose attendance before him the master shall have disallowed, and also any person complaining of any act of the master in any case not specially provided for, or requiring the direction or order of the court in any proceeding before the master, may apply to the court against such disallowance, act, or proceeding, or for such direction or order, but so that no such application complaining of any disallowance, act, or proceeding of the master shall, without special leave of the court, be made, unless within fourteen days after the act complained of, if the court be then sitting, and if the court shall not be then sitting, unless notice of such intention to apply at the sitting of the court be given within fourteen days to the party petitioning for such sale.

20. That all the directions in this act as to proceedings before the master and in court shall have such and the same force as if the same were orders of the court, and the court shall have such and the same powers and authorities in relation to all such proceedings and in relation to the costs of or incident thereto, as the court would have if such directions were orders of the court, and were not expressly contained herein.

21. That when any incumbrance shall be subject to any limitations of estate or interest, or shall be held upon any trust, the first person entitled to the income of such incumbrance, or the trustee or other person whom the court may think fit, shall be the person to make any application or give any consent under this act in respect of such incumbrance.

22. That where any person who shall be entitled to any charge not being an incumbrance within this act (including any such apportioned charge as herein-after mentioned) shall be willing to accept a gross sum in satisfaction of such charge, the master, if he shall think fit, may treat and include in his report such charge as an incumbrance within this act; and that where any land or lease a part only of which shall be contracted to be sold shall be subject to any such charge not being an incumbrance or to any incumbrance from which the land or lease contracted to be sold shall not be otherwise discharged under the provisions of this act, the master, if he shall see fit, may approve of the part not contracted to be sold of such land or lease being charged with such charge or incumbrance in exoneration of the land or lease contracted

to be sold, or to approve of an apportionment of such charge or incumbrance between the land or lease to be sold and the residue of the land or lease subject thereto, with the consent in either case of all parties interested in the part of such land or lease not contracted to be sold, and to include such matters in his report: provided that a sale by order of the court may be made before all the accounts of incumbrances are taken, or the rights of incumbrancers ascertained, if the court shall so direct.

23. That the report of the master as to the expediency of sale, and all other reports, affidavits, orders, and other proceedings, shall, so far as consistent with the provisions of this act, or with any rule or order of the court, or of the Lord Chancellor, to be made as herein-before provided, be filed according to the rules and practice of the court in causes or matters; and that at the expiration of fourteen days after the filing of the report, as to parties who shall have appeared before the master, and as to all other persons, at the expiration of one month after the filing of any report approving of a sale, if no application shall be made, or shall be pending before the court, complaining of such report, or of any proceedings of the master under the reference under which such report shall have been made, the court, upon the application of any party interested in such report, (and without the attendance of counsel, unless the court shall see fit to direct such attendance), may confirm the report, and to direct a sale to be made by the master, and that after confirmation of such report no person shall make any application complaining of the same without special leave of the court.

24. That any order for sale to be made by the court, may include the whole, or any part or parts of the incumbered land or lease, and may provide that the land or lease, or the part or parts thereof to be sold, shall remain subject to any incumbrance which the court shall think fit; and such order shall specify the land or lease, or the part or parts thereof, which shall be directed to be sold, and also the incumbrances and charges (if any) to remain charged on the land or lease to be sold, and also the incumbrances and charges (if any) to remain charged on any land or lease, or part or parts thereof, not included in the sale, and whether such incumbrances and charges are to be charged on any such land or lease or part thereof exclusively, or in common with any other land or lease or part thereof, and whether with priority of charge, or liability in respect of any such land or lease or part thereof, or otherwise, and all such other matters incident to the sale as the court shall think fit.

25. That it shall be lawful for the court to order the whole of any incumbered land or lease to be sold, although the master shall have approved of the sale of a part thereof, or to order a further or other part or further or other parts thereof to be sold than what the master shall have approved, and to alter or vary such report, and the plan or scheme therein contained, and to confirm such report, subject to such variations, without any further reference to the master.

26. That previously to making any order for sale the court may make any order of confirmation of the report nisi, and direct service of such order on any person or persons, and also the court, in the course of any proceedings under this act, may direct any reference back to the master to review such report, and upon any terms and with any directions, the court shall think fit.

27. That the assurance of the land or lease sold by order of the court shall be made in such form in all respects as the master shall direct, and that the master shall execute the same, and execution thereof by any other party shall not be necessary for the validity thereof, nevertheless the master may direct any other persons to execute the same, for the purpose of covenanting for title, or for the production of title deeds and evidences, or otherwise; and the assurance shall be made to the purchaser, his heirs, executors, administrators, and assigns, or as he shall direct; and in case the assurance shall be a conveyance upon a sale of land under this act the same shall be effectual to pass the land thereby expressed to be conveyed, and the fee simple and inheritance thereof, to the uses and in manner therein limited and expressed, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever of

her Majesty, her heirs and successors, and of all other persons whomsoever, save such charges and incumbrances, shall be thereby excepted, and as herein-after provided; and in case such assurance shall be a conveyance or assignment of a lease in perpetuity or other lease as aforesaid, such assurance shall pass the estate created or agreed to be created by such lease then remaining unexpired, subject to the rent and covenants annexed to the reversion, but discharged from all rights, titles, charges, and incumbrances whatsoever affecting the leasehold title or interest, save and except such charges and incumbrances, if any, as shall be thereby excepted, or expressed to be or to remain charged upon such leasehold estate or interest, and except also as herein-after provided.

28. That no such assurance shall prejudice the rights of any lessee, tenant, or occupier in possession, nor the rights of any lessee or under lease at a rent, subject to whose lease or under lease the petitioning owner or incumbrancer applying to the court under this act shall be an owner or incumbrancer, nor any right of common, nor any right of way or other easement, nor any rent-charge in lieu of tithes, crown rent, or quit rent, charged upon any land, except in respect of the apportioned part, of any such rent-charge, crown rent, or quit rent from which the same shall be expressed to be discharged by such conveyance under the provisions herein contained.

29. That subject as herein-after mentioned, the purchase money to arise on any sale by order of the court under this act shall be paid into the bank of *Ireland*, in the name of the Accountant-general, to his account in the matter of "The Act to facilitate the Sale of Incumbered Estates in *Ireland*," *ex parte* as aforesaid, to the credit of the matter of such sale, or as the court shall direct, and the same shall be applied in payment of the incumbrances which affected the land or lease from the sale of which such purchase money shall have arisen, by order of the court from time to time made upon petition to be preferred by any person entitled under this act.

30. That where any land, or any lease in perpetuity of land in *Ireland*, shall be subject to an incumbrance or incumbrances, the owner of such land or lease may, without the order of the court, sell such land or lease, or any part thereof, and upon payment of the purchase money into the bank of *Ireland* in manner herein-after provided to convey such land or lease to the purchaser, &c., unless after such publication of notice as herein-after directed such sale or conveyance shall be restrained by order of the court under the provision herein-after contained.

31. That where any land, or any lease in perpetuity of any land in *Ireland*, shall be subject to an incumbrance or incumbrances, the incumbrancer entitled to any such incumbrance, in case the principal money owing on such incumbrance shall be actually payable, or in case any interest thereon shall be in arrear for twelve months or upwards, may give notice in manner herein-after provided to the owner of such land or lease, requiring him to discharge the money due and payable on the incumbrance of such incumbrancer for principal, interest, and costs, or to proceed to raise a fund for the discharge thereof by sale; and in case such owner shall not at the expiration of six months after such notice pay the money then due on such incumbrance for principal, interest, and costs, and shall not have published notice by advertisement of his intention to sell such land or lease, or a part sufficient for the discharge of the money due and payable on foot of such incumbrance for principal, interest, and costs, the incumbrancer, without the order of the court absolutely, may sell such land or lease, as the case may be, or any part thereof, and upon payment of the purchase money into the bank of *Ireland* to convey such land or lease to the purchaser, &c., unless after such publication of notice as herein-after provided such sale or conveyance shall be restrained by order of the court under the provision herein-after contained; and where at the expiration of such six months such owner shall not have paid the money due on such incumbrance, but shall have published notice by advertisement of his intention to sell such land or lease, and shall subsequently neglect to sell in pursuance of such notice, the court, upon the application of such incumbrancer, by peti-

tion in a summary way, may direct that such incumbrancer shall have the benefit of such publication and notice by advertisement, and thereupon such incumbrancer may sell as such owner might have done, and the conveyance by such incumbrancer shall have the same operation as a conveyance by such owner, but except for the purposes of this provision such sale and conveyance by such incumbrancer shall be deemed a sale and conveyance without the order of the court: provided that no incumbrancer shall sell or give notice as herein provided of his intention so to do, unless the principal sum of two hundred pounds at the least shall be owing on his incumbrance.

32. That where incumbrancers entitled to more than one such incumbrance as aforesaid shall have given several notices to such owner, and such owner shall not have paid the money due and payable on such incumbrances, and shall not have published notice of his intention to sell, or having published such notice shall have subsequently neglected to sell, such of the incumbrancers by whom notice shall have been given to such owner as shall be entitled to the first incumbrance in order of priority shall have the power of selling and conveying which one incumbrancer giving notice to the owner would have had under the provisions herein-before contained; but upon the refusal or neglect of the incumbrancer entitled to such first incumbrance to exercise such power of selling, the court, upon the application by petition in a summary way of any other of the incumbrancers who shall have given notice to the owner, may direct that the incumbrancer so applying may exercise the power of selling and conveying which might have been exercised by the incumbrancer so refusing; but, except for the purposes of this provision, a sale and conveyance in exercise of such power shall be deemed a sale and conveyance without the order of the court.

33. That the notice to be given by an incumbrancer to an owner as aforesaid shall be given in writing to such owner or left at his usual place of abode, or in case such owner or his place of abode shall not be known, or in case such owner shall be out of the United Kingdom, or in case from any other cause the incumbrancer shall be unable to give such notice, such incumbrancer may file an affidavit in the court showing his inability to give such notice, and thereupon the court, upon the application of such incumbrancer, by petition in a summary way, may direct that such notice shall be served upon such owner wherever resident, or that service thereof upon his solicitor and land agent shall be deemed good service thereof on such owner, or to direct the substitution of service of such notice as to the court shall seem fit.

34. That every owner and every incumbrancer who shall propose to sell any land or lease without the order of the court shall cause notice of his intention so to sell to be published at least once in four successive weeks in the *Dublin Gazette*, and in two newspapers published in *Dublin*, and in one newspaper published or circulating in the county in which the land shall be situate, and in the *London Gazette*, and shall cause a copy of such notice to be posted in one or both of such two weeks on the church (if any), and on the Roman Catholic chapel (if any), and where there shall be no such church or chapel on some public or conspicuous place of the parish, or of each of the parishes in which the land shall be situated, and on the court where the sessions of the peace for the division of a county at large or for the city or town or county of a city or town in which the land shall be situated are usually holden; and where any person shall have entered a caveat in the office of the registrar against the sale of any land or lease under the provisions of this act, every such owner and incumbrancer shall cause a copy of such notice to be served in one of such weeks on such person in manner herein-after mentioned; (that is to say,) where the place of abode or address mentioned in such caveat shall be in the city of *Dublin* shall cause such copy to be served on such person personally, or to be left with some inmate of such place of abode or address, and where such place of abode or address shall be elsewhere than in the city of *Dublin* shall transmit such copy through the Post Office, addressed to such person at such place of abode or address as aforesaid, and such notice shall state the name and addition or title of the owner, and if the sale shall be proposed

to be made by an incumbrancer the name and addition or title of such incumbrancer, and the intention of such owner or incumbrancer, to sell under the provisions of this act without the order of the court, and in case such owner shall not be entitled absolutely to such land or lease, or to the equity of redemption thereof, shall mention the settlement, will, or other assurance under which he shall be owner, and if such sale shall be proposed to be made by an incumbrancer shall mention the incumbrance under which he shall be such an incumbrancer, and in every case shall state the denomination or sub-denomination or short description of the land or lease proposed to be sold, and the county and the barony or parish or place wherein such land or the land comprised in such lease shall be situate, and all the incumbrances affecting such land or lease known to the person proposing to sell the same, and any other matters which may from time to time be directed or required by such orders of the court as herein-after mentioned; and no such sale without order of the court shall be made under this act before the expiration of three months after the publication of the last of such advertisements as aforesaid, in the computation of which period of three months the months of *September* and *October* shall be excluded; and it shall be lawful for any incumbrancer or person interested in the land or lease proposed to be sold before the expiration of such three months to apply to the court by petition, and the court, upon such petition, having reference to the amount and nature of the interests of the person proposing to sell, and of the incumbrancer so applying to the court, and to all the circumstances of such land or lease, and of the incumbrance or incumbrances affecting the same, may restrain the person proposing to sell as aforesaid from proceeding with such sale, either as respects the whole of the land or lease, or as respects any part or parts thereof, which it may appear to the court unnecessary to sell, or may require security to be given to such petitioner, or may give to such petitioner the conduct or right of supervision of the proposed sale, so far as the court may not restrain the same, or may make such order in relation to such petition and to costs as the court shall think fit; and the Lord High Chancellor of *Ireland*, with the Master of the Rolls, may make from time to time orders prescribing and regulating the particulars to be included in the notices of such sales, and such other orders for or concerning such notices, as shall appear necessary for ensuring the knowledge by incumbrancers and persons interested of the sales proposed to be made.

35. That where the owner of any land which shall be proposed to be sold without order of the court shall not be entitled for an estate of inheritance in possession to such land, the owner or incumbrancer who shall propose to sell such land shall cause a copy of such notice of his intention so to sell to be served personally, or in such manner as under the rules and orders of the court would be deemed equivalent to personal service, on all persons except such owner having estates in remainder or other future estates in such land other than such estates, if any, as may be subsequent to the first vested estate of inheritance therein; and where the owner of any lease which shall be proposed to be sold as aforesaid without order of the court shall not be entitled for the whole estate created or agreed to be created by such lease, the owner or incumbrancer who shall propose to sell such lease shall cause a copy of such notice to be served personally, or in such manner as aforesaid, on all persons except such owner having remainders or future estates in such lease other than such remainders or estates, if any, as may be subsequent to the first vested estate quasi in tail therein; and such notices shall be given before the publication of such notices by advertisement as aforesaid; or where any such person entitled to any such remainder or future estate, except as aforesaid, in such land or lease shall be infant, idiot, lunatic, or a married woman, a copy of such notice shall be so served on the father or guardian of any such person being an infant, or on the committee of any such person being an idiot or lunatic, or on the husband of any such person being a married woman; and where any such infant shall not have a guardian, or the father of such infant shall be the person proposing to sell, or where any such idiot or lunatic shall not have a committee duly appointed, or where any notice

required by this provision cannot be given, the person proposing to sell may apply to the court by petition; and the court may order notice to be given to any other person, for and on behalf of such infant, idiot, or lunatic, and in such manner and within such time as the court may direct, or to direct any substituted service of any such notice; and every person on whom such notice shall be served on behalf of any such infant, idiot, or lunatic, shall have the like power of applying to the court in relation to such sale as such infant, idiot, or lunatic would have had if free from disability.

36. That no such notice of an intention to sell any land or lease shall prejudice or affect the right of any mortgagee, or other incumbrancer of or upon such land or lease to commence any proceeding for redemption, foreclosure, or other proceedings at law or in equity, or the right of any mortgagee of such land or lease who shall have under the security a power of sale which has arisen and may be exercised, to proceed to the exercise of such power of sale, any time before a sale shall have been made under this act.

(To be continued.)

In the Matter of Richard Samuel Guinness, Petitioner.

And in the Matter of the Acts of 33rd Geo. 2nd cap. 14, and 40th Geo. 3rd, cap. 22.

IN Pursuance of the Order made in this Matter, bearing date the 2nd day of February, 1849, I hereby require all persons who claim to be creditors of the said Richard Samuel Guinness, and have not proved their demands before Samuel Vignoles and John Berwick, Esqrs., Trustees of the Estate of Richard Samuel Guinness, and who shall to oppose the allowance of the Certificate of the said Richard S. Guinness as provided by said Acts, or desire to intervene under the said Acts, to come in before me at my Chambers on the Inn's Quay, City of Dublin, on or before the 2nd day of April next, otherwise I will proceed in their sense with the reference directed by the said Order.

Dated this 16th February, 1849.

EDWARD LITTON.

Dooner and McCay, Petitioner's Solicitors, 5, Kildare Street, Dublin.

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1843.

A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING, the 2nd February. Chair to be taken at Eight o'clock precisely.

SUBJECT FOR DEBATE.

"Has the Statute 8 & 9 Victoria, c. 109, s. 18, a retrospective operation so as to defeat an action for a wager commenced before the statute received the royal assent?"

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq. 11, Lower Ormond Quay.

JAMES O'DRISCOLL,
PROFESSED TROWERS MAKER,
9, ANGLESEA-STREET.

IRISH MANUFACTURE INDIAN RUBBER BLACKING, Manufactured by RICHARD KELLY, Boot Maker, 11, COLLEGE-GREEN, Dublin.

It makes the Leather soft, pliant and even Waterproof, sold by the Bootmakers and Grocers through the City, in Bottles at 6d, 1s, and 1s 6d. N.B.—Country Shopkeepers treated with on the most Liberal Terms. *Portobello March 2nd.*

Sir,

"I have examined your Indian Rubber Blacking, and find it made of those materials which are most proper for such a composition. It has great advantages in use not possessed by similar articles of manufacture; it is susceptible of a very high polish, it does not soil, and its permanent effect on the leather is of a beneficial character."

"THOMAS ANTIHALL,
Lecturer on Chemistry."

"Mr. Kelly, College-green."

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE-GREEN. Correspondents will please give the Name and Address, and the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE-GREEN, or by letter (post paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the 2nd of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, February 17, 1849.

THE Irish Jurist

No. 17.—VOL. I.

FEBRUARY 24, 1849.

Price {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.	Queen's Bench, including Civil Bill and Registry Appeals.....	{ FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARE HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.	Exchequer of Pleas, including Manor Court and Registry Appeals.	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, FEBRUARY 24, 1849.

THE universally acknowledged improvement made by the great Alfred in the laws of England, and transmitted—with variations from time to time—from his age to our own, was the establishment of tribunals for the trial of all causes, civil and criminal, in the very districts where the complaints arose. This principle has been partly carried out in Ireland, by dividing the kingdom into circuits, and commissioning judges to administer justice in the several counties; by the establishment of sessions of the peace to be held at stated periods in certain towns, and lastly, by the establishment of Petty Session courts.

Of these, the last—the Petty Session Courts—carry out much better than either of the others the great object of the common law, namely, the distribution of justice with cheapness, expedition, and ease. Considerable summary jurisdiction has been conferred on these courts from time to time by statute, and they have lately, by an act of the last session, received an increase, by having their summary jurisdiction extended over cases of simple larceny, when the age of the offender does not exceed fourteen years.

By this salutary enactment justices of the peace are empowered to convict and sentence juvenile offenders, in place of—as was the former practice,—sending them for trial to the next Quarter Sessions, and thus exposing them in the meantime, to the degradation and contamination of a prison, which, however necessary it may be to society, rarely has a beneficial effect on a prisoner.

In this act also there is a further power given to justices of the peace to admit to bail. There is no power committed into the hands of those who are charged with the distribution of justice among the lower orders of the Irish population, in the exercise of which a greater latitude should be allowed to the discretion of the magistrate, than in

that of admitting to bail. In many cases it would lead to great hardship even to require bail from a prisoner, though convicted. This is so plainly seen by magistrates in districts where trivial assaults—from hastiness of temper, without malice—are constantly occurring, that the following practice has arisen. In these trivial assault cases magistrates have a summary jurisdiction, and the offender, if convicted, is sentenced to pay a penalty, (generally a small one) or, in default of payment, to be confined for some short period in the county gaol; in some instances the fine is paid at once; where it is not, application is generally made to the court by the convicted parties, to liberate them till the next court day, on their engaging to appear in court on that day, and either pay the fine, or surrender themselves prisoners. Liberty is generally given, and though we have seen this indulgence very frequently accorded, we do not remember an instance where the parties have broken faith. In the generality of cases the fines were paid on the next court day, the money having been procured in the mean time; and, where the fines were not paid, the parties uniformly came in, and voluntarily surrendered. Among a poor population the expense of bail bonds, though very moderate, would be a greater obstacle to the liberation of prisoners than the procuring of sureties, and, in some instances, the expense would equal the penalty inflicted by the court.

Petty Session Courts derive their chief value from their being held so frequently, and their existing in every locality, thus distributing justice at every man's own door, with very little expense or delay.

The 6 & 7 W. 4, c. 75—the act by which the jurisdiction of the civil bill courts in Ireland is extended, and their proceedings regulated—intended that the distribution of justice, through the Quarter Session Courts, should be almost as general and convenient, but its provisions have not been in all instances properly carried out.

The 53d section, after reciting, that "it would facilitate the administration of justice, if a sufficient number of places were appointed for hearing, and determining causes by civil bill, and transacting the criminal, and other business at a general Quarter Sessions of the peace," enacts "that it shall, and may be lawful for the Lord Lieutenant, or other chief governor of Ireland, by and with the advice and consent of the Privy Council, to divide the several counties of Ireland, or any of them, or any riding, or division of a county, into as many districts as shall be thought proper or expedient, for the purpose of more conveniently hearing and determining causes by civil bill, and of transacting all such criminal, and all such other business, as may be cognisable, or determinable at any general or Quarter Sessions of the peace; and to appoint one or more convenient town or place, towns or places, in any such district in which a civil bill court, and a court for transacting such criminal and other business as aforesaid, shall be held. And every such district shall be distinguished by the name of such town or place. And every such session, and adjournment thereof, shall be good and effectual for the administration of criminal business, and civil bill cases, and doing all other business that may by law be done at the General Quarter Sessions of the Peace." And again it is enacted in section 59—"that it shall, and may be lawful for the Lord Lieutenant, or other chief governor of Ireland for the time being, by, and with the consent of the Privy Council, to direct that a general session of the peace and civil bill court shall be held four times in every year, in any or all of the times appointed for holding sessions. And the Lord Lieutenant, or other chief governor of Ireland for the time being, shall nominate and appoint the baronies, or half baronies, or parishes, for which respectively such sessions shall be held."

By this enactment the legislature seems to have done much to facilitate the administration of justice through these courts. Pursuant to these provisions, counties have been divided into districts, and places have been appointed for holding quarter sessions; but, that the arrangements made are not as conducive to public convenience as they might be, it is our intention to point out.

When informations are received by magistrates at Petty Sessions they are returned to the next Quarter Sessions for the division or district; now some of these divisions are very large; for instance in the Ballina division, in the county of Mayo, two of the Quarter Session towns, Belmullet and Swineford, are upwards of fifty Irish miles apart, and cases are constantly sent for trial from the Belmullet Petty Sessions to the Swineford Quarter Sessions. This is a great hardship both to the prosecutor, and the prosecuted, who are under the necessity of bringing their witnesses upwards of fifty miles from their homes, and of supporting them in a strange town until the trial comes on. In civil cases, likewise, considerable inconvenience is constantly experienced. At Belmullet, Quarter Sessions are held but once a year; hence, as plaintiffs, may bring their processes at any Quarter Sessions in the division, parties are constantly taken, with their witnesses,

to Swineford, upwards of fifty miles, or to Ballina, upwards of thirty, to defend themselves; or obliged, —when it is necessary to obtain a decree without delay—to proceed at the sessions held in either of these towns, occasioning much unnecessary hardship and expense; and further, processing for an unjust or doubtful demand, to a distant session, is sometimes successfully resorted to, to extort money by way of compromise, the defendant preferring to pay a small sum, to undertaking a long journey, which he must do if he adopt the alternative of defending himself.

Appeals, too, against the valuation of rateable property under the poor law, from the Belmullet district, would also be tried at either of those distant towns, unless its *annual quarter sessions* happened to take place within the time limited by law for appealing.

These inconveniences—if they do not deserve some worse name—are obviously the consequence of the great extent of the divisions, and of sessions not being held with sufficient frequency in some of the towns. This division of the county of Mayo is not a solitary instance, though, from its great size, it perhaps exhibits the faults of the system more glaringly than they appear elsewhere.

In poor districts, such as that county, the present arrangement should be altered, by diminishing the size of the district and increasing the number of Quarter Sessions within the year; or the jurisdiction of the Petty Session Courts should be extended, so as to embrace all simple contract debts of small amount. It seems almost ridiculous that wages can be recovered in these courts, and yet that in all other, even the most trifling simple contract debts—and, among a poor population, the great majority of those debts are very trifling indeed—recourse must be had to another, and often a distant tribunal, and one in which the cost of the proceeding, though very moderate, is frequently greater than the debt proceeded for. However, there is no necessity for a new enactment, as the provisions alluded to, if carried out in their true spirit, would render the Quarter Sessions Court sufficiently convenient for every purpose.

◆

A Treatise of the Law of Property as administered by the House of Lords. By Sir Edwd. Sugden. London, Sweet.

WHEN we stated in our last number that in our judgment the lay lords had, in the case of *O'Connell v. the Queen*, weakly abandoned one of the highest functions with which they have been entrusted by the constitution, we should, perhaps, have qualified the statement so far as to limit our condemnation to the fact of their not attending as judges, rather than that of their not voting. We think they—or those of them who had not heard the arguments—acted quite rightly in not voting when they had not been present during the consideration of the case, and had not throughout acted as judges. But we also think that not only on this, but on other occasions, by not taking part in the appeal business of the country, they have culpably neglected one branch of their duty, and delegated their entire appellate jurisdiction to a few law

lords. They have been invested with a very solemn trust—they have been for two centuries the arbiters of the nicest and most critical points of law in the last resort. "Yet, vast as this trust is, it can no where be so properly reposed as in the noble hands where our excellent constitution has placed it, because, from the independence of their fortunes, and the dignity of their station, they are presumed to employ that leisure, which is the consequence of both, in attaining a more extensive knowledge of the law than persons of inferior rank, and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth, which as, on the one hand, it will prevent either interest or affection from interfering in questions of right, so, on the other, it will bind a peer in honour, *an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.*"

So wrote Sir Wm. Blackstone nearly a hundred years ago, and the same point was earlier urged with as much force, and more quaintness, in the Doctor and Student, "As for knights and other nobles of the realm, me-seemeth that they should be bound to take knowledge of the law. * * *

And therefore if the noblemen of this realm would see their children brought up in such manner that they should have learning and knowledge more than they have commonly used to have in time past, specially of the grounds and principles of the law of the realm wherein they be inherit, (though they had not the high cunning of the whole body of the law) I suppose it would be a great help hereafter to the ministration of justice, a great surety for the prince, and a right great gladness to all the people."

Admittedly, however, the great majority of the members of the Upper House have not devoted themselves to the study of the law, neither for the reasons assigned by Blackstone, nor for any others, and they have not rendered themselves competent judges in the last resort; the duty was one of imperfect obligation, which they have not fulfilled, and they have in consequence felt themselves unfitted to form an independent judgment, and, whenever they attended at the hearing of appeals, they were on all questions of law either cyphers—following the advice of the Chancellor—or, if self-opinionated, their decision was mischievous, as calculated to unsettle the pre-existing law.

The "delicacy of sentiment" to which our great commentator alludes, was a very proper reason for the lay lords not voting in Mr. O'Connell's case, but their abstaining from so doing, for the reasons put by Lord Wharnccliffe, was tantamount to a confession of incompetence, and it must now be taken as conceded, that their appellate jurisdiction is confided to the few law lords whom professional eminence has raised to the peerage, and who are thus in truth its pillars.

Do then the few hands to whom this most arduous duty has been delegated, perform it satisfactorily? Our author thinks not:—"Undoubtedly much is required. Fixation of law, general rules not simply binding in law, and the guides which judges are bound to follow, but well founded in

law, and carrying with them the opinions of the great lawyers of the day, and satisfying succeeding generations. . . . It is rarely that any great principles of law are enunciated there; that any clear fixed rule is laid down as a rule for other courts."

This he attributes to a variety of causes; the frequent disagreements of the Lords, their never meeting and agreeing upon one uniform judgment, and the unsatisfactory nature of the early reports of the decisions. He admits, however, the present jurisdiction to have its excellences. "If the audience is not large, yet the court is open to all, and the importance of the place, the distance of the counsel from the judge, and the power which all the lords have of attending, afford an opportunity of being heard to advantage which no other place could give."

Our own early impressions of the austere dignity of the House of Lords, when sitting as the supreme court of judicature, were much lessened, if not wholly removed, on acquaintance; that solemn sanctity which invested it with a sort of mysterious awe in our imagination, was dispelled on closer scrutiny.

Whether the chamber of justice in the new House of Lords may be more imposing than that in the last, we have had no opportunity of judging, but the last certainly was not much calculated to excite feelings of legal reverence.

It was a room of no extraordinary dimensions. The place for the audience exceedingly limited—mere standing ground under the reporter's gallery—that for the bar exceedingly inconvenient, no better than a cockpit. Nor, on ordinary occasions, when the judges did not attend, was the appearance of the house itself imposing; the Chancellor alone was in his robes, the other law lords, few and far between, sat without any insignia of authority, or any very marked regard to attention and decorum. Lord Brougham, for instance, with an unvarying iniquity of manner, at one moment busy taking a note of the argument, the next jumping up, and approaching the woolsack, luring the Chancellor into conversation, or failing in that, walking to the bar to ask a question, or called out for ten minutes, and then returning to an argument, the thread of which had been interrupted.

Sir Edward Sugden remarks:—"Noble lords should not feel themselves at liberty to occupy the attention of the Lord Chancellor with any other subject during the hearing, and above all the Lord Chancellor should give to the argument his undivided attention."

We cannot forbear quoting the following very sensible observations, which are as applicable to a judge sitting in any other court, as to one in the House of Lords:—

"Nothing discourages a counsel so much as the inattention of a judge; it has a tendency to render him indifferent to his argument, for it is very distressing when one of great labour is thrown away, and, if he persevere, it leads to repetition, which in its turn disgusts the judge, and the court and the bar become mutually dissatisfied with each other. If a judge give, as he ought to do, his undivided attention to the argument, he encourages the

diligent, and stimulates the indolent, and he can always interpose with propriety when a counsel is rambling or repeating his argument. The great object of counsel must be to impress the judge with his view of the case, he always desires to succeed, when he is satisfied the judge comprehends him, his purpose is answered. The assistance which would be given to the House of Lords in a well regulated court of appeal, would at once impress upon it the forms of a court of justice, and as the highest, from which there is no appeal, it would feel bound to give its attention wholly to the cause, and would be able readily to keep counsel to the points really in dispute. It is not often possible to satisfy the losing side, but if the judge is incompetent or inattentive, the counsel who fails is sure to complain; his dissatisfaction quickly communicates itself to his client, the suitor, who has not the consolation which an attentive hearing and a well considered judgment would afford to him. Thus mens' minds are soured, and they become, not without reason, discontented with the best institutions of the country."

Though Sir Edward Sugden was himself a formidable judge to plead before, yet no man seemed to appreciate more keenly an able argument, or on such occasions did the advocate greater justice.

We have lingered so long that we must pass by the proposed plans of our author, Lord Cottenham and Lord Langdale, for the improvement of the appellate jurisdiction. The body of the work contains a review of the decisions of the House of Lords upon the law of property. We believe it will be very useful to the practising lawyer, as it presents in a point the authorities bearing upon every question discussed, and shows how far the law may be considered settled. The deduction by the author of the law on each head, is not sufficiently clear, which we regret, as it would have added much to the practical utility of the work; which will be found more useful in suggesting arguments than removing difficulties.

The reader is naturally attracted to the review of those decisions which the author himself had made, and which were subsequently brought by appeal before the House of Lords.

In *Heron v. Stokes*, the author still maintains his own opinion, though very temperately. The questions arose on a will of personalty. It was, undoubtedly, a case of considerable difficulty. Lord Plunket made a decree deciding that certain annuities were perpetual, grounding his judgment on a point of great importance, as he extended the rule in *Wild's case*, (6 Rep. 17,) as to real estate, to personalty, namely, that if A. deviseth his lands to B., and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; but if a man devise lands to A. and to his children or issue, and they then have issue, they shall have but a joint estate for life. Sir E. Sugden after stating, "I do not know that I ever bestowed so much attention upon a case lying within so small a compass," reversed the previous decision, being of opinion that if the will stood alone, the annuities were perpetual, (not on the authority of *Wild's case*, as to which he had great doubts, as to the possibility of applying its doctrine

to personal property,) because there was a gift of property producing the amount of the annuities, but he thought a subsequent codicil cut them down to life estates. The House of Lords reversed this decision, and held the annuities perpetual, on the ground stated by Sir Edward, that there was a gift of property producing the amount of the annuity, and that the gift being of a perpetual annuity, could not be cut down without "indication plain," which the codicils did not afford.

The value of the decision is not great, if it cannot be understood as affirming Lord Plunket's decree on the authority of *Wild's case*. Sir Edward observes truly enough, "It was decided upon another ground, and Lord Plunket's reliance on *Wild's case* was not supported on the re-hearing, or on the appeal." Now, directly it assuredly was not, but Lord Brougham stoutly defended the decision of Lord Plunket, and certainly agreed with him, 'that the rule in *Wild's case* of itself is applicable to personalty.'

Lord Campbell was more doubtful—"I do not consider myself bound by Lord Chancellor Sugden's doctrine on this subject. I am not clear that this principle may not be applied to a bequest of personalty."

Sir Edward, after vindicating himself from Lord Brougham's random charge—that he had looked to the margin of *Wild's case*, instead of to the case itself—by the most satisfactory proof in the world, as the only edition he possessed of Lord Coke's reports was that of 1727, in which there are no marginal notes, and having shewn that the noble lord could himself be inaccurate, labours with considerable success, by a review of all the authorities, to prove that the rule in *Wild's case* is inapplicable to personalty, and not strictly adhered to in realty, and having thus disposed of Lord Plunket and Lord Brougham, he attacks the decision on the grounds by which his own was reversed, and implies that the lords, in effectuating the intention of the testator, have removed landmarks of the law.

The case, therefore, is deprived of all weight as a leading authority, and leaves the law in the most unsettled state possible. Is the rule in *Wild's case*, or is it not, applicable to personalty?

The part devoted to the rights of husband and wife would interest the general, as well as the legal reader. Lord Brougham, in the case of *Howard v. Digby*, (2 Clark & Finely 634,) started some queer doctrines as to pin money, in a judgment which would read exceedingly well in a romance, or the Book of Beauty, or any work of light literature, but which, in the pages of a law report, savour amazingly of the burlesque. Sir Edward thinks the decision untenable, at least, not easily reconciled with the current of authorities; if it be any satisfaction to him to be able to add another case to those in which the authority of the House of Lords has not been acquiesced in, we can inform him that the present Lord Chancellor for Ireland has decided in a case, not yet reported, that pin money stands on no different footing from separate estate, and can be recovered in like manner.

(Continued from p. 112.)

37. That no land or lease shall be sold without the order of the court, unless the price at which the same shall be sold shall be equal to or exceed the sums which a surveyor appointed or authorized as herein-after mentioned shall certify in writing to be the fair selling value thereof; and the Lord Lieutenant or other chief governor or governors for the time being of *Ireland* may appoint or authorize, as occasion shall require, such and so many surveyors as he or they may think fit, to act as surveyors for the purposes of this act, and at pleasure to revoke any such appointment or authority; and such surveyors may be so appointed or authorized to act throughout *Ireland*, or for any counties, county, or division mentioned in such appointment or authority.

38. That where any person having entered a caveat under the provision herein-before contained shall in such caveat have signified his desire that notice be given to him of the price at which any sale shall be made, the owner or incumbrancer who shall sell as aforesaid shall, forthwith after entering into any contract for sale, and before the filing of such affidavit as herein-after mentioned, give notice in manner aforesaid to the person who shall have entered such caveat of the price at which such land or lease, or any part thereof, shall have been contracted to be sold.

39. That where any land or lease shall be sold under this act without the order of the court, the owner or incumbrancer by whom such sale shall be made shall file an affidavit in the court, which shall be made by such owner or incumbrancer, as the case may be, and his solicitor; and such affidavit shall set forth the notice which shall have been published by advertisement and otherwise as aforesaid of such sale, and shall state the dates of the several publications of such notice by advertisement, and shall also state that to the best of the knowledge and belief of the deponents such notice has been otherwise published and given as directed by this act, and shall state whether the whole or what part or parts of the land or lease described in such notice shall have been sold, and to whom, and shall state the amount of the purchase money, and the person by whom the same is to be paid, and that the purchase money was the best price that could be reasonably gotten at the time of such sale, and shall state the sum which shall have been certified by a surveyor authorized as aforesaid to be the fair selling value thereof, and, if a part or parts only of the land or lease shall have been sold, shall sufficiently describe the same by the description by which the same shall have been sold and conveyed, or shall be intended to be conveyed; and the deponents in such affidavit shall declare that such land or lease, or the part or parts thereof so sold, has or have been so sold without fraud, for the purpose of discharging an incumbrance or incumbrances affecting such land or lease, and where the sale shall be made by an incumbrancer, that the principal sum of two hundred pounds or upwards is justly owing on his incumbrance; and such affidavit shall also state, that before the publication of such notice by advertisement a negative search was made in the office for registering deeds, wills, and conveyances in *Ireland*, for a period of not less than sixty years next before the day of making certificate of such search (such day not being more than three months before the time of the first publication by advertisement of such notice) for the acts affecting such land, or the land comprised in such lease, of all persons by whose acts, according to the belief of the deponent, the land or lease described in such notice might have been affected in title or charge, and that a negative search was also made in the office for the registration of judgments and incumbrances affecting real estates in *Ireland* for such judgments and other incumbrances there registered within twenty years before the day of making certificate of such last-mentioned search (such day not being more than three months before the first publication by advertisement of such notice) against the several persons the judgments and incumbrances against whom would, in the judgment and belief of such deponents, have affected such land or lease, and that all the incumbrances appearing on such respective searches, except such (if any) as such deponents know to have been satisfied, or to have otherwise ceased to affect such land or lease, and all other incumbrances (if any) affecting such land or lease

known to such respective deponents, were mentioned in such notice; and in case the sale shall have been made by an incumbrancer after notice to an owner, such affidavit shall also state that notice was given to the owner according to the provisions of this act; and such certificate of the fair-selling value, and the official certificates of such negative searches, shall be annexed to and filed with such affidavit; and the registrar of the court shall give a certificate of the filing of such affidavit, specifying the names of the deponents, the dates of the jurat, and of the filing, and such other particulars as he may think necessary to identify such affidavit, and shall state the amount of the purchase-money mentioned in such affidavit, and that such affidavit contains the statements required in an affidavit upon a sale without the order of the court under this act; provided that where such an affidavit as aforesaid shall have been filed upon a sale of a part of the land or lease described in such notice as aforesaid, it shall not be necessary in the affidavit to be filed upon any subsequent sale of other part or parts of the land or lease described in the same notice again to set forth such notice or the publications thereof, or the searches and statements in relation thereto, mentioned in such former affidavit, but reference may be made to the former affidavit, and to the copy of notice and statements of the publication, and searches in such former affidavit contained, and to the certificates of searches filed with such former affidavit.

40. That upon the delivery to the Accountant General of such certificate of the registrar, the purchase money mentioned in such certificate shall, without order of the court, be paid into the bank of *Ireland*, in the name and with the privity of the Accountant General, to his account in the matter of private sales, under the "Act to facilitate the Sale of Incumbered Estates in *Ireland*," to the credit of the persons interested in the land or lease mentioned in the affidavit, describing such affidavit by reference to the names of the deponents, and the dates of the jurat and filing, and otherwise as described in such certificate of the registrar; and such purchase-money shall be paid out or applied by order of the court made from time to time upon petition to be preferred in a summary way by any person entitled under this act; and unless within two months after payment into the bank of such purchase-money the court shall otherwise direct, such purchase-money shall, without order for this purpose, be invested by the Accountant General in the purchase in his name of any stocks, funds, or annuities transferable at the bank of *Ireland*.

41. That a separate register of the affidavits filed upon sales without order of the court under this act shall be kept, and any person shall have liberty at any reasonable time to inspect the same, on payment of the sum of two shillings and six pence for such inspection, and shall be furnished with a copy of any affidavit on payment after the rate of two-pence for every seventy-two words contained in such copy.

42. That where such purchase-money shall be paid into the bank of *Ireland*, with the privity of the Accountant General, no defect or irregularity in the notices and affidavits, or the certificate of the registrar herein-before required, shall invalidate or affect such sale or the operation thereof.

43. That upon the payment of the purchase-money into the bank of *Ireland* the conveyance upon a sale without the order of the court shall, as from the execution thereof by the person selling, and without the execution of such conveyance by any other person, be an effectual disposition of the land or lease thereby expressed to be conveyed, as against the person making such conveyance, and as against the owner mentioned in the notice set forth in such affidavit, and all persons entitled or interested, or who may become entitled or interested, under the same settlement, will, or other assurance, if any, mentioned in such notice, and all persons entitled or interested, or who may become entitled or interested, under the incumbrances mentioned in such notice, and also as against all estates, rights, and interests, which the persons against whom such conveyance is made an effectual disposition, or the persons by whom such incumbrances shall have been created, at the time of such creation, or at any time afterwards, might have passed, barred, or prevented from taking effect, save and except the estates,

rights, and interests of all lessees, tenants, and occupiers in possession, and of all lessees and under-lessees at rents subject to whose leases or under-leases the owner mentioned in such notice shall be owner of the land or lease expressed to be conveyed; and from and after the expiration of five years from the time of the payment of such purchase-money into the bank of *Ireland* as aforesaid, such conveyance shall have the same operation as if the sale and conveyance had been a sale and conveyance under the order of the court under the provisions herein-before contained.

44. That a conveyance without the order of the court shall not prejudice or affect any estate, right, or interest, (other than the estates, rights, or interests against which such conveyance is made effectual upon the payment of the purchase money into the bank of *Ireland*;) in case an entry, action, distress, or suit shall be made or brought on or in respect of such other estate, right, or interest before the extinction of such five years as aforesaid; and any person claiming any such estate, right, or interest in the land or lease comprised in such conveyance may apply to the court by petition in a summary way; and the court may, upon such petition, order that a sum be set apart to answer any claim in respect of such estate, right, or interest, or to be applied by way of payment in purchase of or compensation for the same, as the court may think fit.

45. That where any notice shall have been published, or other act done, in relation to a sale without the order of the court, and the owner or incumbrancer by whom such notice shall have been published, or other act done, shall die or cease to be owner or incumbrancer before the sale or all the sales which might be made or completed under such notice or act shall be made and completed, the person who, after the death or determination of the ownership of the owner who shall have published such notice or done such act, shall for the time being be owner of the land or lease, or the executors or administrators or persons who, after the death or determination of the interest of the incumbrancer who shall have published such notice or done such act, shall for the time being be incumbrancer in respect of the same incumbrance, shall be entitled to proceed to the completion of the sale or sales which might have been made and completed by the owner or incumbrancer by whom such notice or other act shall have been published or done, in case he had been living, and had not ceased to be owner or incumbrancer, and so on every successive death or determination of ownership or interest: provided always, that the Lord Chancellor of *Ireland*, with such advice and consent as herein-before mentioned, may from time to time make such rules and orders as shall appear necessary for the protection of infants and absent parties.

46. That the money which shall be paid into the bank of *Ireland* on any sale without the order of the court shall be paid and applied in payment of the incumbrances which affected the land or lease from the sale of which such purchase money shall have arisen, according to the rights of the persons interested in such land or lease; provided that unless any other person or persons shall, upon application by petition, or otherwise, show better right thereto, the persons who may be entitled to the incumbrances, and the persons otherwise interested, according to the statements in the notice and affidavit given and filed on such sale as aforesaid, shall be deemed to be the persons interested in such land or lease; and the court, upon the order for payment out of court of any such money as aforesaid, may make such conditions for the delivery by the person to whom such payment may be made of any title deeds, or for the execution of any release of any other land or lease on such other conditions as the court may think fit and direct.

47. That as respects as well sales under the order of the court as sales without the order of the court, and the application of the purchase money arising therefrom respectively, the receipt of the accountant-general, or of such other person as the court shall appoint to receive any monies paid under this act, shall be a sufficient discharge for the same, or for so much thereof as shall in such receipt be expressed to be received.

48. That in any case where it shall appear that there are more incumbrances than one affecting any land or lease

which shall have been sold or contracted to be sold, or shall be desired to be sold, whether with or without the order of the court, and any doubt shall exist as to the order and priority of such incumbrances, and in any case in which the court shall consider an issue or a suit or action expedient for ascertaining or determining the rights of parties in the land or lease or incumbrance, the court may at any time, either before or after any sale under this act, direct proceedings to be instituted at law or in equity for the purpose of ascertaining the same, and to make any rules or directions relative to such matters as it shall see fit.

49. That the surplus of the purchase money received on any sale, whether under the order of the court or without the order of the court, after the discharge of all incumbrances, shall be laid out, under the direction of the court, in the purchase of other land, which shall be limited and settled to the same uses, upon the same trusts, for the same purposes, and in the same manner as the land sold, or such of them as shall be then subsisting or capable of taking effect; or such monies may, at the discretion of the court, be paid out of court and distributed amongst the parties who shall appear entitled thereto, as the court shall direct; and all such monies may in the meantime be paid over to trustees, to be appointed by the court, or in such manner as it shall direct, for the purpose of such investment thereof and in such manner as shall be directed by the court.

50. That any money so paid into court may by order of the court be invested by the accountant-general of the said court in his name in the purchase of any stocks, funds, or annuities transferable at the bank of *Ireland*; and until the same shall be sold by order of the court, and after payment of such incumbrances as aforesaid, the dividends thereof shall from time to time be paid to the person who for the time being would have been entitled to the rents of the land to be purchased therewith.

51. That no money which under this act shall be paid into the bank of *Ireland* to the credit of the accountant-general of the Court of Chancery, or shall be paid out of court, shall be liable to usher's poundage.

52. That whenever the court shall appoint or direct the appointment of any trustee for the purposes of this act the court may make such provision as it shall think fit for the appointment of new trustees on any event to be determined by the court.

53. That where any annual charge, not being an incumbrance within the meaning of this act, shall affect any land or lease to be sold under the provisions of this act, being part of an estate affected by such annual charge, the person entitled to such charge, with the approbation of the court, and with the consent of all parties interested in the remaining part of such estate, may release the land or lease from such charge, without impairing or affecting the same charge as to the remaining part of such estate, and the form of such release shall be approved by the master, and may be included in the aforesaid assurance; and if any person so entitled shall be willing to execute such release the master may state such matter in his report.

54. That every person to whom all or any part of the purchase money received on any sale, either with or without the order of the court, shall be so paid out of court, shall and he is hereby declared to be liable to refund and repay the same, or so much thereof as he shall have received, into and amongst the person or persons who shall, upon a suit to be instituted for that purpose, prove to the satisfaction of the court that he or they had at the time of such sale a better title to the land or lease so sold, and in respect whereof such purchase money was received, than the person or persons to or amongst whom such purchase money shall have been so paid out and distributed; and every such repayment shall be made to such persons, and at such time, and in such proportions, manner, and form respectively, as the court shall direct: provided always, that the court, where from any uncertainty of title or otherwise it shall appear proper so to do, before or upon the payment out of court of any such purchase money may require and take from any person to whom or for whose benefit the same or any part thereof shall be so paid out of court such security for the repayment of such money as to the court in its discretion shall seem fit.

55. That where a sale shall have been made without order of the court of any land or lease, and such sale shall not have been made *bona fide* for the discharge of incumbrances, the person who shall have so sold, whether he shall or shall not have received all or any part of the purchase money under order of the court, shall be and is hereby declared to be liable to pay or make to any person whose right or interest to or in such land or lease shall have been defeated or prejudicially affected by such sale such compensation as the person so selling would have been liable to pay or make in case the power given by this act had been a trust for the discharge of incumbrances affecting such land or lease, and, subject thereto, a trust for the benefit of the person whose right or interest shall have been so affected and of all other persons interested in such land or lease, and the court, upon suit for that purpose, shall order such compensation to be made, and where any sale shall have been made under this act without order of the court of any land or lease, and any notice required by this act shall have been withheld, or shall have been omitted to be given, or where any such sale shall have been made at an under-value by collusion with the purchaser or his solicitor or agent, then the person who shall have so sold under this act, whether he shall or shall not have received all or any part of the purchase money under the order of the court, and his solicitor or agent, and where such sale shall have been made at an under-value by collusion the purchaser, or his solicitor or agent if such solicitor or agent shall have been cognizant of such collusion, shall jointly and severally be liable to pay or make to any person whose right or interest to or in such land or lease shall have been defeated or prejudicially affected by such sale full compensation, and the court, upon suit for that purpose against all or any of the persons liable under this provision, shall order such compensation to be paid or made accordingly, and the liability of any defendant in any such suit as aforesaid to any pains or penalties for perjury in respect of any statement in any affidavit made under the provision herein contained shall not be allowed in the way of demurrer, plea, or refusal to answer or otherwise to protect such defendant from discovery in respect of the premises: provided always, that the provision for compensation herein contained shall not affect or abridge the right of any person to bring a suit in equity for the recovery of the land or lease on account of fraud against any person who shall have assisted in the commission of such fraud, or shall have taken such land with knowledge of the commission thereof.

56. That no payment towards discharge of what shall be due on any incumbrance, not being payment in full, shall prejudice or affect any right or remedy of the incumbrancer, otherwise than as against the land or lease sold freed and discharged from such incumbrance, unless so far as by the provisions of this act, or by any general rule or order or special rule or order of the Lord Chancellor of Ireland or of the court, is or shall be otherwise specially provided.

57. That where any incumbrancer shall be satisfied, by payment out of any monies arising from any sale under this act, and it shall appear that any person, or any land or estate other than the land or lease sold, was liable to such incumbrance or any part thereof, and that any such person or land or estate ought to discharge or contribute towards the discharge of such incumbrance or any part thereof in exoneration of the land or lease sold, the court, may order that any proceedings shall or may be instituted by such person, on such terms and in such manner as the court shall think fit, for recovering the money which ought to be so discharged or contributed in exoneration, and to direct that any such money shall be paid into the bank of Ireland in the name and with the privity and to the credit, or as the court shall direct, to be paid, applied, and dealt with in manner aforesaid, or as the court shall direct.

58. That no payment of or in respect of any incumbrance which shall be made under this act, whether upon or after a sale under order of the court, or upon or after a sale without the order of the court, or which shall be made for facilitating or otherwise in relation to any such sale, shall impair any right or equity of any persons out of whose estate such payment shall be made to be reimbursed or indemnified by any person or out of any other land or estate, except so

far as the court under any special circumstances shall order.

59. That where any lease subject to any incumbrance shall be proposed, or shall be ordered to be sold under the provisions of this act, the court, upon the application of any persons claiming to be owners of any estate in reversion in the same land, may direct or authorize and empower the master to include in his report approving a sale, and also to include in the sale, such estate in reversion, upon such terms as the court, or the master under the authority of the court, shall see fit; and in every such case the court, or the master, under the authority of the court, shall apportion the purchase money and the expenses as the court or master shall see fit; and the assurance to be made under this act shall or may include such estate in reversion so sold as aforesaid, if the master shall think fit.

60. That if any land or lease to be sold by order of the court under this act shall be subject to a lease or under-lease for years or lives comprising other land at an entire rent, the master, before proceeding to a sale, may apportion the rent between the land or lease to be sold and the remainder of the land subject to such rent, having first caused notice thereof to be given, as well to the tenant as to the person by whom such entire rent shall be payable, and to the person entitled to receive such entire rent, and any persons claiming an interest in the matter may claim to be heard before the master on the subject of such apportionment: provided no apportionment so made by the master shall be vitiated by any want of notice, or by the absence of any parties, unless the court, on the application of any person complaining of such apportionment, shall otherwise direct; and after such apportionment, and after such sale shall be completed, the owners of the reversion of the respective lands shall have the like remedies for the apportioned rents respectively as were subsisting for the entire rent before such apportionment; and all the covenants, conditions, and agreements of every lease or under-lease, except as to the amount of rent to be paid, shall, as regards the apportioned parts, remain in force in the same manner as they would have done in case no such apportionment had taken place.

61. That no person entitled to any incumbrance shall be bound to accept payment until such incumbrance shall be payable, or to accept at any time less than the full amount due thereon; and no person so entitled, who, according to the practice of the court or the rules of equity, shall be entitled to six months notice of payment, shall be bound to accept payment of his incumbrance without six months notice; but when such notice shall have been given no fresh notice shall be necessary if the money shall be paid within three months after the day fixed, nor shall any incumbrance, being a re-purchaseable annuity, be re-purchased until the time for re-purchase thereof shall have arrived; and every notice with respect to any incumbrance may be given in such form, and by and in the name of such person, and to such person, as the master or the court shall direct; and every such notice shall be binding and effectual to all intents and purposes.

62. That where any incumbrance included in an order for sale, or affecting any land or lease which shall be sold without the order of the court under this act, shall, for want of any notice or otherwise, not be payable, or where parties entitled to an incumbrance cannot be ascertained, or have not come in and claimed to be paid, the court may order such sum as it shall think fit to be set apart, and carried by the accountant-general to such credit, and to be applied as the court shall direct, in order to provide for any such incumbrance, and for costs and expenses relating thereto.

63. That pending any proceedings for a sale by order of the court, the court, on the application of any party interested as owner or incumbrancer, may appoint a receiver of any land or lease, which shall have been contracted or shall be desired to be sold, or any part thereof, and also to discharge such receiver at any time; and that every such receiver shall have all the same powers and authorities and be subject to the jurisdiction of the court, and to all subsisting rules and orders of the court for the regulation of receivers, in like manner, and as fully as any receiver appointed in a cause pending in the court is so subject;

and that every such receiver shall account before the master, and shall pay his balance into the Bank of Ireland, in the name, and with the privy, and to the credit aforesaid, to be paid, applied, and dealt with as the court shall direct: provided, that nothing in this act contained, shall empower the court to appoint such receiver at the instance of an incumbrancer who would not, if this act had not passed, be entitled to apply for the appointment of a receiver over such land or lease.

64. That in every case, in which the guardian of an infant would be authorised to do any act, or give any consent under this act, on behalf of such infant, if such infant shall have no guardian, the court under this act, may appoint a guardian of such infant for the purpose of any proceedings under this act, and also to change such guardian from time to time.

65. That where any person, the committee of whose estate if he were idiot or lunatic, would be authorised to do any act or give any consent as aforesaid, on his behalf, shall be of unsound mind, or incapable of managing his affairs, but shall not have been found idiot or lunatic under an inquisition, or there shall be no committee of the estate, the court, on the application of any person on behalf, or as next friend of such person, or on the application of any person interested in any proceedings pending under this act, may appoint a guardian of such person, for the purpose of any such proceedings under this act, and also at any time, and from time to time to change such guardian.

66. That the costs and expenses of, and incident to every application for the appointment and change of any guardian under this act, shall be in the discretion of the court, and shall and may, if the court think fit, be introduced amongst the costs to be provided for under the general provisions of this act.

or. That this act shall not authorize, nor be taken to authorize the presenting of any petition for sale by order of the court, in any case where an incumbrancer shall be in possession of the land subject to his incumbrance, unless with his consent, nor in any case where the first mortgagees shall have under his security a power of sale which has arisen and may be exercised, unless he shall make, or consent to the application, or shall, after being requested by the petitioner so to do, have refused, or for three months, have neglected, in the opinion of the court, to use diligence towards the exercise of such power of sale, nor in any case where, at the time of presenting such petition, any suit for foreclosure, or redemption, or sale of the incumbered land, which shall have been commenced before the first day of July one thousand eight hundred and forty-eight shall be pending, unless with the consent of the parties competent to consent to the dismissal or staying of the suit, and that every such consent shall be stated in the petition for confirming and carrying into effect a contract for sale as aforesaid; and that in case of such suit the court, may give directions to any parties discontinuing or staying such suit, and respecting the costs thereof, or otherwise, and that pending any proceedings for a sale by order of the court under this act any owner or person claiming to be owner within the provisions of this act, or claiming by the act of such owner or person, or by act of law, pending any proceedings under this act, or any incumbrancer, may commence any proceedings at law or in equity for redemption, foreclosure, or sale, without the leave of the court, to be given under this act; and that in every case the court shall have full power to make or grant any order or injunction for staying any proceedings contrary to the provisions of this act, and for costs relative thereto: provided always, that this act shall not authorize any sale or assignment of a lease contrary to the covenants and conditions of such lease.

68. That when any petition shall be presented for confirming and carrying into effect a contract for sale or for a sale under this act of any land or lease in respect of which any suit for foreclosure or redemption or sale shall have been pending, and shall be discontinued or stayed under this act, the court may order that all such proofs and debts and other proceedings, and such evidence as shall have been taken in the suit, may be adopted and used in the proceedings under such peti-

tion, in the same manner as if the same had been originally taken under the reference upon such petition.

(To be continued.)

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IN Pursuance of the Order made in this Matter, bearing date the 3rd day of February, 1846, I hereby require all persons who claim to be creditors of the said Richard Samuel Guinness, and have not proved their demands before Samuel Vignoles and Esq. Berwick, Esqrs., Trustees of the Estate of said Richard Samuel Guinness, and who intend to oppose the allowance of the Certificate of the said Richard's Goods as provided by said Acts, or desire to intervene under the said Order, to come in before me at my Chambers on the 1st of March, 1846, or before the 2nd day of April next, otherwise I will proceed in their absence with the reference directed by the said Order.

Dated this 16th February, 1846.

EDWARD LITTON.

Dooner and McCay, Petitioner's Solicitors, 5, Kildare Street, Dublin.

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Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 43, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in the same Parish, by EDWARD JOHNSON MILLIKEN, residing at the same place, and being in the County of the City of Dublin. Saturday, February 23, 1846.

THE Irish Jurist

No. 18.—VOL. I.

MARCH 3, 1849.

Price { Per Annum, £1 10s.
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DUBLIN, MARCH 3, 1849.

THE case of the *Queen v. Charles Gavan Duffy* has been so protracted, so often before the public at distinct intervals of time, the points raised have been so numerous, and the law of criminal pleading so thoroughly sifted, that we think a succinct history of this extraordinary case may prove acceptable to our readers.

The proceedings have already been before four Commissions of Oyer and Terminer, four bills of indictment have been found, and the prisoner has been placed at the bar nearly forty different days. The questions of law discussed prior to the last Commission, will be found reported *ante*, p. 81. We purpose to continue our report of the subsequent proceedings almost immediately. In anticipation, however, of it, and as a *resumé* of the whole case, we now intend to give a brief narrative of the points of law raised and ruled at this prosecution, unprecedented in the annals of criminal law, and which, judging from the past, is yet far from being terminated.

The prisoner was committed on the 8th of July, 1848, and on the 8th of August following, a bill of indictment, for feloniously publishing, in the county of the city of Dublin, certain printings in the *Nation* newspaper, was preferred to, and found by the grand jury of the county of the city. The indictment was framed under the recent statute, 11 & 12 Vic. c. 12. The prisoner was not tried on this indictment—the trial being postponed by the crown, in consequence of the then recently discovered letter of the prisoner to W. S. O'Brien.

At the October Commission next following, a bill of the same nature was found by the grand jury of the county of Dublin, the venue being changed, under the provisions of the 6 Geo. 4, c. 51, by the crown, in order to avoid the question which had been raised in the *Queen v. Martin*, as

to the interest of a burgess. The prisoner having been brought to the bar for arraignment, his counsel objected that this could not be done while he was in the custody of the sheriff of the city, and that the writs of *habeas corpus* sued out for the purpose of removal, could not be acted on, not having been issued ten days previous to the holding of the Commission for the county. The objection was ruled in the prisoner's favour. The case of the *Queen v. Martin* having, in the *interim*, been decided in favour of the crown, at the ensuing commission, in December, for the county of the city, the prisoner was, for the third time, indicted; and, the bills being found, it was moved on his behalf, that this indictment should be quashed, for this reason—that the venue of the indictment had been changed from the county to the city, and that under the provisions of the 9th section of the 6 Geo. 4, c. 51, it was enacted, "that after the delivery of the said notices, it shall not be lawful for any person to prefer any bill of indictment to any sessions of Oyer and Terminer, for any such county of a city." In fact, that the crown could not return again to the city, having once elected to proceed in the county; and that this migratory warfare was forbidden by the statute. To this it was answered by the crown, that the notices required to be served, by the 8th section, on persons who had entered into recognizances, and, by the 9th section, on the persons before whom the recognizances had been entered into, respectively to attend at, and to return the recognizance to the adjoining county, not having been given—that the clause of the 9th section relied upon by the prisoner did not apply. And this view of the case was adopted by the court.

Three questions were raised, independently of that on which the court decided. First, whether the crown was within the letter of the act, the word "prosecutor," in the enabling parts of the statute, being large enough to include the Attorney-

General prosecuting for the Queen; and the word "person," in the disabling clause of the 9th section and in the 13th section being, it was contended, insufficient for that purpose. On this, the opinion of the court appears to have been, that the crown was within the enabling, and would not be bound by the disabling parts. Perrin, J. (Ir. Jur. p. 85), says, "Before the passing of this statute, it was not illegal to have a second bill found during the pendency of the first, and it would be difficult to hold, that where there is no *express provision* in the act, we should imply one restraining the crown from sending up a second bill in the place where the offence was committed." And Richards, B. (p. 86 of the same report), speaking of the 13th section, and of the use of the word "person," says, "That section was plainly intended to apply to private prosecutors only, but it would be too much to hold from that, that none of the preceding enabling sections of the act includes the crown."

Secondly, it was argued, that though the crown was not included within the letter of the act, yet, having taken advantage of it, it became bound by all its provisions. On this branch of the case, the court does not appear to have come to any final determination, their opinion (as we understand it) being, that the crown could scarcely be said to have taken advantage of the provisions of the act; that no notices having been served, the election to proceed in the new venue was not complete. The inclination of the mind of the court was apparently that the crown should not be bound; and the case of the *Attorney-General v. Wilson* (Jebb, C. C., Reserved, 313) would appear to support this view.

Thirdly, whether the Attorney-General could in any case be bound by the restrictive provisions of the 9th section; and on this question the court were of opinion that, as there were no express words to bind the crown, they were not to be implied. But Richards, B., at p. 87, says, "Supposing the 9th section to bear the construction contended for, on the part of the defendant, in regard to cases coming plainly within its operation, it may, I apprehend, admit of some question—I will say, of a very grave and serious question—whether the court would not feel itself authorised to apply the principle to be extracted from such a provision as that to crown prosecutions. I mean prosecutions carried on by the Attorney-General, as well as to all other cases where the Attorney-General had availed himself of the general provisions of the statute." He then subsequently guards himself from being considered to have expressed an opinion one way or the other.

These points, after much discussion and delay, having been disposed of, the prisoner, being called upon to answer the indictment, pleaded in abatement that two of the grand jurors who found the bills were not either inhabitants of the city, or resident therein, or freemen thereof, or burgesses, or seized or possessed of, or entitled to, any lands, tenements, or hereditaments within the city for any estate of freehold or less estate, or liable to be rated for municipal and other taxes. The court held that it was not necessary for grand jurors to be freeholders, *Anonymous*, (Russell & Ry. C. C. 177,) that it was sufficient if they were good and

lawful men of *the place, probi et legales homines*, which they might well be, and yet not residents, *R. v. Adland*, (4 B. & C. 772). And, that consistently with the averments in the plea, the jurors might be principal merchants of the city, directors or shareholders in a bank, qualifications which would entitle them to act as grand jurors of the city, though non-resident. Perrin, J., was of opinion that the 5 & 6 W. 4, c. 91, was applicable to grand jurors at the Commission of Oyer and Terminer, as well as to juries for the trial of issues, and grand juries at sessions, to which it had been contended the act only applied. That this act consolidated the law, respecting jurors, as it previously existed, and that as the plea did not negative the qualifications given by this act it was bad.

Still fertile in points, the counsel for the prisoner demurred to the indictment.

We are not aware of any case in which the law of criminal pleading has received such consideration, at least no case of felony. This has arisen principally from the serious doubts which existed, whether the prosecutor could, in the event of judgment being in his favour, demand final judgment, and the consequent dislike of those entrusted with a prisoner's defence to incur the responsibility, and run the hazard, of risking the liberty, perhaps the life, of their client on the result of a point of law. The course taken was a bold one, but perfectly justifiable, this being a case arising on a new statute.

The arguments and judgments will well repay the lawyer's perusal, and will be found useful for civil as well as criminal pleading, involving a nice consideration of the doctrine of innuendos or explanatory averments, as applicable to the law of libel or slander.

The indictment preferred at the December Commission contained six counts. The first and third set out the portions of the publication relied upon by the crown, and in the first count charged the prisoner with the publication of certain articles with the intent to "depose the Queen," and in the third count with the intent "to levy war." Three objections were taken to these counts, first, that the writings, by which the prisoner was alleged to have expressed his intention, were not set out with sufficient certainty; secondly, that they severally charged distinct felonies in the same indictment in a manner not allowed by law, and thirdly, that the printings and writings were not accompanied with the averments or innuendos necessary to affix to them the stamp of illegality necessary to bring them within the act.

All these objections the court overruled.

The second and fourth counts set out the same printings and writings as the first and third, but stated them in the second count to be distinct overt acts evidencing the intention to depose the Queen, and in the fourth count as evidencing the intention to levy war.

To these counts, the objections made to the first and third were also raised, and, in addition, it was objected that they were repugnant and inconsistent, and that the publications were improperly laid as overt acts.

The court decided that these counts were bad

for repugnancy as to all but the first overt act, inasmuch as the first overt act being stated as evidencing an intention to do an act on the 3d of June, a subsequent overt act on the 17th could not be said to evidence the same intention as that on the 3d. To express the same idea in untechnical language, and by an illustration—it would be inconsistent and repugnant to state that the prisoner raised his arm on the 3d of June with the intention of striking the Queen, and on the 17th again raised his arm to strike her on the 3rd. There was but one felony charged, and it was impossible that a subsequent overt act could be said to relate back to that which had been charged to have been previously committed, and on the same ground the court rejected every overt act subsequent to that laid on the 3d of June. They, however, decided that publications might properly be laid as overt acts.

The fifth and sixth counts were general, not setting out any of the printings or writings charged in the previous counts, merely stating in the former that the prisoner on the several days therein mentioned expressed his intention to depose the Queen by divers overt acts of publication, and in the latter count expressed his intention, by the same means, to levy war against her. These counts were objected to for not setting out the contents of the overt acts, and that they were also bad for repugnancy. On the first objection the court decided that the contents of the publications charged as overt acts need not be stated, but that the same arguments, on the question of repugnancy, which applied to the second and fourth counts, applied to these likewise, that is, that the demurrer should be allowed as to all the overt acts except the first.

Although this part of the demurrer was allowed, yet it will be observed that it only applied to part of the counts, therefore all the first and third counts were good, so, likewise, were the first overt acts laid in the second, fourth, fifth, and sixth counts. The advantage supposed to have been gained by the prisoner was this, that in the last mentioned counts no evidence of overt acts could be given subsequently to the 3d of June; but this advantage appears to us not a very substantial one, as all the publications could be given in evidence under the counts that remained untouched.

At the termination of the judgment on the demurrer, the Attorney-General asked for final judgment; but the court said, that was a question of much difficulty, one upon which they did not then wish to give any opinion, and suggested three courses which might be adopted to bring the question before the court above. First, to reserve a case for the opinion of the twelve judges, as had been the practice before the passing of the 11 & 12 Vic. c. 78. Secondly, to reserve a case for the opinion of the Court of Criminal appeal, under the provisions of that statute; and, thirdly, for the Attorney-General to remove the proceedings by *certiorari*.

The Attorney-General, on a subsequent day, declined to adopt any of the courses suggested, and pressed for final judgment. The court directed the case, on this point, to be further argued, and,

finally, gave judgment of *respondet ouster* in favour of the prisoner.

These various proceedings were not terminated until after the first day of Hilary Term, when the judges declined then to try the case, and adjourned it to the next Commission of Oyer and Terminer.

At the ensuing Commission in February, the Attorney-General preferred an entirely new bill of indictment to the city grand jury, which being found, the prisoner on the 7th of that month was brought to the bar to answer the matter of the last indictment. The prisoner's counsel moved that the court should direct that no proceeding be taken on this indictment until the prisoner be tried on the former one, or it should be otherwise disposed of. This application the court refused.

Then the prisoner pleaded in abatement, that one of the grand jurors who found the bill resided at a place outside the city boundary, as it existed before the passing of the 3 & 4 Vic. c. 109, but within the borough as defined by that act, and it was contended, first, that the city boundaries were not altered for the purposes of the Court of Commission, the terms of the act being applicable to borough courts alone, which it was argued that court was not; and secondly, that as the Court of Commission sat by virtue of a commission of the 1st of Vic., that the jurisdiction of the court must be taken to be co-extensive with the limits as they existed at that time. The court were of opinion that even if their own opinion had been otherwise, that they could not set it in opposition to the solemn judgment of the superior courts, in the cases of the *Queen v. the Inhabitants of St. George*, (8 Ir. Law Rep. 23); *Lessee Barber v. Evans*, (10 Ir. L. Rep. 480); and that the second point was not open for argument on the record.

On Saturday, February the 10th, the plea in abatement being overruled, the prisoner demurred to the indictment.

The indictment contained four counts. The first two set out the printings and writings as publications, and charged that the prisoner did, on the 3d of June, publish certain printings, stating the intent in the first count to be "to depose," and in the second to "levy war," and that he did on the 17th of June further express the same compassing by publications on that day, and so on the several subsequent days of publication. The third and fourth counts were general, not setting out the publications, and charged them as overt acts, that the prisoner did on the 3d day of June intend to depose, and that intention he expressed on the said 3d of June, by divers overt acts and deeds, and, in order to fulfil that intention, he published on the 3d of June, and further to fulfil, &c. he published on the 17th of June, and so through the subsequent days of publication. The fourth count was similar, except that the intention averred was to levy war.

The objections raised on the argument of the demurrer were, that all the counts were uncertain, double, and repugnant; and to the third and fourth counts it was further objected, first, that there was no distinct statement of any overt act, and that a publication was not an overt act within the meaning of the treason-felony statute. Secondly, that

the third overt act, in each count was averred to be a printing and not a publication; and, lastly, in neither of these counts was there any averment of a contemplated rebellion or treasonable design. The court overruled the demurrer. This indictment, it will be observed, was not open to the objection for repugnancy that had been made successfully to the preceding one.

The prisoner pleaded, Not Guilty, and a jury being about to be sworn, he, through his counsel, challenged the array, and shewed for cause that the panel had been arrayed unfavourably to the prisoner. That the majority of the jurors of the city of Dublin were Roman Catholics, whereas the jury panel as returned, consisted of a large preponderance of Protestants, and he offered evidence to the triers appointed to try the challenge, of the religion of the jurors, which the court held to be inadmissible. The triers found against the challenge. The prisoner then challenged every juror whose age exceeded sixty, or who resided in the county, having only a place of business within the city.

The jury sworn to try the issue having disagreed, were finally discharged, leaving this case, already so unprecedented in length, to be brought under the consideration of another jury.

THE open expression by the Premier, a few days since, of his conviction that the law of settlement had worked badly in England, and that any law impeding the circulation of labour would be attended with very injurious consequences to Ireland, led us to hope, that the necessity of such an enactment would not have been involved in the proposition he was about to submit to the Committee of Inquiry into the Irish Poor Law—a proposition for the relief of Irish pauperism.

The plan he has proposed, however, exhibits no indication that any such conviction existed in the mind of its framer; it is based on the principle that, to 25 per cent. on the valuation, property should support its poverty—that when this limit has been reached, the neighbourhood shall be taxed in aid, to 10 per cent., and that when these united supplies have been exhausted—and not till then—a national rate of $2\frac{1}{2}$ per cent. shall be resorted to. Other subsidiary provisions are suggested,—one exonerating any increase in the value of property resulting from expenditure of capital, from liability to poor rate, for from seven to ten years; and another exonerating lands which have lain waste for a year from arrears of poor rate. It is compounded of the two rival systems,—based on limited and extended areas of taxation,—and is open to many of the objections to which these systems are exposed, besides to others, and serious ones, peculiarly its own. It has, however, some advantages to recommend it, and which we shall proceed, in the first place, to consider.

The most important of these consists in fixing the maximum to which taxation can reach. This will do much to remove the present objection entertained by substantial parties to undertake the cultivation of land in the distressed districts; it will enable landlords to calculate what rent they should demand, and tenants what rent they could

afford to pay for land; though in future lettings—at least, in the poorer parts of Ireland—it will probably have the effect of throwing the whole weight of the poor rate—and that at its maximum—on the proprietor, as farmers will naturally take this maximum rate into consideration when proposing for land, and calculate on paying only the difference between the letting value and this maximum; and landlords are not now—and probably will not be for some time—in a position to contest the point with solvent *bona fide* bidders. We do not object to the limit at which the tax is fixed; and we think that if by sacrificing, even permanently, one-fourth of their incomes, proprietors could save the other three-fourths, they should, under present circumstances, be very well satisfied indeed.

The suggestion to exonerate improvements on land, during seven or ten years, from taxation for poor rate, is also a very valuable one; outlay will be encouraged, and thus the quantity of employment given be increased; and this, in our opinion, is a much more rational method of restoring the country, than by endeavouring to force men, by legislation, to do what a regard for their own interests should compel them.

Clearly, however, as we see these beneficial tendencies of the plan, and highly as we value the importance of the suggestions noticed above, we cannot shut our eyes to the disadvantages under which it labours, or which will follow from it, as necessary consequences.

The most important of these consequences we apprehend to be a *law of settlement for paupers*. It is quite evident that this must be a necessary consequence; for the only advantage expected to follow from the part of the plan which limits the area of taxation, is, that proprietors will undertake the profitable employment of their poor, when they will have these only to maintain, and their protection must consist in keeping the paupers from other divisions within their own divisions. If paupers were allowed to wander from one division to another, then the proprietor who gave most employment would attract most paupers, and the proprietor would be best off who exerted himself least. If there is any benefit to be derived from this part of the plan, it will be by individualizing responsibility; and this must lead to a law of settlement, with all its pernicious consequences.

A second objection consists in taxing, for the benefit of the county generally, those very classes which have suffered most and are least able to bear the pressure.

The failure of the staple article of food,—that great calamity which has fallen on this country,—is the great cause of Ireland's present distress. By this calamity the small holders of land, who occupy the great extent, especially of the poor districts, have been either extinguished altogether, or reduced to the brink of ruin. Their landlords rank next in the scale of suffering, whilst mortgagees and other incumbrancers, and owners of property, not connected with land, have, comparatively speaking, not suffered at all. Those three classes represent the whole property of the country. It is admitted on all sides that circumstances call for measures

very different from those hitherto adopted. The country is sinking, and some great and combined effort must be made to rescue it. Who, then, are called on to make this effort? The owners of property, which has not suffered from the universal and repeated failure of the national food? They, whose resources are unimpaired, and whose energies are unexhausted? By no means. The struggling, the almost ruined occupier of a few acres of land, the landlord whose incumbrances remain to their full amount, but whose means of meeting his engagement are cut off by the ruin of the small farmers; who, in some instances, are in a prison, and in many others are with difficulty keeping without its walls. These are the parties who are called upon to make this exertion—these are they, on whom the government plan casts the onus of supporting a sinking country; and yet these two classes, who are thus about to be crushed under this enormous and disproportionate weight, are the sole manufacturers of our wealth—the sole hope of our prosperity—the moving power, without which the machine of society would soon cease to work. The law imposing an income-tax in England provides that, persons possessing property of less than £150 a year—which in Ireland would be considered a respectable income—shall be protected from its operation; while in Ireland an almost diametrically opposite rule is adopted, and only those who are in reality least able to pay, are taxed for the benefit of the whole country.

The two first objections we mentioned before; the third has the merit of being peculiarly the consequence of the plan of the Premier. It follows from that part of it, which proposes, that property which has lain waste for a year, shall be exonerated from the arrears of poor rate. Here is a most convenient loop hole contrived for the escape of idle or indolent proprietors, and one which, if passed into law, we have no doubt will be taken advantage of. Properties in the distressed parts of Ireland are at this moment, to a great extent, waste; any substantial tenants who survived the horrors of 1846 and 1847 having gone away on the re-appearance of the blight in 1848—for these waste tracts, whenever the former tenants were valued at under £4 annually in the rate books—the proprietors have been held liable, and have been in many instances compelled to pay poor rates. What will be their conduct under the altered circumstances of their position? Will they raise or borrow money, and by employing the paupers endeavour to render these waste tracts productive? Not at all; for then they would cease to be waste tracts, and the proprietors would be liable to poor rate for them. What, then, will be their course? They will not only not cultivate, or attempt to cultivate these waste lands, but will render waste every acre, to the rate on which they would otherwise be liable. They will argue, that it will be better that their properties should be unproductive, than that they should be ruined by, perhaps, a fruitless exertion to provide employment for their resident poor, from any contribution to whose support they will be exonerated by merely letting their lands lie waste; that they will lie by till the storm blows over, either by the starving

down of the population, or by some other means; that—the law providing that these waste lands should be free from arrears of poor rate—the very best position in which they could hold untenanted lands would be in a waste state, as thus they would be in a condition to be let immediately to any tenant who might offer, and which, in the meantime, would be no incumbrance. Here, then, we have a direct premium on idleness—an idleness, too, to be indulged in, at the expense of the neighbouring divisions, or at the expense of the country generally.

In another particular, likewise, this plan seems by no means satisfactory. It is proposed that no rate in aid shall be called for by any electoral division, till 5s. in the £1 is first collected on itself. Now suppose—and the hypothesis is not an extravagant one—that some divisions will not be able to pay this 5s. in the £1, will the rate in aid be refused in that instance? Or suppose further, that the union cannot pay 5s. in the £1, will the national rate of 6d. in the £1 be refused? Perhaps Lord John intends to pursue the course he proposes to adopt in the commencement, namely, levying the national rate first, and calling for the others as they may be found wanting. And, indeed, some such intention as this is apparently shadowed out in his proposal of exonerating waste lands from arrears of poor rate.

Much reliance is placed on the new arrangement to be founded on the report of Commissioners for "Inquiry into the number and boundaries of Poor Law Unions and Electoral Divisions in Ireland." In their report, however, after pointing out the object they have sought to obtain, viz, the "placing the country, and each part of it, in a position which shall best combine the interest of the labouring class with that of the employers of labour," and that it "was to be found in such a change of boundary, and, in many cases, in such a reduction of area of the present electoral divisions, as shall give every practicable advantage to the zealous improver, without unduly restricting the field of the labourer's employment," the Commissioners have, after all the attention they have been able to bestow on the subject, and the peculiar means of information which they possessed, only been able to report that they "*hoped* to find it practicable to have in each district such an amount of labour as was necessary for its improvement, having regard to the peculiar capabilities it might possess, without making the divisions so large as to prevent the influence of each proprietor and occupier from being usefully exerted, as well by the force of example, with its valuable operation on public opinion, as by the more direct means of labour afforded; and this *we had* every reason to suppose could be accomplished with such regard to the boundaries of property, as at least to prevent any part of an estate from being severed from the other parts, unless they were outlying or detached."

That these hopes must have been disappointed in very many cases, is the necessary result of the manner in which the property of one proprietor is found scattered in small portions over very wide districts in many parts of the country. We know

one district in the Ballina union which hitherto was comprised in two electoral divisions, and which the Commissioners propose to re-arrange into thirteen; and, minute as are these subdivisions, and anxious as the Commissioners were to "prevent any part of an estate from being severed from the other parts," one proprietor has property in twelve out of these thirteen divisions, and among the thirteen divisions there is not one which does not embrace the properties of five, or six, or more, different proprietors. In fact there is no arrangement, save that of throwing the same property, though scattered over a wide space, into one electoral division for itself—and which the Commissioners regard as impracticable—by which this property, or the other properties in these divisions, could be more satisfactorily condensed.

In fine, the plan has the merit of pleasing nobody, though it apparently was intended to please all. For ourselves, we confidently expect that Lord John's sixpenny national rate will rapidly increase, and, as Aaron's rod swallowed up the rods of the Egyptian magicians, so that it will swallow up in the end the union rate and the electoral rate, leaving no trace of that part of his plan based on individualizing responsibility, but the pernicious consequences of the law of settlement.

(Continued from p. 120.)

69. That when any petition for confirming and carrying into execution a contract for sale or for a sale shall have been presented without the requisite consent, such consent may by leave of the court be given subsequently, so as to render valid the proceedings under such petition; and that where any such petition shall be invalid for want of such consent the court may make such order against the person who shall have presented the same relative to the costs of any other person of any proceedings had under such petition as the court shall think fit.

70. That any incumbrancer not being the first incumbrancer on any land or on any lease of land in *Ireland*, who shall be desirous of exercising the powers given to a first incumbrancer under this act, and for that purpose shall be willing to redeem the prior incumbrance, or all the prior incumbrances if more than one, may apply by petition in a summary way to the court for liberty so to redeem such prior incumbrance or incumbrances; and the court, upon such petition, may make such order and give such directions in all respects as might have been made or given in a suit by such petitioning incumbrancer for redemption of such prior incumbrance or incumbrances; and in case the amount which shall be owing to any incumbrancer whose incumbrance shall be sought to be redeemed shall not be admitted or agreed upon, the court, upon payment into court by the petitioner of the money due on such incumbrance, may order that the petitioner shall, for the purposes of all proceedings in court under this act, and for the purposes of sales without the order of the court under this act, stand in the place of the owner of such incumbrance, without prejudice to the rights of the petitioner and of the incumbrancer whom he shall seek to redeem, upon taking the account of the incumbrance: provided, that it shall not be lawful upon any such petition to question the validity or title of any such prior incumbrance.

71. That no petition shall be presented for confirming and carrying into execution a contract for sale or for a sale by order of the court under this act by any assignee of any bankrupt or insolvent debtor, without the consent thereto of the major part in number and value of the creditors assembled at a meeting duly convened for that purpose first had and obtained: provided that where any such petition shall have been presented without such consent having been

first had and obtained, such consent may by leave of the court be given subsequently, so as to render valid the proceedings under such petition.

72. And whereas doubts are entertained whether, when a judgment affects lands in *Ireland*, and when the person entitled to such judgment is willing to release a portion of such lands in order to the sale thereof, or otherwise, he can grant such release without nullifying the effect or validity of such judgment upon the residue thereof, or any other property which it is intended should remain subject to such judgment: and whereas it is expedient that such doubts be removed: be it enacted, that the release of any portion of lands in *Ireland* from any judgment shall not operate or be construed to extend or operate so as to nullify or in any manner to affect the validity and force of such judgment as regards the residue of such lands, or any other property not specially released from such judgment, but that such judgment shall continue to affect such residue or other property, notwithstanding such release, in like manner, and with the like powers to enforce payment of interest and principal, and to all intents and purposes, as if such deed of release had not been executed.

73. That in the month of *February* in every year, or, if parliament be not sitting, then within fourteen days after the next meeting of parliament, a return shall be laid before both houses of parliament, showing the total amount or quantity in statute acres of all lands sold under the provisions of this act during the year ending the thirty-first day of *December* then last past, together with a statement of the total annual rent of such lands (so far as the same shall have been shown in the proceedings,) the total amount of incumbrances which affected such lands at the time of the applications for the sale thereof respectively under this act, the total amount of purchase money for the same, together with the total amount of all such law costs incurred as shall have been paid out of such purchase money, and of all other charges and expenses which may have been paid or deducted from the proceeds of such sales under the order of the court.

74. That in citing this act in other acts, and in legal instruments, it shall be sufficient to use the expression "*The Irish Incumbered Estates Act.*"

75. That this act shall, except so far as the special provisions of the same otherwise require, extend only to *Ireland*, and may be amended, altered, or repealed by any act to be passed in this session of parliament.

CAP. XLIX.

An Act for regulating the sale of beer and other liquors on the Lord's day. [14th August, 1848.]

CAP. L.

An Act to empower the Commissioners of Her Majesty's woods to remove the colonnade in the *Regent's Quadrant*. [14th August, 1848.]

CAP. LI.

An Act to provide additional funds for loans for drainage and other works of public utility in *Ireland*. [14th August, 1848.]

Sec. 1. *Treasury* may cause to be issued a further sum not exceeding 945,000*l.* to the commissioners of public works in *Ireland*. Sums issued not to exceed the sum actually paid into the *Exchequer* under provisions of 9 & 10 *Vict.* c. 1. 107. and 10 & 11 *Vict.* c. 87.

2. Sums issued to be applied for loans for completion of public works commenced under 9 & 10 *Vict.* c. 11 107., and for promotion of drainage and other works of public utility.

3. Powers, &c. of 10 & 11 *Vict.* c. 106, to extend to this act.

4. Power to treasury to postpone commencement of payment of annuities under 10 & 11 *Vict.* c. 61.

5. Power to treasury to convert annuities into others of longer or shorter duration of equal value.

6. If Grand Jury shall not make application at *Summer Assizes* for conversion of annuities, clerk of the peace may call special sessions, at which justices may make application.

7. *Provision where occupation of premiss may be changed.*

8. *Act may be amended, &c.*

Whereas an act was passed in the 9 & 10 Vict. c. 85, and whereas another act was passed in the 9 & 10 Vict. c. 108, and whereas an act was passed in the 10 & 11 Vict. c. 106, and whereas under the authority of an act of the 7 W. 4, & 1 Vict. c. 21, and of an act passed in the said session of parliament holden in the 9 & 10 Vict. c. 1, and also of another act passed in the 9 & 10 Vict. c. 107, and of an act of the 10 & 11 Vict. c. 10, sundry advances were made by the commissioners of public works in *Ireland* for the purpose of affording relief by means of employment on public works: and whereas, under the conditions on which these advances were made, and under the provisions of an act of the 10 & 11 Vict. c. 87, one moiety of the advances made under the two last-recited acts, with interest, was made re-payable by half-yearly instalments: and whereas by various presentments made at the Spring and Summer Assizes 1847, and at the Spring or Summer Assizes 1848, in different counties in *Ireland*, several sums are payable into the Exchequer in respect of the advances herein-before mentioned, and whereas certain of the works commenced under the two lastly above-recited acts of the ninth and tenth years of Her Majesty are unfinished: and whereas it is expedient to complete the same, and also to carry on works of river drainage under the act passed 9 & 10 Vict. c. 4, and the other acts recited therein, and also of carrying on other works in *Ireland*: be it enacted, that the commissioners of Her Majesty's Treasury, may cause to be issued from time to time as they may find necessary during the three years next ensuing the 5th of April, 1848, out of the consolidated fund, any sum or sums of money not exceeding the sum of £945,000, to be placed to the credit of the commissioners for the reduction of the national debt: provided that the total sum issued from the consolidated fund under this act shall not exceed the sum paid into the Exchequer under the act of the 1 Vict. c. 21, the act of the 9 & 10 Vict. c. 107, the said act of the same years "to facilitate the employment of the labouring poor for a limited period in the distressed districts in *Ireland*," and the said act of the last session of parliament "to facilitate the recovery of public monies advanced for the relief of distress in *Ireland* by the employment of the labouring poor."

2. That all the monies placed to the credit of the commissioners for the reduction of the national debt shall be held subject to the disposal of the commissioners of public works in *Ireland*, for the purposes of any loans which the said commissioners may think fit to make for the completion of public works commenced under the 9 & 10 Vict. cc. 1, 107, and for the extension and promotion of drainage, and for any other works in respect of which, under any of the acts herein-before mentioned, or any other acts, loans are authorized to be made by the said commissioners of public works in *Ireland* out of the funds provided by parliament for that purpose, and for the purposes of any other loans which the said commissioners of public works in *Ireland* may, by any act or acts hereafter to be passed, be authorized to make for the execution of works of public utility in *Ireland*.

3. That all the powers, of what nature or kind soever, contained in the firstly herein-recited act of the last session of parliament, and the acts recited therein, and in any act authorizing loans to be made for the extension and promotion of drainage and other works of utility in *Ireland*, shall extend to this act, and to the loans hereby authorized to be made.

4. And whereas by the said act of the 10 & 11 Vict. c. 106, it is provided, that the sums chargeable under the said act on the several baronies, &c., with interest up to the first day of March, 1848, shall be ascertained by the commissioners of public works in *Ireland*, and for every £100, there shall be paid an annuity of £12, and so on in proportion for any lesser sum during the period of ten years; and such annuity shall be charged upon the barony, half barony, electoral division, part of an electoral division, district, county of a city, county of a town in respect of which the said commissioners shall certify the same to be due; and such an nuity

shall be payable by two instalments in each year, one at each successive Assizes, or in the case of the county of *Dublin* at the successive periods limited for the payment of the respective moieties of grand jury cess for such county, until twenty instalments shall have been paid, the first of the same being payable at the Summer Assizes, and in the case of the county of *Dublin* at the period limited for the payment of the first moiety of grand jury cess after the presenting term of the year 1848, and provided that the whole sum may be paid off in one payment in any case where the grand jury shall think fit to make a presentment for that purpose; and it is further provided, that the said commissioners shall issue certificates to the secretaries of the several grand juries of the total sum so to be repaid, and of the annuity by which the repayments are to be made, and that each secretary shall lay such certificate before the grand jury of the county, county of a city, or county of a town to which the same shall relate, at the Spring Assizes, and in the case of the county of *Dublin* at the presenting term of 1848, each grand jury, without any application to presentment sessions, may present the total sum of principal and interest specified in such certificate: And whereas the said commissioners of public works in *Ireland* have, previous to or at the Spring or Summer Assizes, and in the case of the county of *Dublin* to the presenting term of 1848, certified to the secretaries of the grand juries of the several counties, counties of cities, and counties of towns, in *Ireland*, the total compound sum to be paid in each barony, half barony, electoral division, part of electoral division, district, county of a city and county of a town respectively, and the instalment of annuity which is to be paid for that purpose at the next and every succeeding Assizes until twenty such instalments are paid: and whereas it may be expedient to postpone the payment of the said annuity, and by reason of the unequal proportions of the annual payments chargeable on the several counties and divisions of counties it may be expedient that the re-payments should be made in some cases by annuities of longer duration, and in others of shorter duration, than ten years: be it enacted, that the commissioners of Her Majesty's treasury, may direct the treasurer of any county, or county of a city or county of a town, in *Ireland*, in which the sum or sums certified by the said commissioners of public works shall have been previously presented, or in case of the county of *Dublin* the finance committee of the same county, to postpone the payment of the first instalment of each such annuity until the Spring Assizes of 1849, and in the case of the county of *Dublin* until the presenting term in the year 1849, and thereupon all the provisions of the said last-recited act in relation to the annuity or annuities in such respective county, county of a city or county of a town, shall be construed and take effect as if the first instalment thereof had been made payable at such Spring Assizes and presenting term.

5. That the commissioners of Her Majesty's treasury, upon application by the grand jury of any county, or county of a city, or county of a town, in *Ireland*, or by the justices assembled at a Special Sessions to be summoned as hereinafter directed, in which the sum or sums so certified by the said commissioners of public works shall have been presented, to authorize the conversion of the annuity charged on such county, county of a city or county of a town, or the portion of such annuity chargeable on any barony, half barony, electoral division, or district, under the certificate and presentment in this behalf, or into an annuity of a shorter or longer duration in no case exceeding twenty years, provided the value at the time; of the conversion shall be equal to the value at the same time of the annuity or portion of annuity charged or chargeable as aforesaid, or such instalments thereof as aforesaid, or portion thereof, such respective values to be calculated on the basis on which such an annuity of twelve pounds for ten years as aforesaid was taken as equal to a sum of one hundred pounds; and all the powers, authorities, or provisions contained in the last-recited act which relate to the presentment, raising, levying, and paying of the annuities to be presented by the grand juries under that act shall extend to the annuities sanctioned under this act: provided that with respect to the limitation of the total sum to be issued under this act, all postponed payments, and payments of substi-

tuted annuities under the postponement and conversions hereby authorized, shall be deemed payments under the provisions of the last-recited act.

6. That in case such application shall not have been made by the grand jury of any county, &c. at the Summer Assizes of this present year, and it may be expedient that such application should be made previous to any levy, the clerk of the peace of any such county, county of a city, or county of a town, and he is hereby required within two days after the receipt of a written requisition of the treasurer of such county for that purpose, may call a Special Sessions of the Peace to be held on or previous to the first day of *October* of this present year, to be held at the county or assize town (giving six days notice thereof to the justices of such county) and the justices then and there assembled may make such application as aforesaid.

7. 'And whereas by the said recited act of the last session of Parliament, intituled, *An Act to facilitate the Recovery of Public Monies advanced for the Relief of Distress in Ireland by the employment of the labouring Poor*, it is amongst other things enacted, that any such sum of money to be from time to time raised and levied off any barony, half barony, electoral division, part of an electoral division, district, county of city or county of a town, as in the said act provided, shall be charged upon, and levied upon, the occupiers of and other persons rateable in respect of lands and hereditaments within such barony, half barony, electoral division, part of an electoral division, district, county of a city or county of a town respectively, and rated under the then last preceding rate or rates made, under the provisions of an act passed in the 1 & 2 Vict. and the several acts amending the same, and shall be payable by the respective rate-payers who under the said last preceding rate or rates shall have paid or contributed or been liable to pay or contribute rate in respect of property in such barony, half barony, electoral division, part of an electoral division, district, county of a city or county of a town; and any such sum of money shall be apportioned, assessed, and levied by the respective high constable or collector of grand jury cess for or in such barony, half barony, or place as aforesaid as a poundage assessment equally upon the net annual value of the several lands and hereditaments within such barony, half barony, electoral division, part of an electoral division, district, or county of a city or county of a town respectively, rated as aforesaid, as such net annual value shall have been stated in such last preceding rate or valuation as aforesaid: and be it enacted, that where any rate-payer or rate-payers shall have ceased to occupy the rateable property, all and every sum and sums of money to be so raised and levied under the said provision of the said act, and all and every sum and sums of money which shall be raised and levied under or in consequence of the postponement of payment and conversions of annuities hereby authorized, or any of them, shall be paid by the person or persons in the actual occupation of the lands and hereditaments on which such sum or sums respectively shall be assessed at the time of the assessment thereof, and in the default of any such person or persons, from the person or persons in the actual occupation of the same lands or hereditaments from whom such sum or sums shall be demanded, subject to such provisions as to deduction from rent as in the said act of the first and second years of the reign of Her present Majesty contained, so far as the same shall be applicable.

8. That this act may be amended or repealed by any act to be passed in this present session of parliament.

(To be continued.)

JAMES WHITESIDE, Q.C.

THE DUBLIN UNIVERSITY MAGAZINE for MARCH, 1846. Contents:—

Dennis' Ktruria.—The Massacre of Saint Bartholomew.—Warren, or the Oracular Affatus of the Hindoos.—Our Portrait Gallery, No. LI.—James Whiteside, Esq., Q.C. *With an Etching.*—The Poor-laws, Potato Disease, and Free Trade.—The Seamen of the Cyclades; a Tale of Modern Greece.—A few plain words to the people of England respecting the present state of National Education in Ireland.—The Closing Years of Dean Swift's Life. *With Illustration.*—Ceylon and the Cingalese.—My Uncle the Curate.—The "Times," the Poor-law, and the Poor-law Committee.

Dublin: JAMES MCGILASHAN, 21, D'Olier-street. Wm. S. Orr & Co., 147, Strand, London. Sold by all Booksellers.

CHANCERY.

Anne Twibill, Plaintiff, }
Thomas Benson, }
John Benson, and }
another, }
Defendants. }
PURSUANT to the Decree made in this Cause, bearing date the 22d day of June, 1846, I hereby require all Creditors of Richard 2d. Esq., deceased, in the pleadings in this cause named, and all persons having charges and incumbrances affecting the lands of Dulargy, and the tenements and premises in Ravensdale, heretofore used as a Bleach Mill, called the little Engine Concern, situate in the Lordship of Ballymacanahan, Barony of Lower Dundalk and County of Louth, and the said Richard 2d. Esq., one undivided fourth part of the lands of Ballyworken and Drumacilly, situate in the Barony of O'Neiland East, and County Armagh, being the lands and premises in the pleadings in this cause mentioned, to come before me at my Chambers on the Inns Quay, in the City of Dublin, on or before the 16th day of April, 1846, and proceed to prove the same, otherwise they will be precluded from the benefit of the said Decree.

Dated this 20th day of February, 1846. EDWARD LITTON.

Charles Gausson, & Co., Plaintiff's Solicitors,
72, Eccles-street, Dublin.

IN CHANCERY.

Thomas Kemmis, Esq., Plaintiff. }
Sir Richard Nagle, Bart. }
Dame Mary Bridget Nagle, }
George Pilkington, }
Luke McDonnell, and }
John Ennis, }
Defendants. }
PURSUANT to the Decree of Her Majesty's High Court of Chancery, made in this cause, bearing date the 17th day of April, 1845, I do on MONDAY, the 23rd day of APRIL next, at the hour of One o'Clock in the Afternoon, at my Chambers, on the Inns Quay, in the City of Dublin, SET UP and SELL to the highest and best bidder, all that and these the LANDS commonly called the DONORE ESTATE, in the County of Westmeath; that is to say, the Manor or reputed Manor of Duns, otherwise Donore, Cooline, Ballinashave, Ballinashave, otherwise Ballinashave, Skelane, Garry-clonoe, Thenglenore; and also that part of Donore called the Green House Farm, and the Customs and Tolls of the Fairs and Patterns of Donore; and also that part of the Land of Ballinashave, called the Red House Farm; and also the Land of Spittlestown and its sub-denominations; also the Town and Lands of Ballybrickego, otherwise Rosemont, Killacunnery, otherwise Killacunnery, Capperakirt, Ballynegall, and part of Ballintubber, Cloghish, and Brackneheria, otherwise Brackneheria; and also the Town and Lands of Aghabrack, Carna, Killare, Gibbstown, and part of Cloobenna, Cloobenna, Streamstown, Killinagh, Ardvaun, Garthy, and the House and Office of Jamestown—all situate in the County of Westmeath, or a compass part thereof, for the purposes in said Decree mentioned.

Dated this 27th day of February, 1846.

EDWARD LITTON.

For Rentals, and further particulars, apply to Mr. RICHARD T. TIGHE, the Plaintiff's Solicitor, No. 20, Middle Gardiner Street.

NEW BOOKS, PUBLISHED THIS SEASON:

THE NATURAL HISTORY of IRELAND. By W. L. Ham Thompson, Esq., Pres. Nat. Hist. and Phil. Soc. Belfast. 8vo. vol. 1. Birds, 434 pp., 16s.

2. EPISODES of INSECT LIFE. Crown. 8vo. 36 engravings, 16s. coloured and bound in silk, 21s.

3. THE POETRY OF SCIENCE, or STUDIES of the PHYSICAL PHENOMENA OF NATURE. By Robert Hunt. 8vo. 48 pp. 12s.

London: Reeve, Benham and Reeve. Dublin: EDWARD J. MILLIKEN, 15, College-green.

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1844.

A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING, the 18th April. Chair to be taken at Eight o'Clock precisely.

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq. 11, Lower Ormond Quay.

JAMES O'DRISCOLL.

PROFESSED TROUSERS MAKER,
9, ANGLESEA-STREET.

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at E. J. MILLIKEN, in the same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, March 3, 1846.

THE Irish Jurist

No. 19.—Vol. I.

MARCH 10, 1849.

Price { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARE HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.

Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Queen's Bench, including Civil Bill and Registry Appeals.....	{ FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.
Exchequer of Pleas, including Manor Court and Registry Appeals.....	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, MARCH 10, 1849.

From the Shannon westward to the Atlantic lie the five counties comprising the province of Connaught—Galway, Leitrim, Mayo, Roscommon, and Sligo, blessed with as fertile a soil, on the average, as perhaps any district of equal size in the United Kingdom, and occupied by a laborious and frugal population. Previously to the blight of the potato in 1845, and the following years, this province yielded a rental of nearly one and a-half million sterling annually; it is now steeped in the most wretched destitution and poverty, and, far from being able to yield this rental, is now scarcely able even to support the population existing on its surface.

However, though this extremity of misery is, no doubt, attributable to the failure of that food on which too exclusive reliance was placed, it must not be forgotten that the distress and degradation of this province is not of recent growth; and its origin must be sought for in sources which were in existence, while the potato was in full and luxuriant health.

From a very early period, the miserable state of Connaught had grown into a proverb. In our own recollection of it, even in prosperous times, it contrasted very unfavourably with other, and less fertile, parts of Ireland. Its naked and unsheltered plains, covered with a net-work of rude single stone-walls, dividing the country into irregular patches, miscalled *gardens*—its unsightly hovels—frequently mere holes cut into the ground or bog—covered with what are called “scraws,” exhibiting whole families living in darkness, squalor, and smoke—its uneducated and uncared-for population—its dirty and stunted towns, whose chief ornament consisted of a barrack and a gaol, attracted the attention and offended the eye of a stranger, who, at the same time, observing the land-

scape chequered with luxuriant crops of potatoes and corn, and the green hills covered with cattle, might feel surprised how such poverty could exist in the immediate neighbourhood of such apparent wealth—how it was that the labourer was deemed apparently unworthy of his hire; and he would be tempted to exclaim, with Virgil,

“Sic vos non vobis, fertis aratra boves!”

Whence arose this state of things? Whence arose this apparent want of affinity between the labouring population and prosperity? The practice of leasing large tracts of land to middlemen, aggravated very much the evils which were probably found pre-existing. The rapid increase of population, without any corresponding increase of employment, by which labour might be absorbed and labourers supported, made the possession of small farms necessary for the existence of the population. The competition for these small holdings carried their value in the market to an extravagant height; and, to enable them to hold possession of them, the occupiers were obliged to be contented with the meanest kind of food, and the coarsest kind of clothing. Middlemen—and proprietors following their example—found it more profitable to stock their lands with people than with cattle; the latter required to be well fed, well housed, and constantly attended to; the former required and received no attention or care, and were found profitable directly in proportion to the degree of misery in which they could exist.

To prevent infinitesimal subdivision of land, several acts against sub-letting were passed, which, however, remained—as far as regarded the greater part of the province—a dead letter on the statute-book. These enactments were an effort to remove the symptoms without touching on the source of the disease. In a fertile and but half cultivated district, when the population was not half what it is now, there should have been little difficulty in finding employment for the labouring poor. How-

ever, unfortunately at that time, the state of the law of landlord and tenant acted as an effectual bar to outlay by middlemen, who were only anxious to make what money they could of their lands during their leases, and leave them at their expiration of as little value as possible.

Under that law, all buildings and such permanent improvements in a farm, became ultimately the property of the landlord. In most parts of the province of Connaught, farms possessed no sort of farming accommodation; farm house and offices there are none; everything is required, and landlords have not had the means to—at least they did not provide—the necessary accommodations, and a farmer undertaking to cultivate land himself should have provided all these at his own expense. These expenses were too considerable to be incurred on the prospect of being repaid by the enjoyment of the premises during the continuance of a short lease, so that middlemen were, to a certain extent, driven to adopt the course of letting out their land to the peasantry in small portions. Thus, these two sources of evil proceeded, re-acting the one upon the other; the state of the law preventing middlemen from making improvements, and thus giving employment. And this very want of employment rendering small holdings the more necessary for the labouring poor, their rents higher, and, in consequence, the inducement greater to landlords and middlemen to adopt this system in the management of their lands.

And the law is not different now from what it was then; still the landlord becomes entitled, at the expiration of the lease, to the benefit of all the improvements made by the tenant during its continuance; still the wide fields of Connaught are naked, destitute of farm-houses, of farm offices, still—in despite of the failure of the potato—farmed on the old system of letting them out to a cottier peasantry. Is it reasonable to suppose that while the same causes continue to operate, results of a different character will follow? We are confident that similar results will be produced, as long as this injustice to improving tenants is continued, and that an alteration of the law, by which a tenant will be secured the enjoyment of property which he has himself created, will necessarily precede any improvement either in the appearance, or the surface of the country, or in the condition of its inhabitants.

We know it will be objected, that any enactment of this kind would be such an interference with the rights of property as could not be tolerated; that if any such principle were admitted, landlords might be improved out of their properties; that all arrangements with respect to outlay and compensation should be left to the parties themselves, and that in the end all interference by the legislature would be found to do more harm than good.

As to interference with the right of property, we apprehend the present rule of law interferes more with the very right of property than the alteration which we suggest. We do not understand how the fact of a house, or other permanent improvement, having been erected on land at the cost of another person, necessarily gives the

landlord a right to the ultimate property in this house or improvement, and, on the other hand, we do not know on what principle of equity a man is to be deprived of property whose very existence is the result of his own outlay and industry, merely because the property of the soil is in another person. Landlords should be content with receiving the full value of their lands, and they should not calculate on increasing their rentals by obtaining possession of property neither theirs, nor created by them. As to being improved out of their properties, it amounts to this, that tenants might create more property, that is, make more improvements on their farms than landlords would be willing to purchase, and, admitting that this might take place—however it might prevent a landlord increasing his rental—it certainly would greatly augment his security for the rent at which he originally let the land, so that, far from improving a landlord out of his property, it would secure him in the receipt of his present income, and, on the supposition that he will not do anything to increase it himself, we do not think him entitled to more.

As to leaving arrangements as to outlay and compensation to private agreement, we would suggest that this is inapplicable in the case of existing leases, that there are large classes of proprietors who are not in a position to make arrangements of this kind, which would amount to charging the inheritance; and lastly, that the experiment has been tried for several centuries, and having produced no beneficial results, it might be well now at length to try the effect of another system. And, as to the legislature doing injury by its interference, we are sorry to say there is very little cause to apprehend any such consequence, as the state of Connaught is at present as bad as it can be, which is an argument against the continuance of a system under whose operation this result has been arrived at.

An enactment providing that every person should have secured to him the enjoyment of the wealth which his industry called into existence, could never be considered an inequitable one. Under the protection of an enactment founded on this principle, the occupiers of land would feel that by their exertions they were realizing property for themselves and their families, and not for their landlords; their farms would improve in appearance and in value, and they would limit the amount of employment given, only when they found it unproductive.

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THERE have been some very important decisions recently made in this country as to the exemption from, or operation of, the statute of limitations, 3 & 4 W. 4, c. 27. We allude particularly to the cases of *Hunt v. Bateman*, 10 I. E. R. 360; *Dundas v. Blake*, ante, p. 121; and *Bennett v. Barnard*, ante, p. 145.

The two former arose on the effect of a trust in a will, and the latter on the pendency of a suit, as preventing the bar of the statute.

Immediately after the passing of the act, courts

of Equity appear to have struggled against its applicability to cases of general trusts created by wills; nor was the distinction very well defined as to what cases were within the saving of the 25th section, and what without the bar of the 40th. The words of the latter appeared sufficiently explicit, "no action, or *suit*, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same."

The saving in the 25th was confined to cases where "land or rent was vested in a trustee upon any express trust."

On these two sections an infinite number of decisions have been made. Much property was involved in their adjudication, and the struggle has been generally keen to maintain demands barred by law; yet, generally, "just debts," the forbearance of creditors, and the procrastinating habits of the people of this country, eventuating in the loss of their demands. Baron Pennefather, in speaking of the statute in *Hunt v. Bateman*, observed, that it was "a matter of regret, and must strike every person as not redounding very much to the credit of the makers of the statute, made and passed nearly fifteen years ago, that in the decisions on it so much contradiction should have taken place." The framers of the statute might perhaps have retorted with considerable fairness that the reprehension of the learned Baron would have applied with as much justice to its expositors as to its makers.

The first case in this country was that of *Knox v. Kelly*, (6 L. R. N. S. 222.) There the testator directed his debts to be paid, and, subject thereto, devised his real estate. It did not appear that there was any interposition of trustees between the creditor and devisee; "no vesting of land or rent in a trustee upon any express trust." The will was in 1810; the debt created in 1791, no payment subsequently to 1796, the application in 1837.

Sir Michael O'Loughlen held the debt not barred, and desired "it might be distinctly understood that he rested his decision entirely upon the trust in the will." And this decision was followed by Lord Plunket in *Dillon v. Cruise*, (3 I. E. R. 70,) where the devise was to beneficial owners, subject to the payment of his just debts, *which the testator directed to be paid in the first instance*. No interposition of trustees, no vesting of land or rent in a trustee upon any express trust. The Chancellor, however, was of opinion that there was an express trust created by the will, not a mere general charge, but a devise upon the condition of paying the debts, and he held that the case was not governed by the statute of limitations, and that the law was on the same basis as it had been prior to the passing of the act. Although there were other circumstances in each case, yet the principle to be extracted is as we have stated it.

These were strong decisions, for it was not very easy to understand how the latter case did not

range within the 40th section. It was a suit to recover a sum of money secured by judgment charged upon, or payable out of, land. And it was tolerably clear that it was not within the saving of the 25th section, as that applied to land, not to a gross sum of money charged on land.

The statute was thus rendered almost altogether nugatory, its policy subverted, and, in fact, the evils which it was designed to check were set up afresh. It became very difficult to determine the effect in a will of a general charge for the payment of debts, and, if not within the bar of the statute, they might start up at any distance of time, and each particular case would have been susceptible of the nicest distinctions, and have been decided very much according to its particular circumstances, or the fancy of the judge—in favour of the debt, if he were disposed to fulfil the "pious intentions of the testator," and prevent him "from sinning in his grave," or of the devisee, if he were opposed to the setting up of "stale demands."

We have stated these cases particularly, because we think they may now be considered as virtually overruled. The first blow struck at their authority was by the present Chief Justice, when Master of the Rolls, in the case of *Knox v. Kelly*, (6 I. E. R. 279). That case was undistinguishable from those we have stated, except that the demand was for a legacy, not a debt, and this in fact constituted no solid ground of distinction. It was there held that the legacy was within the 40th section, barred by it, and not saved by the trust created by the will.

The cases under discussion were further undermined by decisions of Sir E. Sugden and Sir James Wigram, who decided that where estates are in the hands of a beneficial devisee, subject to the payment of debts, there is a liability—not a trust—created, and that the creditor will be barred if he does not pursue his remedies before the time given by the statute has elapsed, *Hughes v. Kelly* (3 Dru. & War. 48); *Harrison v. Duigenan* (2 Dru. & War. 295); *Francis v. Grover*, (5 Hare, 1).

In *Hunt v. Bateman*, the question was very carefully considered; and there, though more than thirty years had passed without any payment of principal or interest, or any acknowledgment of the debt, it was held not barred. But the distinction between that case and those we have adverted to, and on which the decision was made to turn, was this, that where estates are conveyed to trustees, and they stand between the creditor and the beneficial owner, so long as the estate remains in their hands, the trust remains and the debt subsists; but the learned judges were of opinion, that where there was a general charge created, and the lands were in the hands of a beneficial owner, no trust would be created, so as to prevent the bar of the statute.

It may, with fairness, be contended that where the legal estate is in the hands of trustees, the cases range within the 25th section of the act; but Mr. Baron Lefroy did not rest the decision upon that, and conceived such cases entirely out of the operation of the statute; he observes—

"It is not within the 25th section, because, though a suit by a *cestui que trust* against his trustee, it is not a suit to recover "the land," but a sum of money. Nor is it within the 40th section, because, though a proceeding to recover a sum of money, it is not a sum of money charged upon land *merely* in any of the ways mentioned in that section. It is a suit by a *cestui que trust* against his trustee, to oblige him to perform his trust, by raising and paying the sum of money, for the raising and paying of which he holds the estate. In fact, it is a suit altogether out of the statute, but within that well-established principle of a Court of Equity, that as between an express trustee and *cestui que trust* length of time creates no bar, and with that principle this statute was not designed to interfere in this class of cases."

It will be observed, that the opinion of the learned judges in the foregoing case was not necessary for their decision of the point before them, and was, therefore, so far extra-judicial.

The point was fairly raised in *Dundas v. Blake*. On reference to our report, it will be seen that the trust created by the will was general; and that the lands, without the intervention of trustees, was given to the devisees beneficially. Counsel for the plaintiffs pressed very strongly upon the court, that the distinction taken in *Hunt v. Buteman* was not justified by authority or principle—that a Court of Equity only looked to the intention of the testator, and that it was perfectly immaterial, in that view, in whose hands the estates were; if in the hands of the beneficial devisee he was, by the will, constituted a trustee—that if the same instrument gave the benefit, it gave the burthen likewise—that a Court of Equity would not permit him to retain the former and divest himself of the latter—that the distinction was more one of words than substance; and it was asked, How could it be maintained that the debt was saved, where the legal estate was in the hands of a naked trustee who never acted, and barred in those of the man in whom the testator reposed personal confidence, whose conscience was directly affected with the trust—that, so far as the creditor was concerned, the trust was raised whether with, or without an intermediary; and it was urged that the case was within that class defined by Baron Lefroy, and expressly within the authority of *Dillon v. Cruise*.

His lordship, however, decided against the plaintiffs, and was of opinion that a devise, subject to the payment of debts, did not constitute the devisee a trustee, so as to take the case out of the operation of the statute; and seemed to think that the Court of Exchequer thought the law more settled than it really was in cases apparently within the 25th section.

The effect of this decision is obviously of great importance; for we suppose it may be now considered as settled—if any question is ever to be so treated which has arisen under the Statute of Limitations—that a general charge created for the payment of debts, where the estate is given directly to the trustee, will not prevent the bar of the statute.

(Continued from p. 136.)

CAP. LII.

An Act to explain the acts for preventing the destruction of the breed of salmon and fish of the salmon kind.

[14th August, 1848.]

- Sec. 1. The word "river" in recited acts to apply to tributary streams thereof.
2. The last recited act to apply to salmon trout and fish of the salmon kind as well as to salmon.
3. Not to extend to offences committed before passing of this act.
4. Act may be amended, &c.

'Whereas an act was passed in the 58 G. 3, c. 43, and whereas an act was passed in the session of parliament held in the sixth and seventh years of the reign of Her present Majesty, to amend and extend the provisions of the said first-recited act: and whereas it is expedient to remove doubts which have arisen whether the said acts extend to the tributary streams of rivers, and the provisions of the said secondly-mentioned act extend to salmon trout and fish of the salmon kind: be it enacted, that in the construction of the said acts, the words "river" and "rivers" shall include all the tributary streams of such river and rivers respectively.

2. That all the provisions, in the said act of the sixth and seventh years of the reign of Her present Majesty contained for the protection of salmon shall extend to salmon trout and fish of the salmon kind, as if in every case where salmon is in such act mentioned salmon trout and fish of the salmon kind had been also expressly mentioned.

3. That with respect to any offence committed before the passing of this act the said acts shall be construed as if this act had not been passed.

4. That this act may be amended or repealed by any act to be passed during the present session of parliament.

CAP. LIII.

An Act to empower the commissioners of Her Majesty's woods to make certain alterations and improvements in the approaches to the castle and town of Windsor.

[14th August, 1848.]

CAP. LIV.

An Act for incorporating the commissioners of the Caledonian canal, and for vesting the Crinan canal in the said commissioners.

[14th August, 1848.]

CAP. LV.

An Act for consolidating the offices of paymasters of Exchequer bills and paymaster of civil services with the office of paymaster general, and for making other provisions in regard to the consolidated offices.

[14th August, 1848.]

CAP. LVI.

An Act to repeal so much of an act of the third and fourth years of Her present Majesty, to re-unite the provinces of Upper and Lower Canada, and for the government of Canada, as relates to the use of the English language in instruments relating to the legislative council and legislative assembly of the province of Canada.

[14th August, 1848.]

CAP. LVII.

An Act to enable Her Majesty to exchange the advowson of the vicarage of Stoneleigh in the county of Warwick for the advowsons of the rectory of Yorall in the county of Stafford and the perpetual curacy of Hunningham in the county of Warwick.

[14th August, 1848.]

CAP. LVIII.

An Act to authorize for ten years, and to the end of the then next session of parliament, the regulation of the annuities and premiums of the naval medical supplemental fund society.

[14th August, 1848.]

CAP. LIX.

An Act for the more speedy trial and punishment of juvenile offenders in Ireland.

[14th August, 1848.]

- sec. 1. *Persons in Ireland not exceeding 14 years of age committing certain offences may be summarily convicted by two justices. If offence not proved, or it is not expedient to inflict punishment, justices may dismiss parties. If charge is thought fit for indictment, &c., case to be dealt with as if this act had not passed.*
2. *Power to justices to hear and determine cases under this act. One Dublin metropolitan justice may, in certain cases, perform acts usually done by two in petty sessions.*
3. *Proceedings under this act to bar further proceedings.*
4. *Mode of compelling the appearance of persons punishable on summary conviction.*
5. *Power to one justice to remand for further examination, and admit to bail.*
6. *Application of fines.*
7. *As to the summoning and attendance of witnesses.*
8. *As to service of summons.*
9. *Form of conviction.*
10. *No conviction to be quashed for want of form, nor removed by certiorari.*
11. *Convictions to be returned to the quarter sessions.*
12. *No forfeiture upon convictions under this act, but presiding justices may order restitution of property.*
13. *Recovery of penalties.*
14. *Proceedings against persons acting under this act.*
15. *Act to extend to Ireland only.*
16. *Act may be amended, &c.*

Whereas, in order in certain cases to ensure the more 'speedy trial of juvenile offenders:' be it enacted, that every person who shall be charged with having committed, or having attempted to commit, or with having been an aider, or procurer in the commission of any offence in *Ireland*, which now is or hereafter shall or may be declared to be simple larceny, or punishable as simple larceny, and whose age at the period of the commission of such offence shall not, in the opinion of the justices, exceed the age of fourteen years, shall, upon conviction thereof, upon his own confession or upon proof before any two or more justices of the peace for any county, riding, division, borough, liberty, or place in petty sessions assembled, be committed to the common gaol or house of correction within the jurisdiction of such justices, to be imprisoned with or without hard labour, for any term not exceeding three months, or, in the discretion of three justices, shall pay such sum, not exceeding three pounds, as the said justices shall adjudge, or, if a male, shall be once whipped, instead of or in addition to such imprisonment, or imprisonment with hard labour; and the justices shall appoint some fit person to inflict the said whipping when ordered to be inflicted out of prison: provided that if such justices, shall deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the party on finding surety for good behaviour, or without such sureties, and deliver to the party a certificate under the hands of such justices, stating such dismissal, and such certificate shall be in the form set forth in the schedule hereto annexed: provided that if such justices shall be of opinion, that the charge is from any circumstance a fit subject for prosecution by indictment, or if the parent or next friend of the person charged shall, upon his or her being called upon to answer the charge, object to the case being summarily disposed of under this act, such justices shall deal with the case as if this act had not been passed.

2. That any two or more justices before whom any such person charged with any offence made punishable under this act shall be brought or appear, are hereby authorized to hear and determine the case under this act: provided one or more divisional justice or justices of *Dublin* metropolis, sitting at any divisional police office, may hear and determine every charge under this act, and exercise all the powers herein contained, in like manner as two or more justices of the peace can do by virtue of this act.

3. That every person who shall have obtained such certificate of dismissal and every person who shall have been

convicted under this act, shall be released from all other proceedings for the same cause.

4. And for the more effectual prosecution of offences punishable upon summary conviction by virtue of this act, be it enacted, that where any person whose age is alleged not to exceed fourteen shall be charged with any such offence, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons to apprehend the person so charged to appear before any two justices of the peace as aforesaid, at a time and place to be named in such summons or warrant.

5. That any justice or justices of the peace, may remand for further examination or for trial, or suffer to go at large upon his or her finding sufficient surety, any person charged before him or them with any such offence as aforesaid; and every such surety shall be bound by recognizance to be conditioned for the appearance of such person for further examination, or for trial before two or more justices of the peace assembled as aforesaid, or for trial at some superior court, and every such recognizance may be enlarged by any such justice or justices to such further time as he or they shall appoint; and every such recognizance which shall not be enlarged shall be discharged without fee or reward, when the party shall have appeared according to the condition thereof.

6. That every fine imposed by any justice or justices under this act shall be awarded to the use of the public hospital or infirmary of the county in which the offence may have been committed, and shall be accounted for in like manner and subject to the same regulations as all other fines imposed by any justice or justices of the peace in *Ireland*.

7. That any justice of the peace, by summons, may require the attendance of any person as a witness upon the hearing of any case before two justices, at a time and place to be named in such summons; and such justice may require and bind by recognizance all persons whom he may consider necessary to be examined to attend at the time and place to be appointed by him, there to give evidence upon the hearing of such charge; and in case any person so summoned shall neglect or refuse to attend in pursuance of such summons or recognizance, then upon proof being first given of such person's having been duly summoned, or bound by recognizance the justices before whom any such person ought to have attended may issue their warrant to compel his appearance as a witness.

8. That every summons issued under this act may be served by delivering a copy of the summons to the party, or by delivering a copy of the summons to some inmate at such party's usual place of abode; and every person so required by any writing under the hand or hands of any justice or justices to attend and give evidence shall be deemed to have been duly summoned.

9. That the justices before whom any person shall be summarily convicted of any such offence as herein-before mentioned may cause the conviction to be drawn up in the form of words set forth in the schedule to this act or in any other form of words to the same effect, which conviction shall be good and effectual to all intents and purposes.

10. That no such conviction shall be quashed for want of form, or be removed by certiorari or otherwise into any of Her Majesty's superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

11. That the justices of the peace before whom any person shall be convicted under this act shall transmit the conviction and recognizances to the clerk of the peace for the county, borough, liberty, or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court of general quarter sessions of the peace; and the said clerk of the peace shall transmit to the chief or under secretary of the Lord Lieutenant of *Ireland* a monthly return of the names, offences, and punishments mentioned in the convictions.

12. That no conviction under this act shall be attended with any forfeiture, but whenever any person shall be deemed guilty under this act the presiding justices may order

restitution of the property to the owner or his representatives; and if such property shall not then be forthcoming, the same justices, whether they award punishment or dismiss the complaint, may inquire into and ascertain the value, and order payment of such sum of money to the true owner by the person or persons convicted, either at one time or by instalments as the court may deem reasonable.

13. That whenever any justices of the peace shall adjudge any offender to pay a pecuniary penalty under this act, and such penalty shall not be paid, such justices, may appoint some future day for the payment of such penalty, and order the offender to be detained in safe custody until the day so appointed, unless such offender shall give security for his or her appearance on such day; and such justices are hereby empowered to take such security, by way of recognizance or otherwise, at their discretion; and if at the time so appointed such penalty shall not be paid, the same or any other justices of the peace, by warrant under their hands and seals, may commit the offender to the common gaol or house of correction within their jurisdiction, there to remain for any time not exceeding three calendar months, reckoned from the day of such adjudication, such imprisonment to cease on payment of the said penalty.

14. And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed; and notice in writing of such action or prosecution, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action or prosecution; and in any such action or prosecution the defendant may plead the general issue, and give this act and the special matter in evidence at the trial and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action or prosecution after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in such action, the plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be, shall certify his approbation of the action, and of the verdict obtained thereupon.

15. And be it enacted, that this act shall extend to *Ireland* only.

16. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

Schedule of forms to which this act refers.

Form of certificate of dismissal.

} We of Her Majesty's justices of the peace
 to wit. } for the county of [or I, a divisional justice
 of the police district of Dublin metropolis, as the case may
 be,] do hereby certify, that on the day of
 in the year of our Lord at in the said county of
M.V. was brought before us the said justices [or me or us,
 the said justice or justices,] charged with the following
 offence, (that is to say,) [here state briefly the particulars
 of the charge,] and that we the said justices [or I the said
 justice] thereupon dismissed the said charge.

Given under our hands [or my hand] this day of

Form of conviction.

} Be it remembered, that on the day of
 to wit. } in the year of our Lord one thousand eight hun-
 dred and at in the county of [or riding,
 division, liberty, city, &c., as the case may be,] A.O. is

convicted before us *J.P.* and *Q.R.*, two of Her Majesty's justices of the peace for the said county [or riding, &c.] [or me *S.T.*, a divisional justice, or us, divisional justices, of the police district of Dublin metropolis, as the case may be,] for that he the said *A.O.* did [specify the offence, and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence,] and we the said *J.P.* and *Q.R.* [or I the said *S.T.*] adjudge the said *A.O.* for his said offence to be imprisoned in the [or to be once privately whipped, with or without imprisonment, or imprisonment with hard labour, or to be imprisoned in the and there kept to hard labour for the space of]; [or we [or I] adjudge the said *A.O.* for his said offence to forfeit and pay [here state the penalty actually imposed,] and in default of payment of the said sum to be imprisoned in the [or to be imprisoned in the and there kept to hard labour] for the space of unless the said sum shall be sooner paid.

Given under our hands and seals [or my hand and seal] the day and year first above mentioned.

CAP. LX.

An Act to alter the duties payable upon the importation of spirits or strong waters. [14th August, 1848.]

CAP. LXI.

An Act to effect an exchange of ecclesiastical patronage between Her Majesty and the Earl of Leicester, and for the severance and consolidation of certain benefices in the diocese of *Norwich*, and for other ecclesiastical purposes. [14th August, 1848.]

CAP. LXII.

An Act to appoint additional commissioners for executing the acts for granting a land tax and other rates and taxes. [14th August, 1848.]

CAP. LXIII.

An Act for promoting the public health. [31st August, 1848.]

CAP. LXIV.

An Act to continue until the first day of October one thousand eight hundred and forty-nine, and to the end of the then next session of parliament, an Act to amend the laws relating to loan societies. [31st August, 1848.]

CAP. LXV.

An Act to suspend until the first day of October one thousand eight hundred and forty-nine the making of lists and the ballots and enrolments for the militia of the United Kingdom. [31st August, 1848.]

CAP. LXVI.

An Act to continue to the first day of October one thousand eight hundred and forty-nine, and to the end of the then next session of parliament, an Act for authorising the application of highway rates to turnpike roads. [31st August, 1848.]

CAP. LXVII.

An Act for further continuing until the first day of August one thousand eight hundred and forty-nine, and to the end of the then next session of parliament, certain temporary provisions concerning ecclesiastical jurisdiction in England. [31st August, 1848.]

CAP. LXVIII.

An Act for extending to *Ireland* an Act passed in the last session of parliament, intituled *An Act for better securing trust funds, and for the relief of trustees.* [31st August, 1848.]

- Sec. 1. Trustees may pay trust monies, or transfer stocks and securities, into the Court of Chancery, or Exchequer in Ireland. Certificate of Accountant-general to be sufficient discharge.
2. Courts of Chancery or Exchequer to make orders on petition, without bill, for application of trust monies and administration of trust.
3. Where concurrence of all the trustees, &c. cannot be

procured, the court or judge empowered to order transfer of monies, &c. by the major part of such trustees, &c.

4. *Lord Chancellor, with Master of the Rolls or the Court of Exchequer, may make orders for payment, &c.*
5. *No money paid under this act liable to usher's poundage.*
6. *Affidavit to state that legacy duty has been paid.*
7. *Construction of expression "Lord Chancellor."*
8. *Act may be amended, &c.*

'Whereas it is expedient to extend the provisions of the 10 & 11 Vict. c. 96,' be it enacted, that all trustees, executors, administrators, or other persons having in their hands any monies belonging to any trust, or the major part of them, shall be at liberty, on filing an affidavit describing the instrument creating the trust, to pay the same, with the privy of the Accountant General of the high Court of Chancery or of the Accountant General of the Court of Exchequer in *Ireland*, into the bank of *Ireland*, to the account of such Accountant General in the matter of the trust, in trust to attend the orders of the said courts, and that all trustees or other persons having any annuities or stocks in the books of the bank of *Ireland*, or of any canal company in *Ireland*, or any government or parliamentary securities standing in their names, or in the names of any persons of whom they shall be personal representatives, upon any trusts, shall be at liberty to transfer such stocks or securities into or in the name of the said Accountant General, with his privy, in the matter of the trust, in trust to attend the orders of the said courts; and in every such case the certificate of the Accountant General of such payment, or of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid or the stocks or securities so transferred or deposited.

2. That such orders shall be made by the said court of Chancery or Court of Exchequer, in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited, and for the investment and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon petition presented in a summary way, by such party or parties as shall appear to be necessary in that behalf, and service of such petition shall be made upon such person or persons as the court shall direct; and every order made upon such petition shall have the same authority, and shall be enforced and subject to re-hearing and appeal in the same manner, as if the same had been made in a suit instituted in the court; and if it shall appear that any such trust funds cannot be distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls, or the said court of Exchequer, may direct any such suit or suits to be instituted.

3. That if upon any such petition it shall appear to the court or judge that any monies, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of this act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant General of the high Court of Chancery, or to the Accountant General of the court of Exchequer in *Ireland*, under this act, but that the concurrence of the other or others of them cannot be had, the said courts of Chancery and Exchequer respectively may order that such transfer, payment, or delivery be made by the major part of such persons without the concurrence of the other or others of them; and where any such monies or government or parliamentary securities shall be deposited with any banker, broker, or other depositary, such courts respectively may make such order for the payment or delivery or transfer of such monies, government or parliamentary securities, to the major part of such trustees, executors, administrators, or other persons for the purpose of being paid or delivered or transferred to the said Accountant General, as to the said courts shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities,

in pursuance of any such order, shall be as effectual as if the same had been made by all the persons entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered, and shall fully protect and indemnify the governor and company of the bank of *Ireland*, and all other persons acting under or in pursuance of such order.

4. That the Lord Chancellor, with the assistance of the Master of the Rolls, shall have power and is hereby authorized to make such orders as shall seem necessary for carrying the provisions of this act into effect; and the said court of Exchequer shall have the like power and authority in respect to payments, transfers or deposits made to or with the Accountant General of that court.

5. That no money so paid into the bank of *Ireland* to the credit of the Accountant General of the court of Chancery, or paid out under any order made under this act by the Lord Chancellor or Master of the Rolls, shall be liable to usher's poundage.

6. That every affidavit made on the occasion of any payment of money or transfer or deposit of stocks or securities under this act by any personal representative shall state that the legacy duty has been duly paid.

7. That in the construction of this act the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper and Lords Commissioners for the custody of the great seal of *Ireland*, for the time being.

8. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. LXIX.

An act to repeal so much of an act of the parliament of *Ireland* of the twenty-third and twenty-fourth years of King George the Third, "for the more effectually punishing "such persons as shall by violence obstruct the freedom "of corn markets and the corn trade, and who shall be "guilty of other offences therein mentioned, and for making satisfaction to the parties injured," as relates to the making of satisfaction to the parties injured; and to substitute other provisions in lieu thereof; and to repeal the provisions of the acts which give remedies against any hundreds or baronies in *Ireland* in respect of robbery.

[31st August 1848.]

Sec. 1. *So much of recited act as relates to proceedings in actions and recovery of damages repealed.*

2. *Damages sustained by means of offences against recited act to be recovered by like proceedings as damages are recovered under 6 & 7 W. 4, c. 116, and 7 & 8 Vict. c. 106. Compensation for offences committed in the city of Dublin may be recovered under 4 & 5 Vict. c. 10.*

3. *Actions commenced before passing of this act for recovery of damages under first-recited act may be discontinued, and such damages may be recovered by presentment of grand jury.*

4. *So much of acts 13 Edw. 1, 28 Edw. 3., and 10 & 11 Car. 1, as relates to remedies against hundreds or baronies in *Ireland* repealed. Persons having sustained damage, and for which they might have a remedy under recited acts, may, having commenced an action, proceed to recover damages and costs under this act. Where damages to be levied.*

5. *Act to extend only to *Ireland*.*

6. *Act may be amended, &c.*

'Whereas by 23 & 24 G. 3, (I.) it is enacted, that if 'any persons, unlawfully, riotously, and tumultuously assembled together, shall after the passing of the said act 'wilfully and maliciously destroy, or shall begin to destroy, 'any storehouse, mill, granary, corn stack, or other place 'where corn, grain, meal, malt, flour, or potatoes are 'usually stored, or shall unlawfully attempt to enter or break 'into, any such storehouse, mill, granary, or other place, 'or take, or spoil, or attempt by force to take, or spoil, 'any corn, meal, malt, flour, or potatoes which shall be 'stored or kept therein, or shall unlawfully enter on any 'ship, vessel, or boat wherein any corn, grain, meal, malt, 'flour, or potatoes shall be laden, and wilfully take, carry 'away, destroy, or damage any of the said articles laden

therein, or wilfully cut, injure, spoil, or take away the said ship, or boat, or the rigging, furniture, tackle, or rudder, or any part of such ship, or boat, rigging, furniture, or tackle, or by force obstruct or endeavour to obstruct the loading or carrying any of the said articles on board any ship, or boat, or shall unlawfully, prevent or endeavour to prevent any ship, or boat laden therewith, or in which any of said articles shall be laden, from sailing, or shall unlawfully, and by force, detain, take, or drive away any horse, car, cart, carriage, or boat laden with any of the said articles on the way to or from any mill, store, granary, or market, sea-port or place of shipping, with the intent to prevent the corn, grain, meal, malt, flour, bread, biscuit, or potatoes therein, or laden thereon, or any part thereof, from being taken to the house, vessel, storehouse, place, or person to which it was intended to be carried, or shall kill or maim any horse or horses or other beast or beasts laden therewith, or shall cut or otherwise break or destroy any of the sacks, or scatter any of the aforesaid articles, wherewith such car, cart, carriage, horse, or boat is or shall be laden, or take away or distribute, or compel the owner, driver, or conductor thereof to distribute, sell, or otherwise dispose of any such article wherewith such car, cart, carriage, boat, horse, or other beast is laden, or any part thereof, or shall destroy any weir, sluice, mill dam, drain, or outwork belonging or appertaining to any mill, every such person so offending in any of the said matters, and all persons unlawfully, riotously, or tumultuously assembled, who shall aid or assist in the commitment or the attempting to commit any of the said offences, being thereof lawfully convicted, shall be adjudged felons, and shall suffer the punishment in that act provided; and that all damages sustained by the offences aforesaid, or by any violence contrary to the said act, may be recovered by action in any of His Majesty's Courts of Record in this kingdom, by the person or persons injured, his, her, or their executors or administrators, against the chief or other magistrate of the county of the town or city, or against any one or more of the inhabitants of the parish in any county; and if judgment shall be given for the plaintiff or plaintiffs, the damages recovered, together with the costs, shall be levied, and paid to the plaintiff or plaintiffs, his, her, or their executors or administrators: and whereas great expenses are incurred in proceeding under the said recited act, and it is expedient that such damages should be recoverable by more summary proceedings: be it enacted, that from and after the passing of this act so much of the said act as provides that any damages sustained by means of any of the offences, or by any violence committed against or contrary to the said recited act, may be recovered by action as aforesaid; or as relates to the proceedings in any such action, or to the recovery of such damages, shall be and is hereby repealed, save and except as to any action or proceeding commenced for such damages sustained by any such offence or violence heretofore committed.

(To be continued.)

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Dublin: T. O'GORMAN, Law Bookseller and Publisher, 33, Upper Ormond Quay. London: Stevens and Norton, Bell-Yard, Lincoln's Inn

CHANCERY.

Anne Twibill, Plaintiff.
Thomas Benson, John Benson, and another, Defendants.

PURSUANT to the Decree made in this Cause, bearing date the 22d day of June, 1848, I hereby require all Creditors of Richard Benson, deceased, in the pleadings in this cause named, and all persons having charges and incumbrances affecting the lands of Dulargy, and the tenements and premises in Ravensdale, heretofore used as a Bleach Mill, called the Little Engine Concern, situate in the Lordship of Ballymacanlin, Barony of Lower Dundalk and County of Louth, and the said Richard Benson's one undivided fourth part of the lands of Ballyworken and Drumalcilly, situate in the Barony of O'Neiland East, and County of Wick, being the lands and premises in the pleadings in this cause mentioned, to come in before me at my Chambers on the Inns Quay, in the City of Dublin, on or before the 18th day of April, 1849, and proceed to prove the same, otherwise they will be precluded from the benefit of the said Decree.

Dated this 20th day of February, 1849.

EDWARD LITTON.

Charles Gausson, & Co., Plaintiff's Solicitors,
72, Eccles-street, Dublin.

IN CHANCERY.

Thomas Kemmis, Esq., Plaintiff.
Sir Richard Nagle, Bart. Dame Mary Bridget Nagle, George Pilkington, Luke M'Donnell; and John Ennis, Defendants.

PURSUANT to the Decree of Her Majesty's High Court of Chancery made in this cause, bearing date the 17th day of April, 1847, I do on MONDAY, the 23d day of APRIL next, at the hour of One o'clock in the Afternoon, at my Chambers, on the Inns Quay, in the City of Dublin, SET

UP and SELL to the highest and best bidder, all that and those the LANDS commonly called the DONORE ESTATE, in the County of Westmeath; that is to say, the Manor or reputed Manor of Donore, otherwise Donore, Coolfin, Ballinlabane, Ballinlahave, otherwise Ballinlahavin, Hoepistown, Skehane, Garrycloone, Thenlemore; and also all that part of Donore called the Green House Farm, and the Customs and Tolls of the Fairs and Markets of Donore; and also that part of the Lands of Ballinlahave, called the Red House Farm; and also the Lands of Spittletown and its sub-denominations; also the Town and Lands of Ballybricke, otherwise Rosemount, Killachunney, otherwise Killasney, Capperakirk, Ballinagall, and part of Ballintubber, Cloghlah, and Bracknehera, otherwise Bracknehera; and also the Town and Lands of Aghabrack, Carne, Killare, Gibbstown, and part of Cloghenna, Cloone, Streamstown, Killinagh, Ardvaun, Garthy, and the House and Office of Jamestown—all situate in the County of Westmeath, or a competent part thereof, for the purposes in said Decree mentioned.

Dated this 27th day of February, 1849.

EDWARD LITTON.

For Rentals, and further particulars, apply to Mr. RICHARD P. TIGHE, the Plaintiff's Solicitor, No. 20, Middle Gardiner Street.

NEW BOOKS, PUBLISHED THIS SEASON:

THE NATURAL HISTORY OF IRELAND. By WILLIAM THOMPSON, Esq., Pres. Nat. Hist. and Phil. Soc. Belfast. 8vo. vol. 1. Birds, 434 pp., 16s.

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London: Reeve, Benham and Reeve. Dublin: EDWARD J. MILLIKEN, 15, College-green.

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1848.

A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING, the 8th April. Chair to be taken at Eight o'clock precisely.

Barriers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq. 11, Lower Ormond Quay.

JAMES O'DRISCOLL, PROFESSED TROWERS MAKER, 9, ANGLESEA STREET.

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):

Yearly, 30s. Half-yearly, 17s. Quarterly, 9s

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, March 10, 1849.

THE Irish Jurist

No. 20.—Vol. I.

MARCH 17, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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		Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, MARCH 17, 1849.

The proposition of Sir Robert Peel for a resettling of the province of Connaught—on the plan of the Plantation of Ulster—has taken the public somewhat by surprise. But, although the magnitude of the measure is at first sight rather astounding, yet it is very far from being an impracticable one, or one, the result of which would not redound inculcably to the national advantage.

The two great facts on which are based the argument for the necessity of some such bold and comprehensive policy are; Firstly, that before any practicable good can be effected in the suffering districts of Ireland *a change of proprietors must take place*; And secondly, that in order to prepare for, and effectuate such a change, a legislative interference will be necessary.

The recent attempt to effect a transfer of property on a large scale, through the medium of private interference, has proved a failure. This was the design of the Irish Incumbered Estates Act, which, for many reasons heretofore adverted to by us, has signally failed, and, unless much altered, will never be the means of any large amount of property changing hands. As a palliative for existing evils in this country it is totally useless, and simply, because those estates most requiring a change of proprietors are just those least likely to find purchasers.

We have already demonstrated that none but the owners of incumbered estates will avail themselves of this act, and few of that class will be inclined to do so. Their energies are prostrate—their means a blank, and, above all, they have nothing to expect for themselves by forcing into a depreciated market their ill-cultivated, and over-peopled estates. And, when lands lie waste, and hands are idle, and no limit to the liability to poor-rate, who would become a purchaser? In such

cases, that the intermediate ownership of the crown would be productive of much good, cannot be questioned. No dwarf remedy can abate an evil so gigantic.

A great proportion of the lands in the distressed districts of Ireland requires the hand of the improver to render them fit for profitable cultivation, and many of our prudent resident landlords have long acted on this principle in the management of their own estates. When they find a tenant pauperised, his land exhausted, and incapable of paying either rent or rates, they take the farm into their own hands, and improve its condition, and, when it is said to be brought "into heart," hand it over to a better cultivator, with means and will to make it productive for his own benefit and that of his landlord. And, on a large scale, this is just the office proposed to the government commissioner by Sir Robert Peel's plan.

Now, the land, and the people of Ireland, are "out of heart." To restore the one, and revive the other, we hope soon to hear of the introduction of a bill to carry into effect this plan, or some modification of it. The present is not the time for entering into the detail of the question, or the manner of working it out, but, as a matter more peculiarly within our own province, we would point to the large amount of rental of Ireland under the management of the Court of Chancery, as a vast field upon which the government commissioner might at once commence his operations, with great ease to the executive, and great advantage to all interested.

The estates under the control of the court offer many facilities for the purpose; and, in the most distressed of the western counties, viz, Galway, Mayo, Sligo, and Roscommon, we find by the Chancery return of last session that the number of properties under the Courts of Chancery and Equity Exchequer are 153, representing a rental of about £120,000 per annum.

The greater number of these properties are

destined to be sold for payment of debts. The amount of incumbrances, and the rights of parties, are generally ascertained; and, as the reported creditors—we may presume—would have no objection to accept of charges on the consolidated fund in lieu of their claims on the land, no impediment would stand in the way of the Commissioners—armed with a Chancery injunction—at once going into possession.

A very grave question here presents itself to our consideration, namely, how far the Court of Chancery, with its great power for good or for ill, might not, at least to a certain extent, have fulfilled some of the duties to be allotted to the government commissioner, by acting, through its officers, as the intervening mediator between the litigant creditor, the owner of the estate, and the occupiers of the soil—and thereby have saved or avoided much of the misery which the occupants of such estates, and the owners of them, are now suffering.

When the owner of an estate is deprived of the superintendence and control of his own affairs—when his tenantry and dependants, those habituated to look up to him for counsel, assistance, and relief in distress—are by the order of the court placed under the dominion of a stranger—when old connexions are broken up, and old feelings and associations disarranged by the embarrassments and difficulties of the landlord, if it be an axiom—which none will now dispute—that property has its duties as well as its rights, at such a moment, and under such circumstances, it is peculiarly necessary that the law which transfers the rights of the owner to another, should at the same time well provide that the recipients of that owner's duties should suffer as little as possible by his misfortunes. We fear we must look in vain for any instance under the court of the exercise of that fostering care of the land, or of the tenantry, so needful in such a case, and we believe we may safely challenge the whole extent of Ireland to produce one solitary instance of improvement in property effected, or real benefit derived, by contact with the Court.

We have already, on more than one occasion, pointed out the evils of, and bad effects resulting from, our present system of the management of property under our Equity courts; and, while that system exists unaltered, we fearlessly assert that no improvement can possibly take place on these estates, or, [we may almost say, on any estates in the vicinity of them, for, in nine cases out of ten, from their neglected condition, they are hot-beds of pauperism, and fruitful nurseries for claimants of out-door relief; inflicting burdens on, and tainting the moral condition of the whole neighbourhood.

Sir Robert Peel dwelt much upon the miserable condition of the people of the Ballina union, and drew from the Report of Captain Hamilton many arguments to prove the necessity for a change of proprietary in Ireland.

That report is indeed instructive, and as suggestive of facts to us as to him; and what does it teach us? that in this small district—admittedly one of the most miserable in Ireland—there are no less than eighteen estates under receivers of the Court

of Chancery; and that while the hard-working active, honest resident proprietor, struggles manfully to support his poor, and cultivate his land, he is bowed down and overwhelmed by the supervening poverty of those neglected Chancery estates.

We believe that the heads and officers of our Equity Courts are feelingly sensible of the evils of the present system, and, as far as their powers extend, would gladly contribute their aid to the improvement of estates under receivers, and the assistance of the poor upon them; but they have little power, unless with the consent of all parties interested. The Court is bound to protect the creditor. He seeks the aid of the law, and demands “penalty and forfeit of his bond,” and the administrators of the law are coerced to guard his rights, no matter at what sacrifice either to the debtor, or to the occupier, or to the interests of the community at large.

The Court appoints its officer to take charge of the estate—and he is not inaptly named a receiver—in contradistinction to the agent of an estate, whose duties are not alone confined to the pounds, shillings, and pence of the rental; but, unfortunately the duty of a Chancery receiver begins and ends with the column of receipts, and the column of arrears. He knows nothing in his dealings with the tenantry of the principle of *Give and Take* which smooths and facilitates the dealings of mankind with each other. His cry must still be that of “the daughters of the horse-leech—Give, Give,” and, without means or power to improve the land, or stimulate the industry of the people, he must come to his reckoning, and account for his full tale of rent, with all the terrors of disallowed poundage, and personal liability for arrears, hanging over his devoted head.

The responsibilities of the office will render it extremely difficult to procure gentlemen of property or position to undertake the dangerous duties of a Chancery Receiver.

The calamitous condition of our peasantry seems to be a wonder, when such is the system under which a surface of country, representing one million and a half of rental—equivalent to that of the whole province of Connaught—is managed, and on which the average expenditure for improvements does not exceed five shillings per cent. per annum; and when, by the return furnished to parliament last year, it appears that out of a rental of over nine hundred thousand pounds per annum, not one shilling has been expended on improvements since the appointment of the receivers.

We feel happy in the knowledge that the present session will not be allowed to pass, without the appointment of a committee to inquire into this most important subject; and we are aware that a plan has been devised for the better management of estates under the Court of Chancery, by which, with perfect justice to creditor, owner, and occupier, the country at large will be materially benefitted.

A KNOWLEDGE of the legal rights and liabilities arising from the relation of landlord and tenant under instruments not under seal, is of much im-

portance in this country, where parol demises are so frequent.

We propose from time to time to consider those questions on the subject on which the least information is derivable from treatises on this branch of the law.

The first question we shall consider is, whether there is any warranty or covenant in law respecting the lessor's title, arising from the mere relation of landlord and tenant, there being no demise under seal; and, if so, what is the extent of it.

It would appear plain from every principle of law and justice, that if one man contracts to give another a certain thing for a specified period, and fails to perform that contract, that the former should be answerable for the breach of it. As if A agree to give to B an interest in land for a certain term, and B be evicted before its expiration, he being in no default; from the period of the decision in *Slade's case*, (4 Coke, 94, a.) to the present day, we know of no case where it has been held that an action for damages would not lie for the breach of such a contract, (Com. Dig. tit. Action, M. 3.) and in some instances an action on the case for the tort. See *Boorman v. Brown*, (11 Cl. & Fin. 1 S.C. 3 Q. B. 525.) In some recent cases, *Messent v. Reynolds*, (3 C. B. 194; 15 L. Jou. N. S. C. B. 226; 10 Jur. 550); *Jackson v. Coffin*, (8 M. & W. 790); *Granger v. Collins*, (6 M. & W. 458, S. C.; 9 Jou. N. S. Ex. 172), this question came before the courts in Westminster, and the dicta of the learned judges in these cases appear to have originated an opinion that no covenant in law whatever, for title or quiet enjoyment, arose from the mere relation of landlord and tenant. These opinions, when considered, are not, we think, decisions for the abstract propositions they are cited to maintain. They are, in our judgment, unquestionably correct decisions with reference in each case to the *subjectam materiam*.

Before we enter upon the discussion of this question, there are two expressions of constant reference, those of warranty and implied covenant, the definite meaning of which must be clearly understood.

Warranty in the strict legal sense is not applicable to leaseholds or chattels real, it being a covenant real attaching to the land, not to the person; the person whose land was bound by the warranty being obliged to make the recompense in land, and not in damages, as would be the case in covenant. (Yelv. 139, Co. Litt. 389, a.) It must therefore be taken in the popular sense, that the grantor has that which he purports to grant; as where A agrees to let land for ten years, there is no implied warranty that they are fit for a particular purpose, but merely that he is in condition to grant the land for the number of years agreed upon.

Next, as to what is an implied covenant? An implied covenant is to be drawn from the words of the parties, not their acts. It is an implication of what the parties intended to express, but have not correctly expressed; as where a man said he would "warrant and defend the quiet enjoyment of the lessor during the term." These words, not amounting to an express covenant, as there can be no

warranty of a chattel,—the court, in *Williams v. Burrell*, (14 Law Jour. N. S. 99, C. B. S. C. 1 C. B. 402,) held to amount to an implied covenant. An implied covenant, when it is once ascertained that such was within the intention of the parties, is therefore in the nature of an express one, and an action for the breach of it will lie against the executor of the covenantor, which is not so in the case of a covenant in law which is that which arises from the word demise, (*Williams v. Burrell*), and which is that which we contend arises from the relation of landlord and tenant existing under contracts not under seal. The expression "implied covenant," is not therefore strictly applicable to such a case, in which the only liability that can exist is a covenant in law, arising from the contract of the lessor that he has that which he promises to give, and that the lessee shall enjoy it quietly during the term.

If A. contracts to deliver goods to B. and fails to do so, an action will lie for the non-delivery. It has been also decided that if A. agrees to let land to B., and C. being in possession, refuses to give up possession, that an action will lie by B. against A. for the non-performance of his contract. *Coe v. Clay*, (5 Bing. 440). It would appear unquestionable, but for the cases referred to, that from every contract of letting or hiring, there results a necessary legal obligation on the part of the lessor to put the lessee in possession of the thing let, and to give not merely the possession, but to undertake that the lessee shall hold it for the term contracted for. In *Sutton v. Temple*, (12 M. & W. 52), Parke, B. says, "The word demise merely annexes to it a condition that the party demising has a good title to the premises, and that the lease shall not be evicted," and in *Hart v. Windsor*, (12 M. & W. 68).—"It is clear that from the word demise in a lease under seal, the law implies a covenant; in a lease not under seal, a contract for title to the estate merely, that is, for quiet enjoyment against the lessor, and all that come in under him by title, and against others claiming by title paramount during the term, and the word *let*, or any equivalent words which constitute a lease, have no doubt the same effect, but not more." In both these cases the question before the court was, what covenant in law, as to the fitness of the premises for a particular purpose, arose from the mere contract of letting, a subject we shall hereafter refer to more fully, but the opinion of the court was delivered after much deliberation, and on a subject in the consideration of which the present question must have necessarily been before it. The observations of the learned judge, which, under a different state of facts, would necessarily decide this question, cannot be regarded as mere ill-considered dicta thrown out during the course of a judgment on a different subject. In *Hancock v. Caffyn* (1 Moo. & Sc. 521). A. agreed with the defendant for the purchase of a house with the furniture, &c. The defendant having permitted the head rent to become in arrear, it was distrained for. A. having in the meanwhile become bankrupt, his assignees brought an action in case against the lessor. Two objections were raised first, that the action should have been in *assumpsit*,

for the breach of contract; and secondly, that there was no implied covenant to indemnify the lessee from the non-performance of the lessor's covenants with the head landlord. Both objections were overruled. This would appear to be an express authority that a covenant in law for quiet enjoyment during the term, arises from a mere contract to let.

We shall now proceed to consider the cases relied on as warranting a different conclusion, and in each it will be found that the covenant, for the breach of which the action was brought, was one either not within the meaning of the legal covenant, which we contend arises, or else that the implied covenant, as stated in the declaration, was so large as to include covenants not within the scope of a covenant in law, and that the count was therefore bad on demurrer, as the court could not say what was the nature of the covenant relied upon as broken.

In *Upton v. Ferguson*, (3 Moo. & Sc. 88), the action, as in the last cited case, was brought to recover damages for a distress for rent by the head landlord. The plaintiff agreed to take the premises at a yearly rent, and to be liable for the rents to become due to the head landlord after a certain day. The rent was reserved to the head landlord quarterly; and a quarter from the date agreed upon having become in arrear, a distress was made, for which the tenant brought this action. The court held, that the plaintiff having made himself liable for the rents to become due to the head landlord after the commencement of his tenancy, he should have known how it was reserved, and that there was no implied covenant that the rent was reserved yearly. This case, then, clearly is no authority against the position contended for. The case of *Messent v. Reynolds* (3 C. B. 194, S. C. 10 Jur. 550; 15 L. Jour. N. S. 226, C. B.) is of a somewhat similar character; the tenant agreed to take subject to the terms of an agreement under which his immediate lessor held, the terms of which were not set out in the declaration, and the court held that no covenant in law could be implied in the absence of any information as to the real terms of the agreement under which the plaintiff actually held. In *Jackson v. Cobbin* (8 M. & W. 790), the covenant sought to be implied, was, that the premises might be used for any purpose; such a covenant, it is evident, could not be implied, and the court gave no express opinion on the abstract question; but the inference is in favour of the affirmative, as the plaintiff had leave to amend, which would not have been granted if the court thought the action unsustainable. The last case we shall refer to is that of *Grainger v. Collins* (6 M. & W. 458; S. C. 9 L. Jour. N. S. 172). The declaration stated, that in consideration of the letting, the defendant promised the plaintiff that he should quietly enjoy during the term; and that before its termination he was evicted by those entitled to the reversion. The point stated for argument on the demurrer was, "that the declaration stated a larger promise than the law inferred, that it would render the defendant liable for a wrongful eviction of the plaintiff by those entitled to the reversion, or for an eviction in consequence of the plaintiff's own

acts ('as was the case here')." The decision the court was called upon to make was merely this, that the declaration did not state correctly the covenant in law which should be implied from the relation of landlord and tenant; and though some members of the court gave utterance to observations going that length, these *dicta* lose much of their effect, if not wholly overruled, by the decision of the same court in the later cases of *Hart v. Windsor* and *Sutton v. Temple*, and the case of *Brown v. Crump* (1 Marsh, 567), cited in the judgment, would appear to shew that the objection was to the mode of statement of the covenant, and not that no covenant existed, as in that case it was admitted that there was an implied covenant on the part of the tenant to till in a proper and husbandlike manner, but not in a particular manner, as was contended.

The result to be arrived at from the consideration of these authorities appears to be, that as a general rule, when one person lets, or agrees to let land to another, there arises a covenant or contract in law, that he has the ability to grant that which he proposes to give, and that he is liable for the breach of that contract; and the cases referred to as deciding the contrary, are so many exceptions to this rule, arising from the peculiar facts of each case.

Court Papers.

Equity Exchequer.

GENERAL ORDER.

Saturday, 24th February, 1849.

It is this day ordered by the court as follows:—

1. That no recognizance hereafter to be entered into by or for any tenant, receiver, or other person, who, according to the general practice, or orders of the court, or by any special order, made in any cause or matter, may be bound to enter into a recognizance, shall be deemed to be completed within the meaning of such practice or orders, or special order, unless and until in addition to the due enrolment thereof, the same shall be duly registered in the office of registrar of judgments, in pursuance of and according to the provisions of the act of the seventh and eighth years of the reign of Her Majesty, intitled, "an act for the protection of purchasers against judgments, crown debts, lis pendens, and commissions of bankruptcy; and for providing an office for the registry of all judgments in Ireland, and for amending the laws in Ireland respecting bankrupts, and the limitation of actions;" and of an act passed in the eleventh and twelfth years of the reign of Her Majesty, intitled, "an act to facilitate the transfer of landed property in Ireland:" but the non-compliance with this order shall not affect the validity of such recognizance at law or in equity, otherwise than as the said act, or either of them, may in such case affect the same, as against purchasers, mortgagees, or creditors.
2. That the chief or second remembrancer shall not perfect any lease under a letting made to a tenant until, in addition to the certificate of the enrolment of his recognizance, a certificate of the said registrar of judgments, of the lodgment and entry of the memorandum or minute of such recognizance required by the said first-mentioned act to be left with him, endorsed on a duplicate of such memorandum or minute, in pursuance of the said act of the eleventh and twelfth years of the reign of Her Majesty, shall be produced.
3. That the production of a like certificate of the regi-

trar of judgments shall be requisite, with the certificate of the enrolment of the recognizance, to entitle a receiver in a cause, or in the matter of a petition under the mortgage act, or title rent-charge act, to enter the general order, that the tenants do pay their rents and arrears to him; and that no receiver appointed in the matter of a petition under the judgment acts, shall serve the order on the tenants to pay their rents to such receiver until, in addition to the certificate of the enrolment of his recognizance, a certificate of the said registrar of judgments of the lodgment and entry of the memorandum or minute of such recognizance, required by said first-mentioned act to be left with him, endorsed on a duplicate of such memorandum or minute, in pursuance of said act of the eleventh and twelfth years of the reign of Her Majesty, shall be filed in the office of the secondary.

4. That all receivers already appointed shall proceed without delay and before the first day of Easter term next ensuing, to have the several recognizances heretofore entered into by them, or on their behalf, duly registered pursuant to the said acts, in the office of the said registrar of judgments, unless the same have been already registered, and do produce the like certificate of the said registrar as aforesaid, in respect thereto, to the chief or second remembrancer, on the passing of their next accounts, who may therein allow the costs of such registry; and the chief or second remembrancer shall have power to disallow his poundage on such account to any receiver not producing such certificate, dated on or before the said first day of Easter term, unless some satisfactory reason shall be given to him for the delay; and the chief or second remembrancer shall not pass any such account without production of the certificate, and in their certificate of the allowance of the account, shall state that the same was produced, and the date thereof.

5. That to the next statement of facts to be laid before the chief or second remembrancer by any receiver or sequestrator, or to his next account, whichever shall be first lodged after the date hereof, there shall be annexed by way of schedule, a specification of the several tenants by whom recognizances have been entered into, and the amount thereof respectively; and the chief or second remembrancer shall examine into the same, and shall be at liberty in all cases when he shall think fit, to direct the receiver or sequestrator, on his attorney to effect within a time to be fixed by the chief or second remembrancer, the due registration, under the said acts, of all or any of the said recognizances which it may be proper to have so registered, and to allow the costs thereof in the account of such receiver or sequestrator, and to suspend the passing of any account until such direction shall have been complied with.

6. That any party interested in any cause or matter, or the receiver or sequestrator appointed therein, may register under the said acts, the recognizance of any deceased or discharged receiver or sequestrator, or of any party, which shall not have been vacated, and the chief or second remembrancer may allow in his next account, to any such receiver or sequestrator, the costs of such registration, where he shall think it was proper that the same should have been effected.

7. That the fee of 16s. 8d. shall be allowed to the attorneys of the court for attending to register any judgment, decree, order, crown bond, lis pendens, or recognizance, under the said acts, and for all duties relating thereto, including the preparation and signing of the memorandum and minute to be lodged with the registrar, and a duplicate thereof, but the chief or second remembrancer, in allowing any costs under the fifth foregoing order for the registration of the recognizances of tenants, may allow a lesser sum for each in his discretion, having regard to the number registered by the same attorney, in the same cause or matter.

D. R. PIGOT, C. B.
RICHARD PENNEFATHER.
JOHN RICHARDS.

(Continued from p. 144.)

2. That all damages heretofore sustained, or shall at any time after the passing of this act be sustained, by any person or persons by means of any of such offences against the said recited act, or by any violence committed contrary to the same, shall be recovered by like applications and proceedings, and by like presentments of the grand jury of the county, county of a city, or county of a town, in which any such offence or violence shall have been committed, and subject to like traverses, and to like provisions, and in like manner as by the 6 & 7 W. 4, c. 116, and 7 & 8 Vic., respectively is or are provided in relation to the recovery of compensation for damages sustained by the mischievously or wantonly setting fire to, burning, or destroying any house, outhouse, or other building, or any haggard, corn, hay, straw or turf, or the setting fire to, burning, or sinking any boat or barge laden with corn or other provisions, or the killing, maiming, houghing or injuring any horse, mule, ass, or swine, or any horned cattle or sheep, or the damaging, injuring, or destroying any bank, gate, lock, weir, sluice, bridge, dam, or other work belonging to any person, public canal, or navigation; and the provisions of the said two acts shall be applied for the recovery of damages sustained by means of any of such offences against the said first recited act; provided that in the case of any of such offences committed in the county of the city of *Dublin*, compensation for damages sustained by means thereof shall and may be recovered in like manner as by the 4 & 5 Vic. c. 10, is provided in relation to the malicious burning of houses, barns, haggards, corn, or other articles or effects.

3. That after the passing of this act any person or persons against whom any action shall have been commenced or prosecuted before the passing of this act, for the recovery of any damages sustained by means of any offence or violence committed contrary to the said first-recited act, or the plaintiff or plaintiffs in such action, may apply to any judge of any of the superior courts at *Dublin*, for an order that such action shall be discontinued; and every such court or judge, upon such application, shall make such order as aforesaid, and shall order the costs of the plaintiff to be taxed as between party and party, and upon the making of such order such action shall be forthwith stayed or discontinued; and thereupon, after such stay of proceedings, the person or persons who shall have so commenced or prosecuted such action, or his, her, or their executors or administrators, may proceed to recover such damages, with the costs, in the same manner as in the immediately preceding provision directed; provided, that such person or persons, or any person or persons who has or have sustained any such damages before the passing of this act, need not serve or post any notice of his, her, or their intention to apply for compensation for any such damages or costs upon any person or persons, save that he, she, or they shall lodge with the secretary of the grand jury, as applications for public works are lodged, an application, setting forth the loss or damages sustained, and the amount thereof, and of such costs so taxed, and setting forth the time and place when and where such injury was done, and the property injured; which application shall be scheduled by the secretary of the grand jury, and be dealt with, as near as may be, as other applications for compensation for damages in other cases.

4. 'And whereas by acts, 13 Edw. 1, 28 Edw. 3, and 10 & 11 Car. 1, provision is made relating to the recovery of damages against the hundred or barony in respect of robberies committed; and it is expedient that so much of the said recited acts should be repealed, so far as relates to *Ireland*:' be it enacted, that after the passing of this act so much of the said last-recited acts as relates to any remedies against any hundred, or to the recovery of damages against any hundred or barony in *Ireland*, or the inhabitants thereof, in respect of any robbery, shall be and the same is hereby repealed, save and except as to any action or proceeding heretofore commenced; and in the case of any such action or proceeding heretofore commenced, the same shall and may be stayed and discontinued, in like manner and subject to like regulations as herein-before provided as to staying and discontinuing proceedings, and after

such stay of proceedings the person or persons who shall have so commenced or prosecuted such action, or his or their executors or administrators, and also any person or persons who shall have sustained any such damages by means of any robbery, and for which he might now have any remedy under the said recited acts, and who shall not have commenced any action or proceeding therefor, before the passing of this act, his, her, or their executors and administrators, (in either of such cases,) may proceed to recover such damages, and in the case of an action being commenced, the taxed costs as aforesaid, and may recover the same by presentment of the grand jury, in the same manner as in the immediately preceding provisions respectively directed: provided, that such person or persons need not serve or post any notice of his, her, or their intention to apply for compensation for any such damages upon any person or persons, save that he, she, or they shall lodge with the secretary of the respective grand jury, as applications for public works are lodged, an application setting forth the damages sustained, and the amount thereof, and in the case of any action commenced, the taxed costs as aforesaid, and setting forth the time and place when and where such robbery was committed, and the particular property robbed, which application shall be scheduled by the secretary of the grand jury, and be dealt with as other applications for compensation for damages in other cases: provided, that such damages shall be levied off the barony, county of a city, or county of a town, in which such robbery shall have been committed.

5. And be it enacted, that this act shall extend only to Ireland.

6. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. LXX.

An Act for dispensing with the evidence of the proclamations on fines levied in the Court of Common Pleas at Westminster. [31st August, 1848.]

CAP. LXXI.

An Act to continue to the 20th day of July 1853, and to the end of the then next session of parliament, Her Majesty's commission for building new churches. [31st August, 1848.]

CAP. LXXII.

An Act to amend the acts relating to the constabulary force in Ireland, and to amend the provisions for the payment of special constables. [31st August, 1848.]

Sec. 1. Power to Lord Lieutenant, &c. to fix salaries of constables.

2. Salary of a limited number of constables under 2 & 3 Vict. c. 75, continued.

3. Number of constabulary chargeable on consolidated fund to be fixed by Lord Lieutenant, &c.

4. Rate of charge on counties and boroughs for constabulary force appointed on application of town council of a borough.

5. Proportion of sub-inspectors and head constables to additional force appointed on certificate of magistrates, or application from town council of a borough.

6. If constabulary shall be ordered under the authority of 6 & 7 W. 4, c. 13, to repair to any other place, &c., and absence exceeds five days, the expense to be charged thereto, and paid by presentment.

7. Where constabulary shall be required under 8 & 9 Vict. c. 46, to keep the peace near railway works, company, &c. requiring the same to pay the expense.

8. Form of certificate to be laid before grand juries.

9. Constabulary to act in adjacent counties.

10. Assistant inspector general, or a county inspector or sub-inspector appointed president by the inspector general or deputy, may inquire and examine on oath into the truth, &c. of charges against constabulary.

11. Oath on appointment may be taken before one magistrate only.

12. Receiver, with consent of treasury, may appoint a person to act for him, and draw on the bank of Ireland, in case of his illness or absence.

13. Orders drawn by justices for payment of special constables under provisions of 2 & 3 W. 4, c. 108, valid.

14. 6 & 7 W. 4, c. 13, &c., and this act, construed as one.

15. Schedules to be part of the act.

16. Act may be amended, &c.

'Whereas it is expedient to alter and amend several provisions of the acts relating to the constabulary force in Ireland: be it enacted, that the Lord Lieutenant or other chief governor or governors of Ireland may appoint such annual salary as may seem proper to be paid to each constable appointed or to be appointed under any of the acts now in force relating to the constabulary force in Ireland, not exceeding thirty-eight pounds for each mounted constable, and thirty-six pounds for each dismounted constable, and to direct that such annual salary shall commence on and from the first day of April in this present year.

2. 'And whereas under the 2 & 3 Vict. c. 75, several of the constables of the said force are at present in the receipt of a salary of forty pounds per annum: be it enacted, that each of such constables shall continue to receive the said salary until the Lord Lieutenant shall otherwise direct, and that the Lord Lieutenant may direct the said salary of forty pounds to be paid to any other constables: provided always, that the number of constables receiving such salary shall not at any one time exceed fifteen.

3. 'And whereas by 9 & 10 Vict. c. 97, it was provided that the whole cost of the constabulary force, save as therein mentioned, should be paid out of the consolidated fund: and whereas it is expedient to determine the number of officers and men whose pay and expenses may, under the said act, be charged upon the said consolidated fund for each county, county of a city, or county of a town in Ireland: be it enacted, that the number of officers and men chargeable to the said consolidated fund shall be such as the Lord Lieutenant or other chief governor or governors of Ireland may consider to be required, but shall not exceed in any year, after 31st March, 1848.

4. 'And whereas it is expedient to determine the sum to be charged upon each county, or any part or district thereof, or any county of a city or county of a town in Ireland, where, by the laws now in force, one moiety of the expenses of any constabulary force is chargeable thereupon, and also the sum to be charged upon any borough for which a constabulary force shall be appointed, in pursuance of an act of the 3 & 4 Vict. c. 108, that after the 31st March, 1848, such cases there shall be chargeable to each such county, county of a city, county of a town, or borough, per annum, for each sub-inspector one moiety of the sum of one hundred and sixty pounds, for each head constable one moiety of the sum of seventy pounds, and for each constable or sub-constable one moiety of the sum of thirty-five pounds two shillings and sixpence, and so for every fractional part of a year.

5. That where an additional constabulary force shall have been certified by the magistrates of any county, as now by law provided to be necessary for the due execution of the law within such county, and shall be appointed in conformity with such certificate, and also where an additional constabulary force shall be appointed for any borough under the provisions of the 3 & 4 Vict. c. 108, the Lord Lieutenant, to appoint one sub-inspector for every fifty constables and sub-constables, and one head constable for every twenty-five constables and sub-constables, so appointed; and the expenses of such sub-inspectors and head constables shall be chargeable upon such county or borough, and be repaid by grand jury presentment, or from the borough fund, in the same manner as the expense of the constables and sub-constables who may have been so appointed.

6. 'And whereas by 6 & 7 W. 4, c. 13, the inspector general is authorised, subject to the direction and control of the Lord Lieutenant, to direct that the whole or any number of the constabulary force of any county, county of a city, county of a town, or town and liberties, shall

'go and repair to any place or places in any other county or counties, or in any county of a city, or county of a town, or town and liberties: and whereas in the said act of the 9 & 10 Vict., the case of a portion of the force of one county temporarily sent by the inspector general into another county was not provided for: be it enacted, that whenever any officer or officers, head or other constable or constables, or sub-constable or constables, shall be ordered by the inspector general, to go and repair to any place or places in any county, county of a city, or county of a town, other than that to which he or they may belong, and shall be absent from his or their proper county or place more than five days, the county, county of a city, or county of a town to which he or they shall be so removed shall, in case the Lord Lieutenant shall so direct, be charged, at and after the rates herein-before specified, with a moiety of the expense of each such officer, head constable, or sub-constable during the period of his or their remaining in such county, county of a city, or county of a town; and the amount of such moiety shall be repaid by grand jury presentment, in like manner as any sums payable in respect of the constabulary force.

7. 'And whereas by an act of the 8 & 9 Vict. c. 46, provision is made for the appointment and payment of additional head and other constables for keeping the peace in the neighbourhood of railway works or other public works in Ireland: be it enacted, that whenever such additional head or other constables shall have been or shall be employed for the purposes and under the provisions of the said last-recited act, the company or other parties carrying on such railway or other public works shall be chargeable for the expense of such head and other constables, but according to the proportion of head and other constables herein-before provided, and also according to the scale of charge herein-before provided for head and other constables, save that such company or parties shall be chargeable for the whole and not for the moiety only of such respective rates of charge.

8. 'And whereas by the 3 & 4 W. 4, c. 13, the Inspector General is required to make out a certificate of the monies chargeable under the said act on each county, county of a city, county of a town, or any part of a county, specifying the force or service in respect whereof such charge may have been incurred, and transmit the same, when approved and certified by the chief or under secretary of the Lord Lieutenant, to the secretary of the grand jury for each county, county of a city, and county of a town, one week before each assizes and presenting term, who shall lay the same before the grand jury: and whereas doubts have arisen in some cases with respect to the sufficiency of certificates which have been laid before grand juries in pursuance of the said enactment, and it is expedient to provide a form of certificate which shall be sufficient in all cases: be it enacted, that the certificate to be transmitted by said inspector general, or by his deputies, to the secretary of the grand jury of any county, county of a city, or county of a town, before any assizes or presenting term, shall be made in the form contained in the schedule (B.) to this act annexed, or to the like effect, and shall not be required to state any further or other particulars than such as appear in the said form; and in case of there being no inspector general, or in case of his absence, any such certificate may be signed by one of the deputy inspectors general, and shall be of like validity.

9. That from and after the passing of this act the officers and men of the constabulary force shall have the same rights, powers, and authorities in and for each of the counties, counties of cities, and counties of towns immediately adjacent to that to which they may have been appointed, as if they had been appointed for such counties, counties of cities or counties of towns respectively.

10. 'And whereas by the 6 & 7 W. 4, c. 13, it is enacted that the inspector general or deputy inspector general, or any other person or persons to be nominated for the purpose by the Lord Lieutenant, to examine on oath into the truth of any charges or complaints preferred against any person, of any neglect or violation of duty in his office: and whereas by the 2 & 3 Vict. c. 75, it is enacted, that

'all witnesses summoned by the inspector general or deputy inspector general, or person or persons nominated at any time by the Lord Lieutenant, shall, during their attendance at such inquiry, and in going to and returning from the same, be privileged from arrest; and that all persons so summoned who shall refuse to be sworn, or, being sworn, shall refuse to give evidence or to answer all such questions as may be legally demanded of them, shall forfeit and incur such penalty, not exceeding five pounds, as the said inspector general or deputy inspector general, or persons holding such inquiry, shall direct, and in default of payment thereof shall and may be imprisoned for such period, not exceeding one month, as such inspector general or deputy inspector general, or person or persons holding such inquiry, may direct and adjudge; be it enacted, that from and after the passing of this act the assistant inspectors general (without any special appointment), or for any county inspector or sub-inspector who shall be appointed by the inspector general (or in his absence by one of his deputies) may be president of any court of inquiry into the truth of any charges or complaints preferred against any member of the said constabulary force of any neglect or violation of duty in his office, to examine on oath into the truth of such charges or complaints, and to summon any witness or witnesses on such inquiry, and to act in all respects in relation thereto as effectually as can be done under the said recited acts, by the inspector general or a deputy inspector general, or by any person nominated for the purpose of holding such inquiry, by the Lord Lieutenant; and the witnesses summoned to attend such inquiry shall have the same privilege from arrest, and shall be subject to the same penalties for false swearing, and for refusing to be sworn, or (being sworn) to give evidence, or to answer all such questions as may be legally demanded of them, as are provided in the said acts: provided, that if any fine or imprisonment shall be imposed by the president of any such court, or person or persons holding such inquiry, upon any person summoned to attend thereat, he or they shall forthwith specially report the same to the Lord Lieutenant or other chief governor or governors of Ireland.

11. 'And whereas by the said act of the 6 & 7 W. 4, c. 13, a certain oath is required to be taken by all persons appointed under the said act, and to be administered by any two magistrates: be it enacted, that after the passing of this act the said oath may be taken before and administered by one magistrate.

12. 'And whereas by the said act of the 6 & 7 W. 4, the Bank of Ireland is authorised to pay the drafts of the receiver only, countersigned by the inspector general or one of his deputies for constabulary services: and whereas the receiver may, from illness or absence on leave, be unable to draw such drafts: be it enacted, that the said receiver shall submit for the approval of the commissioners of Her Majesty's treasury the name of a person to act for the said receiver during his illness or in his absence; and when the commissioners of Her Majesty's treasury shall signify to him their approval of such person, the said commissioners shall notify the same to the inspector general and to the secretary of the Bank of Ireland, whereupon the governor and company of the Bank of Ireland may pay the drafts of the person so named and approved, to draw on the account of public monies for the said constabulary force; provided that the drafts of such person shall be countersigned by the inspector general, or by one of his deputies, and shall express whether they are drawn during the illness or absence of said receiver; and the said receiver and his sureties shall be, and they are hereby declared responsible for the act or acts of such person so authorised by such receiver to act in his behalf as aforesaid.

13. 'And whereas by an act of the 2 & 3 W. 4, c. 108, it was provided that in case any tumult, riot, or affray is apprehended, any two or more justices of the peace may appoint special constables: and whereas by the same act power is given to the justices, as therein mentioned, to issue orders on the treasurer of the county, county of the city, or county of the town in which such special constables shall have served, directing such treasurer to pay to the said special constables such allowance for their trouble,

'loss of time and other expenses as they may deem fit: and whereas doubts have arisen in some cases as to the legality of such orders on the treasurer, in consequence of their having been made payable to the clerks of the respective petty sessions: be it enacted, that any such orders drawn in the manner last mentioned, or to the like effect, shall be as good and valid as any such orders drawn as in the said act provided; and that the grand jury of any county, county of a city, or county of a town in Ireland may present, without previous application to presentment sessions, to be raised off such county, county of a city, or county of a town, or any barony, half barony, townland, or other division or denomination of land, within which any such special constables may have served, the full amount of all sums paid by any such treasurer, whether such order or orders shall have been made in favour of each individual special constable, or in favour of the clerk of the petty sessions of the district in which such special constables may have acted, and whether such orders shall have been made either before or after the passing of this act; and in case of such orders made in favour of the clerk of the petty sessions, such clerk shall duly pay over to such constables any monies received by him by virtue of such orders, and forward to the treasurer a receipt from each constable for the amount paid to him, and a certificate from the magistrates at petty sessions that such sums have been so paid by their order.

14. That the said recited act of the sixth year of the reign of His late Majesty King William the fourth, and the several acts in force amending the same, and this act, shall be construed as one act.

16. That the schedules to this act annexed shall be deemed part of this act.

16. That this act may be amended or repealed by any act to be passed in this session.

SCHEDULE (B.)

CONSTABULARY OF IRELAND.

CERTIFICATE OF THE EXPENSE OF CONSTABULARY FORCES to be presented by the Grand Jury of the county of _____ and to be levied on the districts mentioned therein for the half-year commencing _____ and ending _____

	Amount.	Mosety.
Expense of apprehension and conveyance of prisoners, and to be presented on the county at large,	_____	_____
Ditto of a force which is extra of the establishment, and to be presented on the county at large,	_____	_____
Ditto ditto ditto and to be presented on the barony of—	_____	_____
Ditto ditto ditto and to be presented on the half-barony of,	_____	_____
Ditto ditto ditto and to be presented on the townland of,	_____	_____

We do hereby certify, that the above demands, amounting to _____ are correct, and justly chargeable to, and to be levied on the districts above mentioned.

A.B., Inspector general [or deputy inspector general] of constabulary.

C.D., receiver of constabulary.

Approved and certified, E.F., chief [or under] secretary.

CAP. LXXIII.

An Act to continue until the 31st of July, 1849, and to the end of the then session of parliament, certain acts for regulating turnpike roads in Ireland.

[31st August, 1848.]

(To be continued.)

CHANCERY.

JAMES MERYRICK, and MARY ANNE, his Wife. } **PURSUANT** to the Decree in this Cause, bearing date the 10th day of November, 1848, I hereby require all persons having Charges and Liabilities affecting the Houses, Tenements, and Premises in Upper Dorset Street, belonging to the Defendant, Edward Thomas Horan, and also the Premises in Cook Street and Brady Row, all in the City of Dublin, in the pleadings in this cause mentioned, to come in before me and prove their respective demands, on or before the 2nd day of April next, otherwise they will be precluded from the benefit of said Decree.

Dated this 6th day of February, 1849.

John J. Tweedy, Plaintiff's Solicitor,
55, Rutland Square, West.

R. LITTON.

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Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have failed to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq. 11, Lower Ormond Quay.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, March 17, 1849.

THE Irish Jurist

No. 21.—VOL. I.

MARCH 24, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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DUBLIN, MARCH 24, 1849.

WHILST the advocates of the antagonising schemes for the relief of the Irish poor are urging arguments in favour of individualizing responsibility, on the one hand, or charging the support of the paupers of the South and West of Ireland on the industrious inhabitants of the North and East, on the other—from the fertile brain of Sir Robert Peel has sprung a proposition, which, from its vastness of conception, its tendency to roll back the flood of pauperism which threatens to overwhelm the whole island, and raise its blighted provinces to a prosperity which they never before enjoyed, is worthy of the sagacity and the renown of this statesman.

He proposes that Government, through the agency of a Commission, should get possession of the properties of the ruined landlords in the pauperized districts, on equitable terms, and arrange for their re-distribution, thus introducing new blood into Ireland, new enterprise, and a new division of property—a proposition by which every one interested would be advantaged,—the pauper, who would be employed and fed—the purchaser, who would be enabled to lay out his capital to advantage—the country, which would be relieved from the imposition of a rate in aid—and even the proprietor himself, who would thus have an opportunity of disposing of an estate which is unprofitable, and perhaps an incumbrance to him, on better terms than he could otherwise have hoped for.

To carry out this plan, the contemplated Commissioners must be armed with powers, not only to get possession of these properties on equitable terms, but to *take* it. Public money is generally considered in Ireland as fair game, and proprietors, dealing with the Government as a purchaser, would insist on extravagant terms; the very amount of pauperism and misery on their estates, crying loudly for relief or employment, would probably be

insisted on as a reason why a larger price should be given; each proprietor would hold back, in the hope that he alone might be able to retain his property, which he might expect would be raised into prosperity again, by the attraction, as it were, of the surrounding country.

But how to discriminate between those properties which should thus be *taken* on equitable terms, and those which should not? This is a question which, though difficult, yet, we think, admits of solution on the following principles:—

The rate for the support of the poor is, under the present law, the first charge on property; its first duty is to supply means of existence to the population existing on its surface. In the Ballina union, instanced by Sir Robert Peel as a type of the Connaught Unions, according to the Report of Capt. Hamilton, 12s. 6d. in the £1, on the *nominal* value of the Union, would not be sufficient for the support of the poor for the year ending the 29th of September next, Lord John Russell, in his proposition, assigns 7s. 6d. in the £1 as a maximum, which the rate should not exceed, insisting, however, that to this extent, property shall contribute to the support of its poverty. Would it be unreasonable, then, to demand that properties which could not discharge this, their first liability, and that could not fulfil this their first duty to society, even to the limited extent of 7s. 6d. in the £1, if that sum were fixed on as a limit, should pass at once into other hands? If a proprietor have not the means of paying 7s. 6d. in the £1, towards the relief of the poor, it is clear he cannot have the means of cultivating his property and rendering it profitable to himself, or the means of support to his tenantry; and if it be intended to insist on the payment of 7s. 6d. in the £1, is it not better to test the solvency of the party at once? Is there any reason to suppose that he will be better able to pay at the end, than at the beginning of the year, especially if he have not the means to cultivate his property in the meantime? Is it just towards

those provinces which are called upon to contribute to the support of pauperism in the distressed Unions, to allow fertile tracts of land to continue in the hands of parties, who not only cannot cultivate them, but who cannot pay even this limited amount of poor rate? For these reasons, we think that the payment of 7s. 6d. in the £1, or whatever other rate may be fixed upon as a maximum, should be adopted as a criterion of the capability of a party to hold land, and that on his failing to make this payment, the Government Commissioners should be empowered to enter into possession on equitable terms. In districts where properties are waste, and proprietors are beggars, poor-rate can only be levied by the sale of the estates themselves, and the more rapidly this crisis is hurried on, the more advantageous it will be for the owners, the occupiers, and for the country generally.

The owners of estates in the distressed districts will consider this plan confiscation, and a flagrant violation of the rights of property. However, if Captain Hamilton's Report be correct, they have very little to lose; and even if their sole source of hope, the potato, again succeeded, the country would not be placed in a much better condition. Captain Hamilton says—"I very much doubt whether the present real value of the Union, if exclusively devoted to the support of the poor, would prove sufficient for the next few years." And again—"Whether the future success of the potato crop would enable or induce the landlords to pay fair wages for fair work, is, I think, very doubtful. It appears to me more likely, the tendency would be rather to return to the old state of affairs, notwithstanding the bitter experience of the last three years."

However, we do not think that when Sir Robert Peel spoke of equitable terms, he meant to give proprietors no remuneration for their estates, because they are at present, and under the present system, of no value. Lord John Russell has proposed 7s. 6d. in the £1, as the maximum to which property should be taxed for poor-rate. If property remains in the hands of the present proprietors, there is every reason to conclude that this 7s. 6d. in the £1 would become a permanent tax on the distressed Unions; so that if the proposal of the Premier becomes law, it will diminish the value of property in these Unions by 7s. 6d. in the £1. If, then, it is considered reasonable to tax property to this amount, and if 20 years' purchase on its valuation be considered its gross value, would it be unreasonable to fix on $12\frac{1}{2}$ years' purchase as an equitable price for the fee—thus giving the proprietor the full value of his estate, deducting merely the value of the poor-rate, supposed permanent? Of course, a further deduction should be made, in proportion to the quit rent, county rates, and rent charge to which the estate might be liable. We think that proprietors disposing of their properties, in their present condition, on terms such as these, could hardly complain of confiscation.

But should terms calculated on such principles as these not be considered equitable, there are precedents sufficient in the legal machinery at present in existence in the country, on whose model the value of the property which it might be deemed for

the public advantage to take possession of, might be estimated.

Where land is required as a site for a jail or a poor-house, or for the construction of a railway the legislature have provided means, not only for getting possession of the land required, and for fixing the price to be paid, but have also provided, that in the transaction no interest shall be prejudiced. Is the necessity less in the present instance, or the urgency less pressing? And if it is just, on public grounds, to take possession of land for such purposes, on equitable terms, how could it be considered unjust to follow the same course, when the very being of the country depends on it? If it has not been found impossible to protect vested and contingent interests in the one case, why should it not be possible to do so likewise in the other? It should not be forgotten, either, that in the one case a man may be forced to part with a portion of his house, his garden, or his demesne, on fair terms, no matter how inconvenient or annoying it might be to him; whilst in the latter case he could select what portion of his estate he would retain, and what portion he would part with, keeping those portions which are convenient and profitable, and parting with those which might be distant and expensive, or difficult to manage.

It may be objected, what will become of mortgages and other incumbrances? Are they to be entirely overlooked in the arrangement? and how is the Government to raise funds to make these purchases which would possibly embrace a great part of the provinces of Connaught and Munster?

As to the extent to which the charges on property would be restored to creditors, the proposition of Sir Robert Peel, we apprehend, would make no alteration. If property is permanently charged with 7s. 6d. in the £1 for poor-rate, it would bring in the market but five-eighths of the price it would bring if not so charged; and if this purchase-money were invested in the public funds, where it would remain liable to these charges in the same way that the property itself was, we are of opinion that the position of the incumbrancer would be improved—he would obtain the value of an estate, calculated on principles most favourable to the owner, as a security, in exchange for the estate itself, which, if not purchased in this way, would soon be altogether valueless.

As to raising the necessary funds, it must be remembered that the Government would not be called upon to pay the principal of the purchase-money, at least in the first instance. They would only have to guarantee the payment of its interest. This might be provided for at first by an income, or any other tax, and would be paid eventually out of the properties purchased themselves, which, as they were re-disposed of by the Commissioners, would gradually liquidate the whole debt. The Government would, in fact, take the properties, as it were, at a rent, which they would guarantee the payment of—the property itself remaining the security for the principal of the purchase-money, and which would be ultimately discharged by the re-sale of the estates.

The great advantage of the proposition is, that it would prevent the enormous sums which must be

expended for the relief of the poor, from being, as hitherto, utterly lost. The application of pauper labour to the estates—thus become public property—would render them more valuable in the market; every pauper who would become self-supporting would enhance their value; the returning—the very prospect of returning prosperity would have the same effect; and instead of an income or other tax, which would be perpetual, and whose tendency would be to increase, once entailed upon the country, the public might look forward to have, at the close of the transaction, not only prosperity restored to the country, but a considerable balance carried to the credit of the national account.



In a former number (*ante*, page 147), we considered the question, whether any covenant in law arose from the relation of landlord and tenant, there being no contract under seal. We now propose to consider, whether a similar contract of demise creates any implied covenant as to the fitness of the land for any particular purpose.

In considering this question, the distinction we have already adverted to between covenants in law and implied covenants, must be borne in mind. In this case, no covenant in law, as to fitness, arises from the mere relation of landlord and tenant; but an implied covenant to that effect may, we think, sometimes be created by the acts of the contracting parties. The general rule respecting the purchase of chattels is, that where the purchaser himself has had an opportunity of inspecting the thing bought, and forming an opinion thereon, no implied warranty of fitness will arise, *Olivant v. Bayley* (5 Q. B. 288). But if the purchaser informs the vendor that the subject of the purchase is for a specified purpose, and for no other, as where a purchaser desired to be furnished with a rope adapted to raise pipes of wine from a cellar, (*Brown v. Edgington*, 2 M. & G. 279) it was held that there was an implied warranty on the part of the vendor that the rope furnished would suit that purpose.

These rules are equally applicable to the sale of chattels real; but the courts, in the application of them, have, in some instances, adopted a distinction, the applicability of which, we confess, we do not comprehend, and which, if followed, will cause much hardship and inconvenience.

In the case of *Smith v. Marables* (11 M. & W. 5), the defendant took a furnished house at a watering place; the house was uninhabitable (being filled with bugs), and it was held that the lessee was not liable for the rent during the period for which he had contracted to take the premises. This case was the subject of much discussion in two very recent cases, *Sutton v. Temple* (12 M. & W. 64), and *Harte v. Windsor* (12 M. & W. 68), and was upheld on the ground of its being a letting of a furnished house—not of real estate merely—taken on the faith of its being fit for immediate habitation.

The case of *Sutton v. Temple* was a lease of aftermath. The agreement was for “twenty-four acres of eddish (aftergrass) from the 8th of September to the 6th of April.” The cattle died from

the effects of refuse paint which had been spread upon the land, whereon the defendant gave up the farm, and the plaintiff brought this action for the sum agreed to be paid for the whole term. There was no evidence that the plaintiff was aware of the state of the pasture. The court held that the plaintiff was entitled to recover. The general proposition stated by the court in their judgment in this case, that no implied covenant can in any case arise from a mere demise of land, is one which, we contend, cannot be sustained in its integrity. The rule of law, as laid down by Lord Abinger, C.B., “that if a party contract for the use and occupation of land for a specified time, and at a specified rent, he is bound by that bargain, even though he took it for a particular purpose, and that purpose be not attained,” is one not likely to be questioned. But if a person requiring land, or a house, furnished or unfurnished, say to another, “I want such for a particular purpose,” naming it, and that other person agrees to give the thing required, and the thing purchased be wholly unfit for the intended purpose, it would appear contrary to the plainest principles of justice that the purchaser should be compelled to pay. An implied covenant that the thing sold is fit for its intended use, appears plainly to arise from the fact of the vendor’s having agreed to give it for that purpose, and for this position the case of *Smith v. Marable*—a decision the validity of which cannot now be doubted—is, we submit, a direct authority. It is observable that the opinions of all the learned judges in *Sutton v. Temple* were based on the ground that the letting was of land in its then existing state, in which case the plaintiff was undoubtedly entitled to recover. The nature and substance of the contract would, however, seem to shew that it was a purchase of the pasturage, and nothing else; and unless there were other circumstances not reported, it would seem justice that the defendant should be as much entitled to have good eddish for his cattle, as he would, had he hired particular goods, be entitled to be furnished with the requisite articles. In *Izod v. Gorton* (5 Bing. N. C. 501), the premises being held from year to year, the court decided that their being burned did not put an end to the tenancy, and that the tenant was therefore liable. In *Arden v. Pullen* (10 M. & W. 327), the premises became uninhabitable for want of proper sewerage, and the tenant, notwithstanding, was held to be liable during the period of his tenancy; and *Collins v. Barrow* (1 M. & Rob. 112), to the contrary, was denied to be law. In each of these cases, the premises were, at the time they were first occupied, fit for the purposes required of them; and it could never be successfully contended, that subsequent circumstances rendering them unfit for habitation, could relieve the tenant of his liability during the continuation of his term.

In *Windsor v. Harte* (12 M. & W. 68), the demise was of a house and garden ground. The facts shew that no statement of the purpose for which they were required, nor inquiry as to the fitness of the premises for that purpose was made; it was a purchase of the premises in their then state; and, in accordance with the rule as stated

by Lord Abinger in *Sutton v. Temple*, it was held, that there was no implied warranty of fitness.

These cases, we submit, are not authorities against the inference deducible from *Smith v. Marables*. There is no case to be found, except *Sutton v. Temple*, where the parties had contracted with an understanding as to the purpose for which the premises were taken, and which, *ab initio*, were found to be useless to the purchaser; all the cases were either where the purchase was of the land in its existing state, from which no covenant in law, and, *a fortiori*, no implied covenant arose; or where, if there existed any covenant, express or implied, as to capability, the purchaser having gone into possession and raised no objection, had been compelled to leave from subsequent circumstances.

The next question on this branch of the law, to which we propose to call the attention of our readers is, whether a tenant for years is liable for permissive waste, that is, more than the natural wear and tear arising from the use of the premises.

This question, though on several occasions before the courts of law at Westminster, has never received any determination. In the most recent case on the subject, *Harnett v. Maitland*, (16 M. & W. 257, S. C. 16; L. Jou. 134, N. S. Ex.) this question was fully argued; the case however was determined on the pleadings, the declaration being held bad on demurrer, as it did not thereby appear whether the defendant was tenant for years or at will, and in the latter case he would not be liable. But the opinion of Parke, B. appears to be in favour of the affirmative; *Martin v. Gilham* (7 Ad. & E. 540, S. C. 2 Nev. & P. 568); was also decided upon, a defect in the declaration which charged the tenant with using the land in an "unhusbandlike manner;" which, in the opinion of the court, precluded the plaintiff from recovering for permissive waste. In *Beale v. Sanders*, (3 Bing. N.C.S.C. 5 Scott. 58), the court held, that a tenant under a void lease containing a *covenant to repair*, was a tenant from year to year, under the terms of the lease, and was liable for permissive waste. In *Jones v. Hill*, (7 Taunt. 332), the court expressly declined giving any opinion; holding that a tenant from year to year was not bound to keep the premises precisely in the order he got them, that there should be some allowance for wear and tear, *Gibson v. Wells*, (1 N.R. 290), was the case of a tenancy at will. *Young v. Torriano*, (6 Car & P. 12), is the only case where the non-liability of a tenant for years is stated in direct terms.

Before the statutes of Gloucester and Marlebridge, no action of waste lay against a tenant for years (3 Inst. 302). In the cases in which this question was raised, it was contended that the liability thereby created was for commissive waste alone, the words being "*qui facient vastum*." Lord Coke (Litt. 53, a, chap. 7, Tenant for Years), after stating the several kinds of waste, voluntary, actual, and permissive, says, that "waste may be done in houses, by pulling or prostrating them, or by *suffering* the same to be uncovered, whereby the rafters or other timbers are rotted. The latter would seem to mean a permissive waste, and many of the examples given are per-

missive, as is shewn by the word "*suffer*," which here means to permit; as where he says, "*to suffer the pale to decay*, whereby the deer is dispersed, is waste," (ib. 53, a); and it is waste to *suffer* a wall of the sea to be in decay, (ib. 53, a), seem all to be instances of permissive waste.

In the case of *Corbett v. Stonehouse* (2 Roll. Ab. 816), it was adjudged, and affirmed on appeal, that an action of waste lies for permitting the walls of messuages to be in decay and unrepaired for default of daubing and plaistering. In *Pomfret v. Ricroft* (1 Saund. 923, d, note by Williams) and *Greene v. Cole* (2 Saund. 252, c, ed. 1845) the reporter gives a precedent of a declaration for permissive waste against a tenant for years. From these authorities, it would seem to be the better opinion, that an action for permissive waste will lie against a tenant for years.

(Continued from p. 152.)

CAP. LXXIV.

An act to authorize the lords of council and session to regulate the rates or dues of registration to be charged by the keepers of the registers of sasines, reversions, &c. in Scotland. [31st August, 1846.]

CAP. LXXV.

An act to defray until the 1st of August, 1849, the charge of the pay, clothing, and contingent and other expenses of the disembodied militia in Great Britain and Ireland; to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quartermasters, surgeons, assistant surgeons, surgeons mates, and serjeant majors of the militia; and to authorize the employment of the non-commissioned officers. [31st August, 1848.]

CAP. LXXVI.

An act to enable archbishops and bishops and other persons in Ireland to compromise suits touching their rights of patronage as to ecclesiastical benefices, in certain cases. [31st August, 1846.]

- Sec. 1. *Power to archbishops and bishops in Ireland to compromise conflicting claims to patronage of advowsons.*
2. *Parties to provide by the terms of such compromise the rights to certain patronage.*
3. *Where compromise carried into effect, an instrument in writing containing terms of the same shall be lodged in the council office of Dublin castle. If Lord Lieutenant, &c. approve of compromise, parties may obtain an order from Common Pleas to carry the same into effect.*
4. *Incumbents to retain possession notwithstanding compromise.*
5. *As to payment of expenses of compromise.*
6. *Act may be amended, &c.*

' Whereas by the 3 & 4 W. 4, c. 27-33, and by the 6 & 7 Vict. c. 54, it was further enacted, that after the 1st of January, 1844, the several clauses and enactments in the said first-mentioned act, relating to any right to present to any ecclesiastical benefice, should extend to Ireland, as fully as if the said clauses were thereby repeated, and it was by the said last-mentioned act further enacted, that the said last-mentioned act should not be prejudicial or available to or for any plaintiff or defendant in any action or suit already commenced, relating to any right to present to any ecclesiastical benefice in Ireland: and whereas in consequence of the said acts actions of quare impedit have been brought, and are now depending, for the purpose of determining the right of presentation to divers ecclesiastical benefices in Ireland, by persons whose right would have been barred by the provisions of the aforesaid acts: and whereas numerous actions and proceedings have been brought and are now pending against archbishops

and bishops in *Ireland* for the recovery of advowsons and rights of presentation to ecclesiastical benefices and preferments in their dioceses, the patronage whereof has been for long and uninterrupted periods exercised by them and their predecessors in right of their sees, and the said archbishops and bishops have been and will be put to heavy expenses in defending, in the said actions and proceedings, their rights of patronage: and whereas by the 8 & 9 Vict. c. 51, it was enacted, that archbishops and bishops might, charge the expenses of defending their rights of patronage on their respective sees, and that plaintiffs in quare impedit, under family settlement or otherwise entitled to a life estate or other limited interest in the rights of presentation to the ecclesiastical benefices to recover which the said writs have been sued out, might, under certain restrictions, charge the expenses incurred by them in prosecuting such claims upon the estates of those who would be entitled in remainder to such rights of presentation: and whereas the prosecution of such suits is attended with very great expense, and the possession of the present incumbents of many of the said benefices is insecure, and it is expedient, for the purpose of avoiding expense, and quieting the possession of incumbents in their benefices, to enable archbishops and bishops, and persons who, under family settlements or otherwise, would only be entitled to a life estate or other limited interest in such rights of presentation, to compromise their claims to the patronage of such ecclesiastical benefices: be it enacted, that any archbishop or bishop in *Ireland* who may be a defendant in any action of quare impedit or other action, and who may claim the ecclesiastical benefice which is the subject of such suit, for and on behalf of himself and successors, and for any person or persons by whom or on whose behalf any such writ of quare impedit has been sued out, and who, under family settlement or otherwise, would only be entitled to a life estate or other limited interest in the advowson to recover which such writ has been sued out only on behalf of themselves, and their respective heirs, executors, and administrators, but also on behalf of every person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estate of such parties, may compromise their conflicting claims to any such advowson or advowsons.

2. That the said parties in such case may provide by the terms of any such compromise that any particular advowson or advowsons or right or rights of patronage of or to any ecclesiastical benefice or benefices in *Ireland* shall belong absolutely to any archbishop or bishop and his successors, in consideration of such archbishop or bishop, agreeing that any other advowson or advowsons, right or rights of patronage to any other ecclesiastical benefice or benefices in *Ireland*, shall belong to any such person or persons as aforesaid, according to such estate or interest as he, she, or they may respectively claim therein, under family settlement or otherwise, or for the parties to such compromise to provide that the alternate right or rights of presentation or patronage to any such ecclesiastical benefice or benefices shall belong to any archbishop or bishop and his successors on the one hand, and on the other to any person or persons, according to such estate or interest as he, she, or they may respectively be entitled to, under family settlement or otherwise, or to make any other arrangement or provision respecting any advowson or advowsons, right or rights of patronage, for the recovery of which suits are now pending, which may by them respectively be deemed proper and expedient.

3. That where any such compromise is to be carried into effect a writing containing the terms of such compromise, and in the case of a bishop being a defendant having endorsed upon such instrument the approbation of the archbishop entitled to exercise archiepiscopal jurisdiction in the province in which the parish or parishes the subject of such compromise is or are situate, or in case any archbishop shall be a defendant having endorsed thereon the approbation of Her Majesty's Attorney General for *Ireland*, shall be lodged in the council office of *Dublin Castle*, and thereupon the Lord Lieutenant of *Ireland* or at least six of the privy council to take such instrument into consideration, and to make an order approving or disapproving of such compromise; and in case such compromise shall be approved the parties, upon

the production of a copy of such order before the Court of Common Pleas in *Ireland*, may proceed to have such compromise carried into effect by a rule or order of such court, to be made upon consent of the parties hereby enabled to enter into such compromise, and (if required by the said court) upon affidavit or affidavits of such facts and circumstances as the said court may require; and every such rule or order shall, be conclusive evidence of the title of the person or persons thereby declared to be the patron or patrons of every such advowson or advowsons.

4. That every such compromise shall provide that every incumbent in possession of any ecclesiastical benefice at the time of the passing of this act shall hold the same as if he had been presented or collated thereto by the true and undoubted patron, notwithstanding that by such compromise it shall be agreed that the advowsons of the benefice whereof such incumbent is in possession shall belong to any person or persons other than the person or persons by whom such incumbent shall have been presented.

5. That the costs and expenses of such compromise incurred shall be charged by the said archbishop and bishop, and by said tenants for life, or other person or persons having limited estates or interest, in such manner and form as is provided by said recited act of the 8 & 9 Vict. c. 51.

6. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. LXXVII.

An act to authorize the application of part of the unclaimed money in the court for the relief of insolvent debtors in enlarging the court house of the said court.

[31st August, 1848.]

CAP. LXXVIII.

An Act for the further amendment of the administration of the criminal law.

[31st August, 1848.]

Sec. 1. *Questions of law may be reserved at sessions of the peace for consideration of judges.*

2. *Questions reserved to be certified to the judges.*

3. *Quorum of judges; their judgments to be delivered in open court.*

4. *Case or certificate may be sent back for amendment.*

5. *When judgment is reversed on writ of error, record may be remitted to court below for judgment.*

6. *Penalty for forgery.*

7. *Act not to extend to Scotland.*

8. *Act may be amended, &c.*

Whereas it is expedient to provide a mode of deciding difficult questions of law arising in criminal trials in any Court of Oyer and Terminer and Gaol Delivery, and to make amendments in the criminal law; be it enacted, that when any person shall have been convicted of any treason, felony, or misdemeanour, before any Court of Oyer and Terminer or Gaol Delivery, or Court of Quarter Sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and thereupon shall have authority to respite execution of this judgment, or postpone it until such question shall have been decided, and in either case the court shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution.

2. That the judge or commissioner or Court of Quarter Sessions shall state, in a case signed in the manner now usual, the question or questions of law so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons shall have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party ought not to have been

convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of Oyer and Terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, or to make such other order as justice may require; and such judgment and order of the said justices and barons shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, who shall enter the same on the original record; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, in the form or to the effect mentioned in the schedule to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted to the sheriff or gaoler in whose custody the person convicted shall be: and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, and in that case such sheriff or gaoler shall discharge him, and also the next court of Oyer and Terminer and gaol delivery or sessions of the peace shall vacate the recognisance of bail, if any; and if the court of Oyer and Terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

3. That the jurisdiction by this act given to the said justices of either bench and Barons of the Exchequer may be exercised by the said justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least shall be part; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law are now delivered.

4. That the said justices and barons, when a case has been reserved for their opinion, shall have power to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended, and judgment shall be delivered after it shall have been amended.

5. That whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the court of Error shall reverse the judgment, it shall be competent for such court of Error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment.

6. That every person who shall forge or alter, or shall offer, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable, to be transported beyond the seas for any term not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement, at the discretion of the court before which he shall be tried.

7. That this act shall not extend to *Scotland*.

8. That this act may be amended or repealed by any act to be passed during this present session of parliament.

SCHEDULE.

Whereas at the session of the peace for the county of held on before and others their fellows, [or at the session of Oyer and Terminer and gaol delivery held for the county of on before, among others, Sir A. B. Knight, one of the justices of the court of and here name the *quorum commissioners*, justices of Oyer and gaol delivery.] A. B., late of Labourer, having been found guilty of felony, and judgment thereupon given,

that [*state the substance,*] the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the Barons of the Exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said Justices and Barons having met in the Exchequer Chamber at Westminster [or Dublin, as the case may be,] on the day of it was considered by the said Justices and Barons there that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B. ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

To the gaoler of and the sheriff of and all others whom it may concern. (Signed) E. F.

Clerk of the peace for the county of [or, clerk of assize for as the case may be.]

CAP. LXXIX.

An act to facilitate and simplify procedure in the court of Justiciary in *Scotland*. [31st August, 1843.]

CAP. LXXX.

An act to empower lessees of tithe rent-charge in *Ireland* to deduct a proportion of poor-rate poundage from rent; and also to empower the ecclesiastical commissioners in *Ireland* to allow sums paid for poor-rate or county cess, or poundage deducted from ecclesiastical persons on account of poor-rate, among their deductions from the valuation of ecclesiastical property directed to be made under an act of the third and fourth years of his late majesty, for the purpose of a certain tax thereby imposed upon such property in *Ireland*. [31st August, 1843.]

Sec. 1. Lessee of tithe rent-charge, if liable to pay rent therefor, may deduct proportion of rate.

2. Ecclesiastical commissioners under 3 & 4 W. 4, c. 37, shall include poor-rate, &c. in deduction from valuation.

3. Successors of archbishop of Armagh and bishop of Derry may deduct from money to be paid to ecclesiastical commissioners a certain sum on account of poor-rate, &c.

4. Act may be amended, &c.

'Whereas by the 1 & 2 Vict. c. 56, it is enacted, that 'where any person receiving rent in respect of any rateable property shall also pay a rent in respect of the same, he shall be entitled to deduct from such rent a proportion of the rate deducted from him, and it is expedient to extend 'such provision to the case of tithe rent-charge: be it enacted, that after the passing of this act, where any person entitled to receive tithe rent-charge shall be liable to pay a rent in respect of the same, he shall be entitled to deduct from the rent so paid by him a sum bearing such a proportion to one half the amount of rate deducted from the tithe rent-charge received by him as the rent paid by him in respect of such tithe rent-charge bears to the tithe rent-charge which he is so entitled to receive.

2. 'And whereas by 3 & 4 W. 4, c. 37, the ecclesiastical commissioners therein appointed were authorized to 'make a valuation of all ecclesiastical property, and to take, 'levy, and receive therefrom a yearly tax, rate, or assessment computed and imposed upon such valuation according to the scale and for the purposes recited in the said act: 'and whereas doubts have arisen whether the said commissioners are authorized to allow among the deductions 'therein set forth any sums paid for county cess or poor-rate, 'or poundage deducted for poor-rate, and it is expedient 'that such doubts be removed: be it enacted, that after the passing of this act the said commissioners, in and from the valuation made or to be made of any ecclesiastical property for the purpose of imposing the rate, tax, or assessment required by the said act, in addition to the charges specified as deductions in the said act, may deduct such amounts or sum as the said commissioners shall ascertain as proper to be deducted from such valuation, for or on account of any county cess or poor-rate, or poundage rate for the re-

ief or employment of the poor, or for repaying any advances made for those purposes, and paid or payable or deducted in respect of such ecclesiastical property, such deduction by the said commissioners to be made according to a return of the county cess paid in respect of such property, and of the rate struck in the electoral division or divisions within which such property may be situate, during the half year ending on the first day of *January* or first day of *July* respectively preceding the half year for which such ecclesiastical tax shall be demanded.

3. 'And whereas said last-recited act, the successor to the present archbishop of *Armagh*, and the present bishop of *Derry*, and his and their successors for ever, are bound, out of the revenues of the said archbishoprick and bishoprick respectively, to pay to the ecclesiastical commissioners for *Ireland*, half-yearly, sums in the said act specified, and it is but just that such persons so paying such annuity be empowered to deduct an allowance for poor-rate: be it enacted, that the successor of the present archbishop of *Armagh*, and the present bishop of *Derry*, and his or their successors in such sees respectively, shall be entitled to deduct from the sum to be paid by him to the ecclesiastical commissioners for *Ireland* such amount or sum as the commissioners shall ascertain as proper to be deducted for or on account of any poor-rate, and paid or payable or deducted in respect of ecclesiastical property by the tenants of such see, such deduction to bear the same proportion to the entire poundage for poor-rate allowed in such half year to his tenants by such archbishop or bishop as the said half-yearly annuity bears to the rent and fines received by such archbishop or bishop in such half year.

4. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. LXXXI.

An act for the further regulation of steam navigation, and for limiting in certain cases the number of passengers to be conveyed in steam vessels. [31st August, 1848.]

Sec. 1. *Penalty for delay in transmitting certificates required by recited act.*

2. *Board of trade may insert in certificate a notice of the number of passengers steam vessels are constructed to carry. Penalty for carrying a greater number than specified in certificate.*

3. *Copy of certificate to be placed in a conspicuous part of vessel. Penalty for neglect.*

4. *Penalty on persons, having been refused admission, forcing their way on board when vessels are full, &c.*

5. *Penalty on persons refusing or neglecting to pay their fares, or quit vessels, &c.*

6. *Penalties how to be recovered and applied.*

7. *Nothing to affect privileges of corporation of London.*

8. *Act may be amended, &c.*

'Whereas by the 9 & 10 Vict. c. 100, it is enacted, that on or before the 30th of April, and 31st of October in every year the owners of every steam vessel shall transmit to the Lords of the Privy Council for trade two declarations, and that said lords shall register such declarations, and shall transmit to the owners of such steam vessels respectively certificates of the registry, and that if any steam vessel proceed to sea with passengers, the owner whereof has not so transmitted such declarations and received such certificates of the registry thereof, the owner of such steam vessel shall forfeit a sum not exceeding one hundred pounds: and whereas it is expedient to make provision for compelling the owners of steam vessels to transmit such declarations to the said lords whether such steam vessels be intended to proceed to sea or not: be it enacted, that in case the owner or owners of any steam vessel, not excepted from said act, neglect to transmit to the lords of the said committee, the declarations in writing by the said act prescribed, the owner or owners of every such steam vessel shall forfeit and pay the sum of ten shillings for every day such declarations is delayed, unless such delay be accounted for: provided that the owners of all steam vessels (not being excepted as aforesaid) in respect of which any declarations required as aforesaid have not been transmitted to the said committee shall transmit the same on or before the twentieth day of September next.

2. 'And whereas much inconvenience and danger has been found to result from the over-crowding of steam vessels, and it is expedient to prevent such; be it enacted, that the lords of the said committee, may insert into any certificate granted by them in conformity with the provisions of the said act a notice of the number of passengers which the vessel is constructed to carry, and whenever such notice shall have been so inserted such vessel shall not at any time have on board any greater number of passengers than the number specified in the certificate last received from the said committee; and in case any such vessel shall have on board any greater number, the owner or owners, or the master or other person having charge thereof, shall forfeit a sum not exceeding five shillings for every passenger above the number so specified.

3. That the owner or owners of every steam vessel shall cause a true copy of the certificate which they have last received from the lords of the said committee to be put up in some conspicuous part of the vessel, where the same shall be visible to the passengers on board, and if they neglect to do so they shall for every offence be liable to a penalty not exceeding ten pounds.

4. That if any person, after having been refused admission into any steam vessel by the owner or owners, or any person in the employ of the owner or owners thereof on account of such steam vessel being full, and after having had the full amount of his fare returned or tendered to him, shall persist in attempting to enter the same, or if any person having got on board any steam vessel be requested to leave such steam vessel before the same has quitted the place at which such person got on board, and shall refuse to do so, after having had the full amount of his fare returned or tendered to him, then such person shall for such offence forfeit and pay any sum not exceeding five shillings.

5. That if any person travel or attempt to travel in any steam vessel which has been duly surveyed without having previously paid his or her fare, and with intent to avoid payment, or if any person, having paid his or her fare for a certain distance, proceed in any such vessel beyond such distance without previously paying the additional fare, or if any person refuse or neglect, on arriving at the point to which he has paid his fare, to quit such vessel, every such person shall forfeit to the owner or owners of such steam vessel a sum not exceeding five shillings.

6. That the penalties and forfeitures by this act imposed shall be sued for, recovered and applied in like manner as the penalties and forfeitures imposed by the said recited act are therein directed to be sued for, recovered, and applied, except as is hereby otherwise directed.

7. That nothing in this act contained shall prejudice or derogate the rights of the mayor and commonalty and citizens of the city of *London*.

8. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. LXXXII.

An Act to amend the law for the formation of districts for the education of infant poor. [31st August, 1848.]

CAP. LXXXIII.

An act to confirm the awards of assessionable manors commissioners, and for other purposes relating to the duchies of *Cornwall* and *Lancaster*. [31st August, 1848.]

CAP. LXXXIV.

An act to amend the acts for rendering effective the service of the *Chelsea* and *Greenwich* out-pensioners, and to extend them to the pensioners of the *East India* company. [31st August, 1848.]

CAP. LXXXV.

An act to continue to the 1st of *October*, 1849, and to the end of the then next session of parliament, the exemption of inhabitants from liability to be rated as such in respect of stock in trade or other property to the relief of the poor. [31st August, 1848.]

CAP. LXXXVI.

An act to empower commissioners of the court of bankruptcy to order the release of bankrupts from prison in certain cases. [31st August, 1848.]

CAP. LXXXVII.

An act to extend the provisions of an act passed in the first year of his late Majesty King William the fourth, intituled an act for consolidating and amending the laws for facilitating the payment of debts out of real estate.

[31st August, 1848.]

Sec. 1. *Recited provision to extend to lands, &c. of a deceased debtor, in certain cases.*

2. *Act may be amended, &c.*

Whereas by the 11 G. 4, & 1 W. 4, c. 47, it was (amongst other things) enacted, that where any lands, tenements, or hereditaments had been or should be devised in settlement by any person or persons whose estate should be liable to the payment of any of his or their debts, and by such demise should be vested in any person or persons or life or other limited interest, with any remainder, limitation, or gift over which might not be vested, or might be vested in some person or persons from whom a conveyance could not be obtained, or by way of executory devise, and a decree should be made for the sale thereof for the payment of such debts, the court by whom such decree should be made might direct any such tenant for life, &c., to convey, surrender, or otherwise assure the fee simple or other interest to the purchaser or purchasers, or in such manner as the said court should think proper; and every such conveyance, or other assurance should be as effectual as if the person who should make the same were seised or possessed of the fee simple or other whole estate so to be sold: and whereas the herein-before recited provision does not extend to the case of lands, tenements, or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and it is expedient that the said act should be extended: be it therefore enacted that the said recited provision of the said act shall extend and is extended to any case in which any lands, tenements, or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such persons, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in such case the court in the said provision may direct such heir or co-heirs, notwithstanding such heir or co-heirs, or any of them, may be an infant or infants, to convey, or otherwise assure the fee simple or other interest to the purchaser or purchasers, as the said court shall think proper; and every such conveyance, or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

2. That this act may be amended or repealed by any act to be passed during this present session of parliament.

(To be continued.)

IN CHANCERY.

Thomas Kemmis, Esq.
Plaintiff.
Sir Richard Nagle, Bart.
Dame Mary Bridget Nagle,
George Pilkington,
Luke McDonnell; and
John Ennis,
Defendants.

PURSUANT to the Decree of Her Majesty's High Court of Chancery, made in this cause, bearing date the 17th day of April, 1847, I will, on MONDAY, the 23rd day of APRIL next, at the hour of one o'clock in the Afternoon, at my Chambers, on the Inns Quay, in the City of Dublin, SET UP and SELL to the highest and best bidder, all that and those the LANDS commonly called the DONORE ESTATE, in the County of Westmeath; that is to say, the Manor or reputed Manor of Danaure, otherwise Donore, Cooftin, Ballinlabane, Ballinshave, otherwise Ballinlavin, Hospitalstown, Skehane, Garrycloone, Thienemore; and also all that part of Donore called the Green House Farm, and the Customs and Tolls of the Fairs and Markets of Donore; and also that part of the Lands of Ballinshave, called the Red House Farm; and also the Lands of Spittlegogue and its sub-denominations; also the Town and Lands of Ballybrickogue, otherwise Rosemount, Killachunney, otherwise Killacunsey, Capperakirk, Ballinagall, and part of Ballintubber, Cloghlah, and Bracknehera, otherwise Bracknehowla; and also the Town and Lands of Aghabrack, Carne, Killare, Gibbstown, and part of Clochenna, Cloonerina, Streamstown, Killinagh, Ardvaun, Garthy, and the House and Offices of Jamestown—all situate in the County of Westmeath, or a competent part thereof, for the purposes in said Decree mentioned.

Dated this 27th day of February, 1849.

EDWARD LITTON.

For Rentals, and further particulars, apply to Mr. RICHARD P. TIGHE, the Plaintiff's Solicitor, No. 20, Middle Gardiner Street; or to VESKY DALY, Solicitor for the defendants, Sir Richard Nagle, Bart., 51, Blessington Street.

IN CHANCERY.

John Thomas Holland, Plaintiff.
William Hughes,
John Hughes, and
Henry Hughes, Defendants.
PURSUANT to the Decree in this cause, bearing date the 17th day of November, 1848, all persons having charges or incumbrances affecting the Lands and Premises in the pleading in this cause mentioned; that is to say, All that part, or one half of the Town and late Irish plantation measure, situate in the Parish of Enniskillen, County of Fermanagh, and County of Monaghan, formerly devised to John Hughes, deceased, are hereby required to come in and file charges in my Office on foot of their incumbrances, on or before the second day of April, 1849, otherwise they will be precluded from the benefit of said Decree.

Dated this 19th day of February, 1849.

E. LITTON.

Robert Ross Todd, Plaintiff's Solicitor,
7, Henrietta Street, Dublin, and Newry.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, March 24, 1849.

THE Irish Jurist

No. 22.—VOL. I.

MARCH 31, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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DUBLIN, MARCH 31, 1849.



WE resume this week the consideration of a subject to which we have already called attention. We are so impressed with the importance of advocating a change in the system of managing estates placed under the control of our Courts of Equity, that we shall not slacken our exertions until we see some practical measure carried into effect for the redress of an universally-admitted national evil.

We have shewn that no doubt exists, in all quarters, of the defectiveness of the present system of receiverships, and we have not done this for the idle object of pointing out grievances, but because we knew that practical and intelligent heads were at work to improve that system, and we were anxious to lend our humble efforts to promote a useful measure of law reform.

When an estate is placed under the Court of Chancery, the *ad interim* ownership is vested in it, ostensibly for the benefit of the creditor, but that benefit is not what it is capable of being made, and certainly it is to the loss of the owner, the injury of the occupier, and of the country generally. It is not difficult to prove these propositions *seriatim*.

1st. The creditor is not benefitted to the extent he might be; in other words, the court does not do for him one-half that, which under better management, it might do.

The question as to him is a pure money one: he cannot get his money without the aid of the court, through that aid he gets it slowly, expensively, and unsatisfactorily. Every one knows this as a matter of fact; it is not a mere vague generality, it is true in particular and detail. Let us test the fact.

Suppose a year's interest due to a mortgagee; the mortgagor cannot, or will not pay it—applications by principal and solicitor are made ineffectually—a bill becomes necessary, and

is filed—the mortgagee, like *Tantalus sitiens*, lives in expectation that he will soon receive his interest. But, no; a little patience. The answer admitting the justice of your claim must be put in, for which it is not unreasonable to allow three months—the court says two—after appearance; but, in addition to this period, there is the time lost in enforcing appearance, and answer after appearance. Making allowance for vacations and the reluctance to be too sharp on a defendant, we are satisfied more than three months, on the average, is consumed between the time of filing the bill and the filing of the answer. It is then necessary to consider whether its admissions be sufficient to justify an application for a receiver, as the motion rests on Equity confessed in the answer. Assume that they are sufficient, some time must elapse before the application is heard, and after it has been heard, before the order is taken out and the reference carried before the Master—then used to come the contest for the appointment. We do not suppose there is much competition now, as the office has lately not been very desirable; and there is, also, the delay of the receiver perfecting his own recognizance and requiring his sureties to perfect theirs. The court thinks it but fair, also, to give him ample time to make himself acquainted with the property; he has to be furnished with a rental by the mortgagor, who withholds it as long as possible, and then returns “*no arrears*,” having used his utmost diligence (from the moment the bill has been filed until the day notice of the appointment of the receiver has been served on the tenants) to collect their arrears, taking as much money as he can procure; when that is exhausted, taking the rent in kind, corn, and cattle, and, as a premium for prompt payment, giving receipts in full.

The receiver need not pass his first account until he has been fifteen months appointed; and even that time may, by judicious management, be extended a little. His costs form the first lien on

the fund, and he has, after deducting them, three weeks to invest the balance appearing on his account. By the time the creditor applies for that balance—if he be in a position to do so—by having a decree, or an undisputed priority, we are under the mark in fixing a year and nine months from the period of filing the bill until he touches a shilling of interest, the arrears of which have thus swelled to two years and nine months.

This, we say, is the ordinary practice of the court. We are quite aware that the present Master of the Rolls, to mitigate this evil, in cases where the right is clear, makes prospective orders on receivers to pay moneys as they come to their hands, but in the majority of cases, such orders are not made, or capable of being made; and if made, in some degree may be baffled by the receiver, as it cannot be tested that he has money in his hands until his account be passed.

Now, we pause here to re-state our proposition, that the creditor is not benefitted as he might be by the jurisdiction of the court, which, let it be observed, has been set in motion by and for him; he receives his money slowly, expensively, and unsatisfactorily, one year and nine months from the time he sought the aid of the court. During this long interval he gets no interest upon interest; he is out of his money, he can turn to no profitable purpose that fund which he might have made reproductive for himself, and with benefit to the country, and which the court does not render fructifying either for him or any one else, except it may be the receiver, who is precisely the only person for whose interest no responsibility devolves upon it. Thus the creditor and the country suffer alike.

We have restricted our observations to the economic view of the question, but the social ills, the family sufferings which are entailed by postponed payments are incalculable and grievous. "*Bis dat qui cito dat*," has never been the motto of a Court of Equity.

Now we have shewn a mischief which is obviously capable of amendment—so far as the preliminary steps necessary to place the property under the control of the court are concerned, the acceleration of them may be accomplished without the interference of the legislature, by new general orders which the Chancellor and Master of the Rolls have power, from time to time, to make; but for the due management of the property now under its care, the assistance of the legislature is requisite. There is no difficulty in having officers of the court to receive the rents, and have them invested so as to fructify from the moment of their collection.

We refrain, at present, from entering into further detail on this branch of the subject, not from the inability or difficulty of doing so, but because we do not think it right to forestall a carefully organized plan which has been prepared by a competent hand, and which will be laid before a committee of the House of Commons, so soon as it has been appointed to examine into the whole system of Chancery estate management. Our readers must concur with us, that even so far as the creditor is concerned, our premise and our conclusion were correct, when we stated that the Court

of Chancery does not do for the creditor one-half that it might. It may, after much delay, give him back his talent, but it has not made anything of it during the time it has been retained in pledge.

It has never been stated with sufficient prominence, that no person, or class of persons, is benefitted by the present system of judicial estate management, except, it may be, the few solicitors who are concerned for receivers. Not the creditor, at least not to the extent he might be—for it is not enough for him that the court should be a judicial pound to keep property safe, it should also improve or enhance its value during the period of its custody. An estate is taken from a proprietor by a creditor, and transferred for safe keeping to a *locum tenens*, which should be omnipotent, and yet is impotent. Admitting that there may be required for the creditor an auxiliary for the recovery of his debt, safe and sure; but in guarding his interests, those of others must not be sacrificed, and, above all, not sacrificed without benefitting him. Law expenses entailed by the present mode of management, and a deteriorated estate, are the consequences of Chancery interference to the owner. Neither of these things are beneficial to the creditor; they are, on the contrary, detrimental, as they diminish the value of his security; and thus, without enriching him, the owner is made poor indeed. These are the consequences which the creditor never anticipated—never wished for—when he sought the assistance of the court, and are equally prejudicial to him as to every one else.

We have already pointed out the evil effects of the system on owner, occupier, and country, but we shall again return to the subject, and state further facts.

Few questions, in practice, have led to so many nice and subtle distinctions as those relative to the production of documents on interlocutory applications.

We have been led to the consideration of the subject, both by the number of the cases and the conflict of authority; some judges leaning to discovery, and others to privilege and protection. The number of cases occurring in England is almost amazing, occasioned, in some degree, by the non-existence of a general registry, discovery is more difficult, and accordingly more pressed for by the plaintiff, and more surely resisted by the defendant than in this country. It was the observation of a celebrated popular writer, that half the miseries of the world spring from foolish mysteries; and the remark holds with as much truth in the legal as in any other world. The unnecessary desire for concealment, the studied disingenuousness of legal documents, are productive of much litigation. For our own part, we are much more disposed to acquiesce in the soundness of the views of Lord Langdale, than in those of any of his brethren who dissent from him. He considers the object of a Court of Equity to be, to enforce discovery by the confession of the defendant, on his oath, and therefore believing the plaintiff entitled to the fullest information, he will not allow it to be

theld by an answer, which, half confessing, if denied, (to use his own language) he considers an answer "should lay naked the heart of the defendant."

A difference of opinion exists between the Irish Chancellor and Master of the Rolls on one branch of this subject. Whether a party having a sole present right to the possession of title deeds, and admitting, by his answer, their possession, materiality, and relevancy, can yet refuse to produce them, on the ground of absent parties having an interest in them, the object of the suit affecting those absent parties.

The case to which we allude is that of *Dundas Blake* (9 I. E. R. 640; 10 ib. 260), where however, the point was made at the argument, and raised by the defendants in the pleadings. The material facts are short. The bill was filed to carry into execution the trusts of a will, and to give the amount of a mortgage and judgment, which were barred by the Statute of Limitations, and only existed under the trust. (It has been held, that they were not saved from the operation of the statute, *ante*, p. 121). One of the defendants derived under the will, the property having been appointed to him under a power, and at his marriage it was settled on him for life, remainder to his children, as he should appoint; and, in default, to all the children of the marriage, as tenants in tail in common. The eldest son, who was a minor, was made a defendant, the plaintiffs alleging he was sole tenant in tail, and the bill charged that the deed of appointment and marriage settlement were made subject to the trusts of the will. The defendants, husband and wife, admitted the possession of both deeds, partly set them out in the answer, introducing particulars in which they varied from the statements in the bill, attacking the interest of the other minors under the settlement, and referred to them for greater certainty; and, in short, made no stand whatever upon the interrogatory, either on the ground of the minor defendants being absent parties, or for any other reason. His honour ordered the production of the deed of appointment, considering that to be the sole title of the father, but refused to compel production of the marriage settlement, as the minors not being parties to the suit, and having no interest in it.

The defendants appealed, and the plaintiff's cross appealed, and the Chancellor ordered the production of both deeds.

It is observable that many elements contributed to assist the plaintiffs, unqualified admissions, relevancy, materiality, ownership, possession, and the power to produce.

His Honour, however, thought that a door might be opened to fraud, if a fishing bill could be put on the file, and holes picked in the title of absent parties. But it was urged with considerable force, and relied on by the Chancellor in his judgment, that the very suggestion of there being absent parties, arose from the defendant's statement of the deed, that might be true, or it might be false; the deed itself could alone test the fact, it was referred to for the truth of that statement, by the defend-

ant's, and so long as *Hardman and Ellames** continued law, that reference incorporated it with the answer, and made its production compulsory. As to opening the door for fraud, it might be, and we believe was observed, that it would be a reproach to the efficiency of a Court of Equity, to allow a tenant for life to have the uncontrolled dominion over the title-deeds of his property, to bring them into the market, for the purpose of borrowing money, to make every imaginable use of them, if he pleased, to post them on the walls of the court; and yet be enabled to screen himself from discovery, on the allegation of an absent party having an interest in them, he would then be allowed to use them for self-interest and withhold them for his own, and not the purposes of justice. That whether the suit affected the inheritance or not was immaterial, the injury would be the same to the remainderman, if it only affected the life-estate, and production was enforced, the information once obtained, could be used ever after.

The argument might be put thus. If you limit the relief you seek, to the person before the court, the plaintiff is either entitled to discovery from that person, or he is not. If he be, as he unquestionably must be from the admission in the answer, if the defendant alone be considered; is a Court of Equity to throw her shield over that defendant to the prejudice of the plaintiff, to guard against what may be but an imaginary danger; and if she does not throw that shield the discovery once obtained, the mischief is done so far as remaindermen are concerned, and it is wholly immaterial what the object of the suit be, if the distinction be drawn; that in suits affecting the interest of the tenant for life, merely production will be enforced, where there is an admission in the answer, or the other elements exist, on which Courts of Equity act; but that such production will not be enforced when the suit affects both the interest of the tenant for life and remaindermen, the latter class not being before the court. How easy evasion is the rule. What can be more facile, than to draw the bill against the tenant for life in the first instance, obtain discovery from him, and then amend the bill, and virtually affect the inheritance? the rule would be as idle, as the one which renders a bill of discovery demurrable, if it pray relief. In practice, the latter rule, leads to no other result than this, that when discovery is obtained, the bill is changed into a bill for relief, it has lost indeed, its primary name, but it has answered its purpose.

If, however, the rule be, that even where relief be sought only against the tenant for life, the plaintiff is not entitled to discovery of the title deeds, because the interests of remaindermen may be re-

* In a very recent case, *McIntosh v. The Great Western Railway* (13 Jur. 179), Lord Cottenham restated the ground of his judgment in *Hardman v. Ellames*. "If a party refers to a document, and sets out a part of the document, and then refers to it, he cannot afterwards tell the plaintiff that he shall not see the document, because you are not bound to take the defendant's representation of the document. If he uses it for any purpose, he must enable the plaintiff to see that he uses it for a proper purpose, or whether it is not more beneficial to the plaintiff, than the defendant thinks proper to admit."

motely affected thereby, the result will be, that in no case can discovery, or its consequence, relief, be obtained from a tenant for life, as he can always shelter himself from production under the plea of absent parties, even though the information has no reference whatever to the inheritance—the ground of refusal being, that the disclosures in the deeds, though admittedly material to the plaintiff, may, on some other occasion, be used prejudicially to the rights of others. You may have justice on your side now, but in aiding you I may by possibility disclose to you a secret by which you may commit a fraud hereafter.

On which side, then, would the balance of inconvenience lie? Obviously, in our judgment, in refusing production.

In the affairs of mankind, *a priori* it must be assumed that plaintiffs come into a court of equity for legitimate ends, for its assistance in enforcing just demands—that was one of the designs of its institution—one of the purposes for which it was established. The refusal of discovery goes on the opposite supposition, as it assumes that plaintiffs come for improper purposes, and aid is denied them, because they may by possibility use it differently from what they profess to do; in other words, they may abuse it.

But so may mankind deal with every object of nature or of art, every institution human or divine; it is plain this argument is untenable. And besides, it is much more probable that the defendant, who desires concealment, has some sinister motive for secrecy, than the plaintiff who would do away with foolish mysteries.

The rule of enforcing production is a salutary one; to be extensively useful it should be clear, and explicit, and capable of easy and general application; the fewer distinctions that hover round it the better for justice. In the case before us, the refusal of the deed of settlement was a question of time; by amending the bill and bringing the minors before the court, we apprehend the objection of his honour would have been removed; and if production could have been enforced then, and if the deed must have been produced at the hearing, *cui bono* to the minors in postponing production? The case also was clearly distinguishable from those where trustees hold possession of deeds for others, or where there was a joint *present* possession, the joint owner not being before the court; though in these later cases, such as *Taylor v. Rundell* (1 Cr. & Ph. 104,) and *Murray v. Walter*, (ib. 111), the distinctions are rather too fine, and in every case where possession is coupled with the power of production, the safer rule would, we think, be to enforce it, always assuming there to be materiality and relevancy in the document, an admission in the answer, and that it is not protected from the circumstance of its being privileged as a professional confidential communication, relating to the subject matter of dispute.

In the case of *Murphy v. Balfe*, which came before his honour at the sittings after last Term, and is not yet reported, he expressed himself as still adhering to the view which he entertained in the case of *Dundas v. Blake*, which he believed to have been decided on the plainest principles of

justice, and to be in accordance with several English decisions. He, however, felt himself coerced by the decision of the Chancellor, and decided in consonance with it.

The point will probably be not considered yet quite settled, and the question will be more fairly raised when the defendant takes his stand upon the interrogatory, and relies upon the absence of minors as a ground of defence. This was not done in *Dundas v. Blake*, and unquestionably, in some degree, the decision of the Chancellor turned upon that ground, but we believe, also, on the broader view which we have endeavoured to put forward.

(Continued from p. 160.)

CAP. LXXXVIII.

An act for further regulating the money order department of the Post-office. [31st August, 1842.]

- Sec. 1. *No money orders granted under recited act to continue in force longer than twelve months; and liability of Postmaster General to pay such orders to cease, except in certain cases, with consent of Treasury. Treasury may, by warrant, alter period fixed for payment of money orders.*
2. *Power to Postmaster General to make regulations relating to money orders.*
3. *Power to Postmaster General to refund excess of money orders. After repayment liabilities of Postmaster General to cease.*
4. *Penalty on officers of Post-office issuing money orders with fraudulent intent.*
5. *In indictments it shall be sufficient to name "Her Majesty's Postmaster General."*
6. *As to warrants of the Treasury.*
7. *Printed copies of the London Gazette to be evidence.*
8. *Act to be deemed a Post-office act.*
9. *Act may be amended, &c.*

Whereas by the 3 & 4 Vict. c. 96, it is enacted, that the mode of transmitting small sums of money through the Post-office, might have continuance so long as the commissioners of Her Majesty's treasury should see fit; and whereas it is expedient to make further provisions as to money orders granted or issued by the Post-office: be it enacted, that no money orders heretofore by virtue of the said regulations, or of the said act, shall continue in force for a longer period than twelve months from the passing of this act; and that after the expiration of that period all liability to pay such orders by the postmaster general, or of any officer of the Post-office, shall cease and determine: provided, that the postmaster general may pay any such money orders in special cases after such period shall have expired: provided, that the commissioners of Her Majesty's treasury, at any time or times hereafter, may alter the period hereby fixed for the payment of money orders, and may fix any other period for the payment of the same, such alteration not to commence or be in force until after the expiration of three calendar months after due notice of the proposed alteration shall have been given in the *London Gazette*.

2. That the postmaster general, may make any regulations relating to money orders, and to the payment thereof, and to the persons by or to whom the same shall be paid, and to the times at which and the mode in which the same shall be paid, as the said postmaster general, shall see fit, and from time to time, to alter or repeal any such regulations or restrictions, and make and establish any new or other regulations; and that all such regulations shall be binding, as well upon the persons to whom such money orders shall be or shall be granted, and the payees thereof, and all persons claiming under them, and all other persons, as upon all officers of the Post-office; and all such regulations shall have the same force as if the same had been and were contained in his act; and that no action, or suit, at law or in

equity shall be instituted, in any court or before any judge or justice, against the postmaster general or against any officer of the post office, or against any other person in consequence of the making of any such regulations, or of any compliance therewith, or otherwise in relation to any such regulations, or in consequence of the payment of any such money orders being refused or delayed by or on account of any accidental neglect, omission, or mistake by or on the part of any officer of the Post-office, or for any other cause, without fraud or wilful misbehaviour on the part of any such officer of the Post-office, any law, statute, or usage to the contrary in anywise notwithstanding.

3. That the postmaster general at any time hereafter may refund the amount of any money orders either heretofore granted or issued or to be hereafter granted or issued to the person or persons to whom the same have been or shall or may be so granted or issued, or his, her, or their executors or administrators, whether such money orders shall remain or be in the possession of such person or persons or not; and after any such repayment or refunding as aforesaid all liability by or on the part of the postmaster general, or of any officer of the Post-office or of the Post-office revenue, for or in respect of such money orders or of the granting or issuing of the same, or of the repayment or refunding the amount thereof, shall, as against the payees of such money orders and the holders thereof, and all other persons cease and determine.

4. That every officer of the Post-office who shall grant or issue any money order with a fraudulent intent shall in *England and Ireland* be guilty of felony, and in *Scotland* of a high crime and offence, and shall, either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years.

5. And for the more effectual prosecution of offenders be it enacted, that in any indictment for any felony or misdemeanor committed or attempted to be committed in, upon, or with respect to the Post-office or the Post-office revenue, or in, upon, or with respect to any property, monies, money orders, goods, chattels, or effects under the management or control of the postmaster general, or where any act, matter, or thing shall have been done by any person with or for any malicious, or fraudulent design, relating to or concerning the Post-office or the Post-office revenue, or any such property, monies, money orders, goods, chattels, or effects as aforesaid, or the postmaster general, it shall be sufficient to lay any such property in, and to state or allege the same to belong to, and to state or allege any such act, matter, or thing to have been done or committed with intent to injure or defraud "Her Majesty's postmaster general;" and in all indictments relating to or in any wise concerning the department of the Post-office it shall be sufficient to name and describe the postmaster general as "Her Majesty's postmaster general," without any further or other name, or addition.

6. That whenever the warrant of the commissioners of Her Majesty's treasury is required by this act, such warrant may be under the hands of the commissioners of Her Majesty's treasury, or any three of them; and that whenever the order, consent, authority, or direction of the commissioners of Her Majesty's treasury is prescribed by this act, such order, consent, authority, or direction (not being by warrant) may be signified either under the hands of the commissioners of Her Majesty's treasury, or any three of them, or under the hand of one of their secretaries or assistant secretaries.

7. That any copy of the *London Gazette*, printed and published by the person or persons having authority to print and publish the same, shall be admitted as evidence by all courts, judges, justices, and others in any part of Her Majesty's dominions of any treasury warrant and of any regulations or restrictions which shall be issued under this act, and contained in any such gazette, and of the due issuing thereof, and of the contents of any such warrant regulations, or restrictions.

8. That this act shall be deemed and taken to be a Post-office act, and that the several terms and expressions used in this act shall be construed according to the respective interpretations contained in the said act passed in the 3 & 4

Vict. c. 96, so far as they are inconsistent with the context.

9. That this act may be amended or repealed by any act to be passed during the present session of parliament.

CAP. LXXXIX.

An act to continue for two years, and to the end of the then next session of parliament, and to amend an act of the second and third years of her present Majesty, intituled, *An act to extend and render more effectual for five years an act passed in the fourth year of his late Majesty George the Fourth, to amend an act passed in the fiftieth year of his Majesty George the Third, for preventing the administering and taking unlawful oaths in Ireland.*

[31st August, 1848.]

Sec. 1. *Recited act of 2 & 3 Vict. to continue in force for a further period of two years.*

2. *Constables with warrant may enter and search houses, and seize papers and arms, &c.*

3. *Duration of act.*

'Whereas acts were passed in the 50 Geo. 3, c. 102, 4 Geo. 4, c. 87, 2 & 3 Vict. c. 74, 7 & 8 Vict. c. 78, 8 & 9 Vict. c. 55, and it is expedient that the act of the 2 & 3 Vict. c. 74, should be continued and amended as herein 'after provided,' be it therefore enacted in this present parliament assembled that the last-mentioned act shall be and continue in full force and effect from the passing of this act for the further period of two years.

2. That if information upon oath shall be given to any justice of the peace in *Ireland*, that there is cause for believing that any society or societies within the meaning of the said acts or any of them is or are held, or is or are about to be held, or that any persons are met or assembled, or are about to meet or assemble, for treasonable or seditious purposes, or for the discussion of treasonable or seditious purposes, in any house, building, or any other place, such justice may issue his warrant to any county-inspector, sub-inspector, or head constable, empowering him to enter any such house, building, or other place, and to remain in such house, building, or other place, for so long a time as he may think fit, and to seize all books, papers, and writings which shall appear to afford evidence of the holding or of the existence of any such society or societies, or of any treasonable or seditious purposes and objects, and all arms and ammunition of every description, that may be found in such house, building, or other place, and to search all parts of such house, building, or other place, for the purpose of discovering the same; and such county-inspector, sub-inspector, or head constable, with such constables and other persons as he shall deem necessary for that purpose, may enter such house, building, or other place, and, if need be, to use force, whether by breaking open doors or otherwise, and to remain with such constables and other persons in such house building or other place for so long a time as he shall think fit, and to seize all such books, papers, and writings, and all arms and ammunition of every description whatsoever, that may be found in such house, room, building, or other place, and to search all parts of such house, building, or other place for the purpose of discovering the same.

3. That this act shall continue in force from the passing thereof for two years, and until the end of the then next session of parliament.

CAP. XC.

An act to regulate the times of payment of rates and taxes by parliamentary electors. [31st August, 1848.]

CAP. XCI.

An act to make provision for the payment of parish debts the audit of parochial and union accounts, and the allowance of certain charges therein. [31st August, 1848.]

CAP. XCII.

An act for the protection and improvement of the salmon, trout, and other inland fisheries of *Ireland*.

[31st August, 1848.]

Sec. 1. *Commissioners of public works in Ireland to be commissioners for the purposes of this act. Recited acts and this act construed as one act.*

2. Two existing inspectors of fisheries to be inspecting commissioners.
3. Commissioners for executing this act to divide Ireland into districts for the purposes of this act.
4. Conservators of fisheries to be annually elected.
5. Commissioners to prescribe number of conservators to be elected from each electoral division.
6. Owners of several fisheries of a certain value to be conservators in like manner as elected conservators.
7. Elected conservators to be chosen by the persons paying licence.
8. All engines, nets, &c. for salmon and trout fishing, &c. to be licensed and pay an annual duty.
9. Persons who have paid licence duty entitled to vote for conservators. Votes to be cumulative.
10. Commissioners for purposes of first elections to fix and publish the scale of licence duties and rates for each district.
11. First meetings of persons paying licence duty for the election of conservators to be called by commissioners. Commissioners may attend and preside.
12. Persons assembled at such first meetings and at future annual meetings to elect conservators of fisheries for the year.
13. Power to board of conservators, after the year 1849, to alter and fix, subject to approval of commissioners, the licence duty and rate.
14. Board of conservators, when constituted, to fix times and places of meetings.
15. In case of failure of any electoral divisions to elect, the conservators of other divisions shall act for the district.
16. On failure of election of any conservators, the former board to act.
17. Quorum of board of conservators. Chairman to have a casting vote.
18. How meetings of board of conservators are to be called.
19. Board of conservators at the annual meetings to nominate treasurer, clerk, inspectors, and water bailiffs.
20. Conservators may apply funds of district towards providing passes for fish through natural and artificial obstructions.
21. For engines, nets, &c. not enumerated in schedule, licences, before the formation of the boards, to be fixed by commissioners, afterwards by the board of conservators. Saving as to rods not used for salmon.
22. Penalty on using engines, nets, &c. without licence. Forfeitures to be applied to the funds of the district. Recovery of forfeitures and penalties.
23. All several fisheries to be subject to an annual rate according to valuation.
24. Last-mentioned rate recoverable before justices as wages, or by civil-bill, or by action.
25. Valuation of such fisheries.
26. Collection of such annual rate.
27. All monies received for licences, rates, penalties, &c. in each district to be lodged in the bank, and applied to defray the expenses of such district under this act.
28. Form of licences, &c. Penalty for misusing or counterfeiting the same.
29. Penalty on persons using or having engines, nets, &c. not producing licence when required. Parties having them for sale, &c. exempt from penalty.
30. Licences how sold.
31. Licences to be sold to all persons demanding to purchase, but such licences not to confer rights not otherwise possessed; but not to alter rights of parties.
32. Account of sales of licences to be furnished.
33. Security to be given by the clerk of the conservators, and duties to be performed by him and other officers.
34. Powers of inspectors and water bailiffs.
35. How fines and penalties under recited acts and this act to be recovered and applied.
36. Appointment of officers not subject to stamp duty.
37. Nothing herein to abridge the powers of the commissioners and officers under recited acts.
38. Commissioners may attend and advise at meetings of conservators.
39. Defining powers of commissioners to alter close seasons. In case commissioners alter close seasons, notice to be given of the same.
40. Alteration of close season in certain rivers above tideways.
41. Penalty for killing or taking fish in or from several fisheries.
42. Minimum of penalties in certain cases.
43. Act may be amended, &c.

Whereas an act was passed in the 5 & 6 Vict. c. 106, and whereas the same was amended by an act of the seventh and eighth years of the reign of Her said Majesty, and further amended by an act of the eighth and ninth years and by an act of the ninth and tenth years of Her said Majesty: and whereas by reason of the want of co-operation among the parties exercising the rights of salmon and trout fishing, and the extent of the common or public rights of such fishing on the sea-coast and in the estuaries and rivers of Ireland, and the varied and conflicting interests involved therein, measures have not been taken for the due protection of these fisheries, and the enforcement of the law in respect of the same; and it is expedient, with a view to the increase and improvement of the said fisheries, to make provision for more effectually carrying out the provisions of the said acts: and whereas it is expedient that funds should be provided for defraying the cost of such additional protection, and it is just and right that the same should be levied from the persons for the time being using any engine or device whatsoever for the capture of such fish: be it enacted, that the commissioners of public works in Ireland, as commissioners of fisheries, together with the inspecting commissioners of fisheries herein-after mentioned, shall be commissioners for the execution of this act, and shall have and use all the powers, privileges, and authorities vested in the commissioners for the execution of the said acts; and the said acts and this act shall be construed as one act.

2. That after the passing of this act the two inspectors of fisheries appointed under the provisions of the said acts shall be denominated and shall, during the pleasure of the commissioners of Her Majesty's treasury, be inspecting commissioners of fisheries, and shall be associated with the commissioners of public works in Ireland, and with them be commissioners for the execution of the said acts and this act; and in the case of any vacancy in the office of the said inspecting commissioners, or either of them, by death, resignation, or dismissal, the commissioners of Her Majesty's treasury from time to time to appoint in the room of each such inspecting commissioners so dying, resigning, or being dismissed, another inspecting commissioner of fisheries, who shall be associated with the said commissioners of public works in like manner; and the said commissioners of Her Majesty's treasury shall be empowered to fix such salaries for any such inspecting commissioners as they shall think fit; and such inspecting commissioners of fisheries shall and may, for the purposes of the said recited acts and this act, have, use, and exercise all and every the like powers and authorities and have like privileges as are by the said recited acts or any of them vested in or given to the said commissioners of public works, and all and every the powers and authorities in and by the said recited acts and this act given to or vested in the said commissioners of public works, or which under this act may be used by or be vested in such inspecting commissioners of fisheries, may be exercised by the said commissioners of public works, or by such inspecting commissioners of fisheries, or by any one or more of them.

3. That the said commissioners shall, before the end of this present year, or at any time afterwards, as they may find it expedient, divide Ireland and the sea-coast and islands thereof into districts, and shall cause the said districts to be defined and described by suitable notices and maps for that purpose; and each such district shall embrace one or more river or rivers, or lake or lakes, with the tributaries thereof, which are frequented by salmon, trout, or pellen, or fish of the salmon kind, or eels, together with such portions of the sea-coast and islands adjacent thereto as shall be described by such maps; and the said commis-

oners shall subdivide each such district into two or more electoral divisions, to be called the upper or fresh water and lower or tidal electoral divisions of such districts, and upon the maps aforesaid the said commissioners shall cause to be delineated the limits and boundaries of such electoral divisions; and the said commissioners from time to time, may alter any such district or electoral division and fix their boundaries for the same, duly publishing and describing the same as herein-before provided.

4. That for each district conservators of fisheries shall be annually elected and appointed as herein-after provided.

5. That the said commissioners shall be authorized and empowered to determine and declare the number of conservators not less than three nor more than nine, which shall be elected and returned from each such electoral division to represent the same, and the persons so to be returned for each electoral division shall be the elected conservators of fisheries for the district until the next annual election.

6. That if in any district one or more persons shall possess a several or exclusive fishery or fisheries therein, as owner, lessee, or occupier, valued under the acts for the relief of the poor in Ireland at £100 yearly or upwards, or they shall be entitled to sit with the elected conservators for such district, and shall be deemed *ex officio* a conservator or conservators for the same, so long as he or they shall possess such fishery or fisheries, and shall vote, and have all the powers and privileges under this act which he said elected conservators may individually possess: provided that where a fishery so rated shall be held by several persons as owners, lessees, or occupiers, one person alone shall sit and act as a conservator in respect of such fishery.

7. That the elected conservators shall be elected annually by the persons who shall have paid licence duty and been licensed within each electoral division, under this act, in the manner herein-after mentioned.

8. That after the 1st of January, 1849, all engines, nets, instruments, devices used for the taking of salmon, trout, pollan, or fish of the salmon and trout kind, or for the taken of eels, and all fixed salmon, trout, or eel fisheries within any district, or on or off the sea-coast, shall before the same be used in the said year or any subsequent year, be duly licensed and rated in the manner herein-after prescribed, upon payment of the licence duty or rate, as the case may be, herein-after provided.

9. That every person who shall have paid licence under this act, within and for any such electoral division within any year, shall be entitled to vote at the election of the conservators to be chosen for such division held for such current year, either in person or by proxy, according to such regulations and forms for the election as shall be fixed by the commissioners, such proxy being a qualified elector, and shall have a vote or votes according to the following scale: (that is to say,) if the licence duty so paid by such person shall not amount to two pounds, one vote; if the same shall amount to two pounds, and not to five pounds, two votes; and if the same shall amount to five pounds, and not to ten pounds, three votes; and if the same shall exceed ten pounds, four votes.

10. That for the purposes of the first meetings in each and every electoral division under this act for the election of conservators, the said commissioners shall fix and determine the scale of licence duties and rates to be paid in respect of all engines, nets, instruments, or devices whatsoever used for the taking of salmon, trout, pollan, or fish of the salmon or trout kind, and for the taking of eels, and for all fixed salmon, trout, or eel fisheries within each district, or on or off the sea-coast thereof, and shall give public notice of the same within each electoral division, and such scale of licence duties and rates shall remain in force until the same shall be altered under this act: provided that such licence duties and rates respectively shall not exceed the amount of the respective licence duties and rates specified in the schedule to this act.

11. That the said commissioners shall appoint the places and times at which all persons who shall have paid the licence duty as herein provided in each electoral division of each district for the year 1849, shall assemble in the month of July in that year, the commissioners giving two week's

notice thereof by hand-bills and advertisements in two or more newspapers circulating in such district; and all persons who shall have paid any such licence duty for such year within such electoral division shall vote at such respective meeting, and shall choose a chairman to preside thereat: provided that the said commissioners, or any one or more of them, may attend and preside at any such first meeting, instead of such chairman.

12. That the persons so assembled in each electoral division at such first meetings, and at all annual meetings for such elections, and who shall be qualified to vote under this act, shall have power to elect the appointed number of persons to represent them as conservators of the fisheries for the ensuing year; and the chairman as aforesaid, or the said commissioners, may receive the votes of the persons so assembled, and may declare the persons who shall have received the greater number of votes to be the elected conservators; and the chairman of such meeting, or the said commissioners, shall certify under his or their hand the election of each conservator, and furnish him with a certificate, which shall be sufficient authority for him to act as such conservator, and shall also within four days after such election cause a list of such conservators, with a statement of the residence and post town of each, to be transmitted to the office of the said commissioners; and the persons so elected for each electoral division of a district shall conjointly form, with any such *ex officio* conservators as aforesaid, a board of conservators of fisheries for such district, until the formation of a new board in like manner in the ensuing year, and so in like manner in each succeeding year.

13. That after the first board of conservators of fisheries for any district shall have been formed, the board of conservators for each such district shall be and are hereby empowered, from time to time, to fix and determine the amount of licence duty to be paid for each year after the year 1849, for every engine, net, instrument, weir, or device set forth in the schedule to this act, used for the taking of salmon, trout, pollan, or fish of the salmon kind, and for the taking of eels, within each such district, or on or off the sea-coast thereof, and for every engine, net, instrument, weir, or device which may be proposed to be used, and which is not enumerated in the said schedule; and the board of conservators may fix and determine the rate *per centum* to be paid for each year after the year 1849, upon the poor-law valuation, in the cases of fixed and established salmon, trout, or eel fisheries, which are designated several fisheries, as herein-before mentioned, within each district, or on or off the sea-coast thereof; provided that no licence duty or rate to be fixed by the said conservators shall exceed the respective amount of duty specified in the said schedule, or the rate of ten *per centum* on the poor law valuation of established or several fisheries; and that any alteration in the same so to be made shall commence and have effect on and from the first day of January in the then succeeding year.

14. That the board of conservators in each district shall fix and determine and duly publish notice of the times and places for the general meetings of such board, and also the times and places for the then next annual meetings of electors in each electoral division for the election of conservators for the same.

15. That if the persons entitled to meet and elect such representatives or conservators in any one or more electoral division or divisions of a district shall fail or neglect for any year so to do, the representatives or conservators of any other one or more electoral division or divisions of such district for which conservators shall have been elected shall be empowered to act in all matters and things relating to such district under the provisions of this act.

16. That if no one electoral division in a district shall in any year elect conservators, the previously-existing board of conservators for such district may continue to act as conservators for such district for that year.

17. That for the purposes of this act, at all district meetings of the board of conservators, three of the persons entitled and empowered to act and vote thereat, shall form a quorum, and all matters and things shall be determined and decided by the majority of such persons so assembled; and if on any matters upon which a difference may arise the votes

shall be equal, the chairman shall, in addition to his original vote, be entitled to give a casting vote.

18. That any such board of conservators assembled at a district meeting may fix time and place for holding a general annual meeting, and hold adjourned meetings; and any three conservators may call special meetings, provided that notice of the place and time of each such special meeting, subscribed by three or more conservators, or by the clerk of the board, on their requisition to him, shall be inserted at least twice in some two newspapers circulating in the county or counties in which such district shall be situate, at least ten days before such meeting shall be held, or that the clerk of such board shall give ten days notice in writing of such meetings to each conservator entitled to act within such district.

19. That the board of conservators for each such district at the annual general meeting or some other meeting specially appointed by them before the first day of October 1849, and in each subsequent year, when it may be necessary to appoint a clerk or clerks, with reasonable salary or salaries, as the said board may think necessary, and to appoint some bank to act as treasurer or treasurers of such board, and also to appoint as many inspectors and water-bailiffs as may be necessary, with reasonable salaries, but only to the extent which the funds at their disposal will admit of, for the protection of the fisheries in the district, and for generally enforcing the fishery laws within the same: provided that no elected or other conservator shall be eligible to hold any appointment under this act from which any salary or emolument shall be derived; and it shall be lawful for the board of conservators from time to time to remove any such clerks, inspectors, or water bailiffs, and to nominate others.

20. That the board of conservators of any district shall be and are hereby empowered to apply from time to time, any portion of the funds in the hands of the treasurers to the credit of such district which they may think fit, for the purpose of making passes in or over weirs, or removing or making passes in or over natural obstructions in any river in such district, subject to the sanction of the said commissioners, under the provisions of the 5 & 6 Vic. c. 106; and upon obtaining the sanction of the said commissioners the said board of conservators may place to the credit of the said commissioners such sum of money as shall have been for that purpose approved by them, and the said commissioners thereupon may construct such works and make such alterations in the bed of any river as shall effectually secure a free and uninterrupted passage for fish, or to direct and cause such alterations to be made in any weir, dam, or dyke erected in or across any river frequented by salmon, for affording a free and uninterrupted passage for fish, pursuant to the powers and provisions of the said last-recited act.

(To be continued.)

IN CHANCERY.

Charles Tuthill, Plaintiff,
John Kirwan and Others,
Defendants.

By Original Bill.

Charles Tuthill, Plaintiff,
James Scott Molloy,
Defendants.

By Supplemental Bill.

Charles Tuthill, Plaintiff,
John Kirwan and Others,
Defendants.

By further supplemental Bill.

PURSUANT to the final Decree in these Causes, bearing date the 14th day of July, 1849, I will, on Tuesday, the 17th day of April next, at the hour of One o'Clock in the Afternoon, at my Office on the Inns Quay, in the City of Dublin, Set up and Sell to the highest and fairest bidder that can be had for the same, ALL THAT and THOSE, the Fee-Simple of the Town and Lands of GLANN, alias BEAGH, and of the Lands of CARROWREA, alias CARROWREAGH, situate in the Barony of Dunmore, and County of Galway: Also the Life Estate of the said Defendant, John Kirwan, in ALL THAT and THOSE, that part of the Lands of ROCKVIEW, alias SHESSERAKEALE, in said Decree mentioned, situate in the Barony of Lower Ormond, and County of Tipperary, or a competent part thereof, as by said Decree directed.

Dated this 3rd February, 1849.

E. LITTON.

Applications for Rentals, &c., to be made to William Tuthill, Esq., Solicitor for Plaintiff, 38, Fitzwilliam Place, Dublin; William Thomas Kelly, Esq., Solicitor for Defendant, J. Kirwan, 16, Mountjoy Square, West, Dublin; also to Henry Mills, Esq., 19, Upper Temple Street, Dublin; Jeremiah Tully, Esq., 45, Marlborough Street, Dublin and Tuum; James Henderson, Esq., 23, North Great George's Street, Dublin and Tuum.

JAMES O'DRISCOLL,
PROFESSED TROWERS MAKER,
9, ANGLESEA STREET.

THE LATE PETER BURROWES, ESQ.

THE DUBLIN UNIVERSITY MAGAZINE for APRIL, 1849. Contents:—

Nineveh.—Sympathies. By Speranza.—The Sacking of Seville.—Our Portrait Gallery, No. LII.—Peter Burrowes, Esq., With an Etching.—My First Legacy.—Ceylon and the Cingalese.—The "Times," Lord Brougham, and the Irish Law Courts.—The Semei of the Cyclades; a Tale of Modern Greece. Conclusion.—Sir Robert Peel on Confession.—Northern India.—The Tuscan Revolution.

Dublin: JAMES McGLASHAN, 21, D'Olier-street. Wm. S. Orr & Co., 147, Strand, London. Sold by all Booksellers.

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INSTITUTED IN THE REIGN OF QUEEN ANNE, A. D. 1714.

FIRE, LIFE, ANNUITIES.

LONDON UNION LIFE OFFICE,
81, Cornhill, 9th February, 1849.

The Life Bonus of the Year 1848, of two-thirds of the Profits of the LIFE DEPARTMENT, has been this day declared; and, with the exception of a Reserve of £20,000 (to accumulate towards the next Bonus, in 1851), is payable upon and with the Sum Insured, on Policies effected in Great Britain, Ireland, and Germany respectively, upon the Profit System, and according to the number of Annual Premiums paid on each since the last declaration.

This BONUS, including the previous additions, may be applied either by having the Annual Premiums reduced for the next Seven Years; or, by adding the amount to the Sum Insured; or, the value thereof may be received immediately in Money, at the option of the original holders of the respective Policies, and unless such parties signify their preference in writing, within Three months from the above date, the BONUS will be added to the Sum Insured.

Further particulars can be obtained at the Offices, as above, or by written application to the Secretary.

The total BONUS on policies effected in Ireland for £1000, of the longest duration, amounts to £283, and varies in proportion to the amount and date of the Insurances.

THOMAS LEWIS, Secretary.

JOHN GOLD, Stock Broker, Agent, 17, COLLEGE-GREEN, Dublin.

Notice is hereby given, that Receipts for renewal of Fire Insurances, due on the 25th of March, are now ready for delivery at the Company's Office, and the respective Agents in the Country; and should be renewed on or before the 9th of April next.

An Engine and body of Firemen are in constant readiness to attend Fires, at the Company's Engine-house, No. 10, Crown Alley, rear of the Commercial Buildings.

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A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING, the 28th April. Chair to be taken at Eight o'Clock precisely.

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq. 11, Lower Ormond Quay.

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):

Yearly, 30s. Half-yearly, 17s. Quarterly, 9s

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 44, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, March 31, 1849.

THE Irish Jurist

No. 23.—VOL. I.

APRIL 7, 1849.

Price {Per Annum, £1 10s.
{Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
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		Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, APRIL 7, 1849.

For nearly four years we have been afflicted with famine—throughout three of them, fever, of an aggravated character, has raged. A worse thing has now come upon us—cholera has again found its way to our shores—our western and southern population have starved in their own homes, emigrated to other countries, died in poor-houses, or live, in daily destitution, unprofitable paupers!

Our western and southern proprietary are ruined—thousands of acres, cultivable, and hitherto cultivated, lie waste, adding yet more of unproductive surface to the large extent of reclaimable, yet unreclaimed, lands of Ireland. When thus good land is consigned to barrenness, we wonder not at the announcement, that the Waste Land Improvement Society has dissolved. Agriculture retrogrades—there is grief in retrospect—gloom in prospective—an unequal poor law paralyses exertion, checks the expenditure of capital, and threatens to engulf the country in one mass of ruin.

To remedy some of the evils we have enumerated—the removal of others rests with Providence—Lord John Russell trusts to a voluntary emigration and the chance of a good harvest. He explains the origin of the *laissez faire* principle; seems to think it applicable to the existing state of things, and to have satisfied himself that “there are some evils totally beyond the reach of any government.”

Sir Robert Peel, more equal to the present emergency, has shadowed forth—as yet, but dimly—a plan to extirpate poverty, and make the wildernesses of Munster and Connaught to “blossom as the rose,” and which, if successful, will conduce more to his fame, as a statesman, than any measure of his long public life. Ireland has hitherto been his “difficulty;” let him make it the foundation of that posthumous fame for which he yearns, and of a solid reputation achieved by an honourable and useful triumph over difficulties, and by which the

happiness of four millions of human beings may be promoted, and half this island made prosperous and contented.

Nor is the time unfavourable for the introduction of a great change in the social condition of this country. “The darkest wave has bright foam near it.” The very depression under which we have laboured has abated, if not expelled, the fever of party heat and political animosity. The different classes of society have been more drawn together, and the opportunity seems golden for a happier amalgamation, and for the permanent improvement of the people of Ireland.

Sir Robert Peel seems disposed to grasp the favourable juncture, and he has within him one of the elements of success. Hopeful himself, he infuses hope in others; he looks the evil undismayed in the face, and “takes courage from its magnitude.”

Omnia possibilia sunt iis volentibus. And in truth, no one who looks at the great natural advantages of Ireland—her fine rivers, capacious harbours, and fertile soil, teeming with a hardy and industrious population—but must see, that except man deliberately thwarts the bountiful dispensations of Providence, her resources are amply sufficient to secure to her inexhaustible supplies of wealth and plenty, and that though calamities may temporarily suspend her prosperity, they cannot eventually extinguish it.

Amongst other measures which possess no novelty, he looks to one which will facilitate the transfer of property, and contribute to its better management when transferred. With this view, he proposes a Government Commission nearly absolute, with power to purchase, and to re-distribute to an improved proprietary the lands so purchased. The plan, as stated on Friday se’nnight, though sufficiently vast, yet, in some degree, dwindles from the size to which, when first stated, it appeared to extend itself.

As we understand it, he proposes, in substitution

for the machinery of the Court of Chancery, that Government Commissioners may be empowered to sell the fee, discharged of all incumbrances, where poor rate, inclusive of the present arrears, is unpaid.

Now, whether much land will thus be confiscated, will depend on its future liability to poor rate. If the premier's plan of a maximum rate be made law, a great transfer of property will, in all probability, not change hands for default in poor rate; if, on the other hand, electoral divisions be taxed to support the amount of destitution existing upon them, the fee of Munster and Connaught will be sold for poor rate alone. But this would be too glaringly unjust to proprietor and incumbrancer, as it would cast all the burden of a visitation of Providence on them, and would sell them out under an *ex post facto* law, which neither contemplated at the period of their respective loans and purchases. A change in that law would also be essential, to induce purchasers to come forward, who would stand aloof whilst the amount of poor rate was indefinite, except, indeed, the Commissioners were prepared to occupy until they had cleared the land of their living incumbrances, and assumed a management, for which no staff would be strong enough, and no revenue sufficiently ample.

The Commissioners should be empowered to purchase up districts, without making the non-payment of poor rate the only test of purchase.

Incumbered estates, and estates in Chancery, should be sold. As we have already shewn, all the properties under our Courts of Equity—except those of minors and lunatics—are placed there for purposes of sale, and a great portion of them are ripe for transfer.

Sir Robert Peel's last speech manifests how entirely his views bear out those which we have, from time to time, enunciated, as to the evils of the present system of Equity estate management.

Incumbrancers are ill paid, owners are ruined, occupiers discouraged, and the country suffers. Receivers and lawyers are said to be the only parties benefitted, but the former find the office irksome, and the latter would be much better satisfied to have that class of professional business which springs from prosperity, than that which is the result of acute national distress. In the first case, they are better paid and better pleased. Their profession is an honourable and useful one, and not dependant for support on that branch of the system of the Court of Chancery which is vicious. They lose more by national adversity than they gain by the litigation, the product of it.

Sir Robert Peel observes—

"All your measures of drainage, of local improvement, of increase of fisheries, of emigration—all will be ineffectual, unless you can cure, in some way or other, those monstrous evils arising out of that condition of landed property to which I adverted the other night. If those estates, producing £800,000 a-year, with arrears annually accumulating, are not to allow more than £2,000 to be applied to the permanent improvement of the land—if there are certain principles and forms of Equity sanctioned by the Court of Chancery, which throw

obstacles in the way of any improvement in that respect, you may feel assured that all your exertions will be ineffectual. I think it would be an inestimable benefit to every insolvent, and to every nominal owner, and to every incumbrancer who is receiving nothing, that it would, in short, be an advantage to everybody, except the receivers under the Court of Chancery, and the lawyers who are dividing the sums received from those estates amongst themselves—if by some process which should not be inconsistent with the principles of equity, and of fair dealing, you could relieve those estates from the control of the Court of Chancery, and permit them to be possessed by men of capital, who would embark in their cultivation with new hopes and fresh vigour, in my opinion, you would do more by that act for the advancement of Ireland than by any other act that can at present be adopted."

Here then, we have a statesman of Sir Robert Peel's sagacity, pronouncing the system adopted in the management of estates, under our Courts of Equity, the master evil of this country.

To extirpate the Court of Chancery altogether, would certainly be an alteration in our constitution; but not an improvement. To vest its powers, except temporarily in a commission, would be to transfer them to a more incompetent tribunal. The Irish Court of Chancery has been very well abused;—we have ourselves not spared it where we thought its practices deserving of reprobation;—but it cannot be dispensed with; there must be a controlling power somewhere, and no where can it, under ordinary circumstances, be better placed than at present. It has indeed, in many instances, failed in its mission, it has not kept pace with the railroad age in which we live, old practices and inveterate usages have clung to it with too much tenacity; it has not used the power of adaptability, which its happy constitution has invested it with sufficiently—but true wisdom will be best employed, not in superseding, but in remodelling it.

The proposed plan of a Commission is but temporary and local, it does not combat with the evils of a system of receiverships which will be perennial and universal. It is impossible to predicate that within any given time, this country will become so prosperous that no estates will be placed under Courts of Equity, and if not, there must be receivers over those estates, whether situate in Leinster, Ulster, Munster or Connaught. That such receivers, may do as much good and as little injury as possible, the present order of things must be changed. Sir Robert Peel's plan for the settlement of the distressed districts does not provide for this; in devising a scheme for one portion of the country, the interests of the other must not be overlooked.

Public attention is directed to the subject; its gaze should not be withdrawn, until the object on which it has looked with such pain, has been so remodelled, that the public eye can rest upon it with content, if not with complacency. A little thought will shew, how susceptible of improvement is the present system, (which nothing but habit could

have reconciled us to endure,) and without injury to creditor, owner, or occupier, but benefit to all three.

Before we conclude, we wish to advert to a matter of detail, which we do not remember to have before stated. A tenant cannot take a lease under the Court of Chancery, except at an exorbitant rate. We do not exaggerate, when we state, that in every advertised letting—and lettings always are advertised, when the farm is of any extent—the expense to the tenant will be near £10. and the estate suffers as great expense, and he it observed, this lease is only for seven years pending the cause. Seven years pending the cause!!

How can estates under the controul of our Equity Courts be improved by the occupier, where the tenure is so insecure and so short?

And, on the other hand, the established practice accounts for the absence of all improvement by the court; acted on by two conflicting interests, its agency has become utterly neutralised. The owner, if he has a hope of retaining his estate, or does not lose his sense of benevolence with his sense of power, is desirous that the receiver should have money to expend in permanent or any useful improvement; the creditor effectively interposes. "Permanent improvements are worse than useless to me, if made with the money primarily liable to repay my debts." The receiver is listless, he is not paid to superintend improvements, and the court between two antagonistic forces, and a supine officer, does nothing.

The remedies suggested for the sad social state of Ireland, we make no doubt, will be many and various; we have glanced at one which high authority pronounces to be necessary, and sober thought to be practicable.



The recent case of *Whittle v. Henning* (18 L. J. 51, S. C., 12 Jur. 1079) has decided—overruling the decisions of the Vice-Chancellor of England in *Hall v. Hugonin* (14 Sim. 595, S. C., 10 Jur. 941), *Crood v. Perry* (14 Sim. 592), *Wilson v. Oldham* (ib. 594)—that there is no case in which a Court of Equity will assist a married woman in alienating, or reducing into possession for the purpose of alienation, her reversionary chattel interest during the lifetime of her husband.

It is not a little singular, that personality should be thus invested with the attribute of inalienability, whilst a married woman, during coverture, can disclaim or dispose of any interest or estate in land. The spirit of legislation has changed. Our forefathers thought personal property of little consideration, and not capable of being trammelled, from its want of fixity, with the same laws against alienation as real estate; but the modern doctrine of a Court of Equity guards, as to personality, the rights of married women, with more jealousy than the common law as to realty. In the one case, the policy of the law is to consider the security of the married woman as paramount to every consideration of subsequent family convenience, under the apprehension of her being too accessible to marital influence, which it is assumed, we sup-

pose, will be always improperly exercised; at least, it thinks it better to guard against the possibility of such an occurrence, and admits of no examination, as to free will or free agency, however respectable or above suspicion this may be. There are cases, no doubt, in which she can waive her equity to a settlement by a separate examination and consent, but the late Master of the Rolls, in the case of *Box v. Jackson* (6 I. E. R. 182), thought it would be a perversion of that practice to extend it to any subject but that which is well known as the wife's equity, "her right to her *chooses in action*, and her reversionary equitable right to personal chattels not reduced into possession during the coverture rest in her by law without her consent; and the same law which gives her the property, disables her from disposing of it. To receive and act on her consent here, would be to defeat her right, and the policy and reason of her disability. But her equity is the creature of this court, and is governed altogether by rules applicable to it, and to no other species of right; it is not founded on contract, it owes its existence to the arbitrary interference of this court.....I may say that it is anomalous, wanting many of the incidents of property, and that it would be subversive of the established policy of the law to make this peculiar and qualified right of waiving a benefit preferred to her by this court, an argument or precedent for enabling her to defeat those rights with which the common law has, while she is married, inalienably invested her."

The distinction which has arisen in the policy of the law, we apprehend, also, to have been occasioned by the fact of the supply of land being limited, and the difficulties of transfer sufficiently great. It was, therefore considered inexpedient, in a national point of view, to tie up real estate, and throw an impediment in the way of its changing hands, even though the interests of married women should in some degree suffer, and a safeguard be removed, the national convenience preponderating over individual interest. In personal property, the same public grounds were not supposed to exist; and it may have been considered just, even in these palmy days of free trade, to leave one relic of protection.

Whatever may have been the origin of the rule, it is now settled, whether the interest came to the wife by contract, or independently of contract, that she cannot by any contrivance, reduce her contingent reversionary chose in action into possession. *Box v. Jackson*, (6 Ir. Eq. 174), decides that she cannot do so by consent in a Court of Equity, even though the contingency does not depend upon her surviving her husband; the decision was contrary to Sir E. Sugden's first impression, who thought that the consent of the wife could be taken "whenever the contingency on which her interest depends, is not that of her surviving her husband; and that with that exception, the property may be dealt with in the same manner as if the interest were immediate." In that case the reversionary interest was expectant upon the decease of the lady's mother. In *Nixon v. Nixon*, (8 I. E. R. 254), the fund was vested in trustees, as to the interest for the lady's separate use for

life, after her husband's decease, in trust for her absolutely, and after her decease, as to one moiety for her children by a former marriage; in case of their deaths, for the sole use of the lady—and as to the other moiety, on which the question arose—in trust for her absolute use, as she should by any deed, or any will, during and notwithstanding coverture appoint, and in default of appointment, in trust for the children of the intended marriage; and if no issue, for the husband, and if no appointment of any of the property, then the entire of the property for the sole use of the lady. There was a covenant by the husband, that, after-acquired property in right of the wife, should be settled upon the same trusts. The lady afterwards acquired considerable sums by bequest, and as one of the next of kin of a relative, and applied to the trustees for a moiety of it, they declined to pay it over, upon which a bill was filed, which Sir Edward Sugden dismissed. It will be observed, the income was settled to the separate use of the wife, during coverture; to her absolute use in the event of her surviving him, and the principal as she should appoint. His Lordship observed, "that there was no question of merger, during their joint lives, the estate is secured to her separate use; after the determination of that estate, the property is not settled to her separate use. She takes it absolutely, and taking it absolutely, according to the settled law of the court, she cannot alien it during the lifetime of her husband."

In England, the ingenious contrivance was resorted to of accelerating the possession, by conveying the intervening interests to the *feme covert*, the reversioner, so that they might merge, or be extinguished in the reversion, and the reversion thereby reduced into possession, by creating a species of union of the particular estate, with the interest in remainder. And this was acted upon by the Vice-Chancellor, Sir L. Shadwell, in the cases before referred to. In his judgment in *Hall v. Hugonin*, he says—"Suppose a father gives a sum of stock to a trustee for his daughter Elizabeth for life, remainder to his daughter Mary, a married woman, *absolutely*, and that immediately after his death, Elizabeth assigns her life interest to Mary, are not, by that mere act, both the life interest of her sister, and also her own absolute interest in remainder, vested in her? I do not put the case as one of merger, but I ask, whether the married daughter has not both the interests—that is, the life interest of her sister, and also her own absolute interest in remainder? If she has then the whole interest, is it not an interest with which she is capable of dealing, in this court, as if it had been originally given to her *absolutely*?" The argument of Mr. Rendall, in the same case, is the true answer to the general proposition stated by the Vice-Chancellor, the hypothetical case put by him by no means warranting such a deduction. The argument of Mr. Rendall is—"That a Court of Equity considers married women as objects of its especial protection, and, consequently—to adopt the language of Sir J. Leach, (*Pickard v. Roberts*, 3 Madd. 384)—it will never lend itself as an instrument to enable the husband to acquire a right in his wife's personal property, which he can by no means acquire at law." In the case put by the

Vice-Chancellor, Shadwell, Elizabeth had an undoubted right to assign her interest to her sister, the married woman; that interest having thereby become present and vested, not reversionary, it would undoubtedly be capable of being assigned, it was no longer a life interest within the principle laid down in *Purdew v. Jackson* (1 Russ. 71), and *Stiffe v. Everett* (1 My. & Cr. 37), both of which cases were decided on the principle, that neither the husband alone, nor the husband and wife together, could dispose of the wife's life interest, in consequence of the possibility of her survivorship. In *Stiffe v. Everett*, Lord Cottenham says—"I do not see how, consistently with the cases of *Purdew v. Jackson* and *Honner v. Morton*, the husband can make title to such of the dividends of the fund as may accrue after his own death, and during the life of his wife surviving him." In the case put by the Vice-Chancellor, the interest being absolute, would be capable of alienation by the husband, when reduced into possession; and, as the wife would, in this case, be entitled only to her equity to a settlement, her consent to part with that would be taken by a Court of Equity, even though the fund should be her separate property, *Major v. Lansley*, (2 Russ. & My. 359); and it is on this ground of absolute interest the Vice-Chancellor rests his judgment, as he expressly guards himself from being thought to have put it on the ground of merger. The following contrivance was resorted to in *Whittle v. Henning*. There a sum of money to which the wife was entitled, under her father's will, was settled on her husband for life, remainder to herself for life; remainder to such children as they should jointly appoint; they appointed to an only son, and father and son assigned to the wife. As the wife took only an estate for life, according to the decision in *Stiffe v. Everett*, and *Purdew v. Jackson*, it was utterly impossible for the husband to alienate her possibility of survivorship, which would have been done, if the court had yielded to the means adopted to effectuate this object; for this reason, the husband will not be assisted by a Court of Equity to obtain personal property of the wife, not attainable at law. In *Whittle v. Henning*, although the whole interest in the money became vested in the wife, by the assignments, the husband could not have reduced it into possession, as the acts of the parties would not warrant the trustees in acting contrary to the settlement under which they were appointed. And this is the foundation of the judgment of the court, that it would not lend its aid to do that indirectly, which could not otherwise be directly done. Lord Cottenham, in his judgment says, "the first thing the court had to consider was, how the rights of the parties could be affected by the machinery which they had adopted. Under the settlement the wife was to have the dividends for her life, subject to the prior life-interest of her husband; and therefore, she had an interest in reversion, which this court would not allow her to part with during her coverture. How, then, could this interest of the wife be affected by the deeds which had been executed? Whatever protection the wife would be entitled to against the interest which her husband might take *jure mariti*, she would not be deprived of by such a

contrivance, as had been resorted to in the present case; otherwise it would not be practicable in many cases, for a father to make provision for his daughter, so as to protect her against her husband. This court had, however, adopted many rules for the protection of the wife; and so far interfered with the rights of the husband, as to refuse him any assistance in obtaining property which belonged to his wife, unless he made what the court considers a proper provision for her." This passage appears wholly to place the ground of the decision on the jurisdiction the court assumes for the protection of the wife, and its determination to prevent the rules it has established for the effectuation of this object, from being evaded by a contrivance, which in this case was evident, and to this length only can the case be pushed. To hold that when the estate has become absolute by the junction of the intermediate and reversionary estates through *bona fide* means; would lead to as great, if not greater inconvenience, than a relaxation of the wholesome rule laid down by Lord Cottenham, in *Whittle v. Henning*. The rule to be deduced from these considerations appeared to be, that when the chose in action, becomes so absolutely vested in the wife, as to be capable of being reduced into possession, though the interest of the wife had been reversionary, and as such unalienable up to the moment of the incident rendering it absolute—as in the case put in the Vice Chancellor, and in many others that may be easily conceived—there the Court of Equity will receive the wife's consent to waive her equity to a settlement. But when there are parties to take after the life-interest of the *feme*, as in *Whittle v. Henning*, and the other like cases, as the trustees cannot act upon the agreement between the *cestui que trusts*, and as the husband cannot consequently reduce the interest into possession—though in one sense absolutely vested by the conveyance of the parties to the wife. Then, under no circumstances, will the court interfere.

(Continued from p. 168.)

21. That for any engine, instrument, net, weir or device whatsoever not enumerated in the schedule to this act, and which may be proposed to be used for fishing for salmon, trout, pellen or fish of the salmon or trout kind, or for eels, the said commissioners at any time before a board of conservators shall be formed, and after the formation of such board, such board of conservators for the district may fix and determine the licence duty on payment of which the same may be used in such district, regard being had to the relative capability of capture and productiveness of the same, as compared with those set forth in the said schedule, and the relative proportion of the duties therein set forth: provided that the party proposing to use any such engine, instrument, net, weir, or device not enumerated in such schedule shall previously give notice to some constabulary or coast guard officer of the district, or to some inspector appointed under this act, of his intention to use the same, who shall and is hereby required to forward to the said commissioners or the said conservators, as the case may be, a description thereof, as to its relative capability of capture as compared with the engines, instruments, nets, weirs, or devices set forth in the said schedule, and shall furnish the name by which it shall be designated, upon which the commissioners or the said conservators, as the case may be, may authorize the use of the same, upon payment of the licence

duty which they may fix, and cause the same to be inserted in the schedule of licences for the said district: provided, that rods used singly for taking trout, perch, pike, or other fish, save and except salmon, shall not be subject to any licence duty under this act: provided, that if any person using a rod shall, under pretence or otherwise of fishing for trout, perch, pike, or other fish, take or kill salmon with such rod, such person shall be subject to a penalty of the like amount as the licence duty for the time being payable for a salmon rod, and the same shall be recoverable before a justice or justices in like manner as other penalties under the said recited acts or this act: provided, that all cross-lines used with a rod or rods for taking fish of any kind whatsoever shall be subject to the licence duty payable under this act for the time being upon cross lines and rods, until the same shall be altered as herein provided.

22. That if any person shall use or erect any engine, net, instrument, or device whatsoever, subjected to licence duty as aforesaid, for the taking of salmon, trout, pellen, or fish of the salmon or trout kind, or eels, or by any means fish within any fixed salmon, trout, or eel fishery in any year, without the same respectively being duly licensed for such year under this act, every such engine, net, instrument, and devices, and such means of fishing, shall be forfeited and sold, or otherwise disposed of, as the justice or justices shall deem fit, and the entire proceeds thereof shall be added to the general funds of the district constituted under this act in which the same shall be erected or used; and any person erecting or using the same shall be liable to pay such penalty, not less than half nor exceeding the whole of the licence duty at which under this act the engine, net, instrument, or device he shall have been so using or erecting would be subject to under this act, such forfeitures and penalties to be proceeded for and recovered under the warrant of such justice or justices, in the manner and subject to the regulations in the act of the 5 & 6 Vict. c. 106.

23. That in all cases of fixed and established salmon, trout, or eel fisheries which under the said first-recited act are designated "several fisheries," or are now or may hereafter be claimed or possessed or used as several fisheries, whether the same be fished by means of weirs extending entirely or partly across rivers or estuaries, with boxes, baskets, or cruives, or be fished by means of existing natural or artificial obstructions stopping the fish, or by draft, pole, loop, or other nets, or by rod and line, or by any other means or device whatsoever, the persons using, occupying, or holding such fisheries, whether such occupation and holding shall be by lease, demise, agreement, or tenancy at will, or in fee simple, fee tail, or for life, shall in each year pay as an annual rate, in two equal half-yearly gales, on the 1st of February and the 1st of July in every year, such sum, in addition to the licence duty by this act provided to be paid for the engines, instruments, nets, or devices erected or used in fishing such fishery, as shall be equal to the difference between the sums paid by such persons for such licence duty or duties and the annual sum of ten per centum upon the poor law valuation of such fishery, subject to such alteration of such per-centage as may from time to time be made by the board of conservators of the district under the provisions of this act.

24. That such rate may be recovered in a summary way before any one or more justice or justices of the peace, as wages, or by civil bill before the assistant barrister of the respective county, or by action in the superior courts, at the suit of the said commissioners, if no board of conservators of the district shall have been formed, or if such board shall have been formed, then at the suit of the clerk of the said board of conservators.

25. That in any cases where any such fisheries as last aforesaid may not be or have not been valued by the persons appointed as valuers for the purposes of the poor laws, the said commissioners, on application of the board of conservators, may and are hereby empowered to call upon the poor law commissioners of Ireland to cause the same to be valued separately and distinctly from other property for the purposes of this act.

26. That such rate shall be collected by such persons as the said commissioners for the execution of this act, at any time before the formation of a board of conservators for the district, or after the formation of such board, then as the said board, as the case may be, shall appoint, adequate security being taken by the said commissioners or the said conservators, from the persons authorized to receive the same, for the duly accounting for the same, and for the due performance of the duties which the said commissioners or the said conservators, as the case may be, may prescribe and the cost of any allowance to be made for the collection of the same shall be charged to the expenses of the district for which the same shall be collected.

27. That the total amount of all sums of money received for all licence duties and rates, and from the sale of forfeited engines, nets, or instruments as aforesaid, and from penalties (save so much as shall be paid to any informer as herein-after mentioned) under the provisions of this act, shall, until the appointment of a treasurer for each respective district, be lodged in the bank of *Ireland*, to the credit of the said commissioners, in the matter of the district for which the same shall have been received, and shall be applied to the purposes of such respective district; and regular accounts of the receipts and disbursements on account of each district shall be kept and furnished by the said commissioners, until the appointment of such treasurer as aforesaid; and upon the appointment of a treasurer of each district respectively, the commissioners shall cause the monies lodged in the bank of *Ireland* in the matter of such respective district to be transferred and lodged with all accounts relating to such district to and with the respective treasurer of such district, and thenceforth all sums of money received for licence duties and rates, and forfeitures and penalties, for each such district, shall be paid over by the parties receiving the same to and received by such treasurer of such district, and be applied to the purpose of such district under the provisions of this act; and such treasurer shall pay such sums of money as shall be required for the purposes of the district from time to time upon a draft or order signed by the chairman at any general meeting of the board of conservators and by two other conservators.

28. That all licences under this act shall be prepared and printed in such form as the said commissioners shall prescribe or from time to time think necessary to adopt; and a separate licence shall be issued for each engine, net, instrument, or device for taking fish, and each licence issued before the formation of a board of conservators shall be stamped with the seal of the said commissioners, and if issued after the formation of such board with the seal of such board: provided that the year for which such licence shall issue, and a name, number, or letter describing the district and the electoral division in which the licence shall be used, and the name of the engine, net, instrument, or device for which the same shall be issued, shall be printed thereon; and such licence shall be only good and valid for the year, district, and purpose for which the same shall be issued; and that any party using or presenting the same for any other year, district, or purpose, or in any manner altering or counterfeiting the same, shall be liable to a penalty, not less than the whole amount of the licence duty for which the same shall have been issued, or which the party so misusing or counterfeiting the same would be liable to, and not exceeding double the amount of the same, at the discretion of such justice or justices before whom the offence may be tried.

29. That any person using any such engine, net, instrument, or device, or having the same erected or in fishing order, or found with the same in his possession, in or near any fishing place, or going to or returning from fishing, shall and is hereby required to produce to any of the said commissioners, or any officer of the said commissioners, or any conservator of the district, or any inspector, water bailiff, or officers, or men of the navy, coast guard, or constabulary, when demanded, the licence for the same, under like penalties as in the last preceding provision mentioned: provided that such parties as shall to the satisfaction

of the justices or justice be proved to have them in possession as manufacturers or sellers of the same, and not for the purposes of using the same within the year in which such demand shall be made of them, shall be exempt from any such penalty.

30. That such licences as aforesaid shall be sold either by licensed stamp distributors, and in such and so many places throughout each district, as the said commissioners before the formation of a board of conservators for the district, or after the formation of such board, then as such board of conservators, shall from time to time appoint, adequate security being taken by the said commissioners or the said board of conservators, as the case may be, from the persons authorized to sell the same, for duly accounting for the same and for the due performance of their duty; and the cost for any allowance to be made for the sale of the same shall be charged to the expenses of the district for which the same shall be issued: provided that if any person shall have paid a licence duty for a rod within any district as aforesaid, such person shall not be liable to pay an additional sum for a licence in any other district by reason only of angling with a rod in any other district.

31. That all persons demanding to purchase any such licences, and tendering to any person so appointed to distribute the same the amount of licence duty for the time being to be paid under this act, shall be entitled to receive the same without any question or objection whatsoever arising either from the time when, the purpose for which or the right in virtue of which, he or they may desire to use such licence: provided that nothing herein contained with reference to the possession of any such licence, or the payment of the licence duty or rates under this act, shall be construed to give or confer any right of fishing or of using any instrument or device for taking fish by any means or in any place which the party having or using such licence would not have possessed if this act had not been passed, or to alter or affect the rights of any other persons.

32. That all persons whom the commissioners or board of conservators, shall appoint to sell licences, shall furnish to the said commissioners or board of conservators, an account of such sales monthly, or so often as they may require, and shall set forth in such accounts the sums received for licences for each particular engine, net, instrument, or device, the names and residences of the persons who shall have purchased such licences, and the district and electoral division of such district for which such licences shall have been obtained.

33. That the board of conservators of each district shall take security from any clerk whom they may appoint, and any other officer or person having the care or custody of money to be received by virtue of this act, for the due execution of the duties of his respective office, or for duly accounting for such money, as the said board of conservators shall think proper; and such clerks shall attend the stated and other meetings of the said board, and shall, in a proper book or books, enter and keep a true account of all the monies to be received, and of the application of the same, and of all the acts, proceedings, and transactions of the said board, by virtue of and under the authority of this act, and shall perform such other duties as the said board may direct; and every conservator shall and may at all convenient times have access to and peruse and inspect the same, and each such board are hereby empowered and required to cause their said clerk to furnish to the said commissioners annually, or as often as they may require, an account of all monies received and disbursed relating to each such district under the authority of the board of conservators.

34. That such inspectors and water bailiffs appointed under this act shall have, for the enforcement of the said recited acts and this act, the powers of constables, and all the powers and authorities conferred on water bailiffs, or officers or men of the constabulary force or coast guard, or navy, under the said recited acts or any of them.

35. That all fines, penalties, and forfeitures under this act not herein-before provided for shall be recoverable in

like manner as penalties and forfeitures under the provisions of the said first-recited act, and one moiety of every sum of money levied as a fine or penalty for any offence under the provisions of the said recited acts or this act (save and except penalties for non-payment of any such licence duty as aforesaid) shall be paid to the informer or person who shall be the means of bringing to justice any person offending against any of such provisions, and the other moiety shall (anything in the said recited acts to the contrary notwithstanding) be applied to the purposes of this act for the district formed under this act in which such offence shall have been committed.

36. That the appointment of officers under this act shall not be subject or liable to the payment of any stamp duty.

37. That nothing in this act contained shall lessen or abridge the powers conferred by the said recited acts on the said commissioners, or on any inspectors, water bailiffs, officers, and men of the navy, coast guard, or constabulary, but the same shall remain in full force and effect, and for aiding the officers, inspectors, and water bailiffs to be appointed under this act for enforcing the provisions of the said acts and this act.

38. That the said commissioners shall be empowered to attend any meeting of any board of conservators held under this act, and to advise, consult, and confer with them upon the regulation, management, and improvement of the fisheries, and shall at all convenient times have access to and peruse, the books and accounts kept for the purposes of any district under this act.

39. 'And whereas by the 5 & 6 Vict., the said commissioners are empowered, to decide that the period in the said act appointed for the close time of the fisheries therein mentioned should cease, and that such other period as should then be fixed upon by them as the close time for any of such fisheries should be kept and observed in lieu thereof, or to alter, as therein mentioned, the period within which it should not be lawful to hang any coghil or other nets in the gaps, eyes, or sluices of eel or other weirs, or make use of fixed engines for taking eels, subject to the provisions in the said act contained: and whereas by the said act of the 9 & 10 Vict., so much of the said first-recited act as specified the close time or close season in which no fish of the salmon kind should be taken is repealed, and new periods for the close time as to fish of the salmon kind are by the said act prescribed and substituted: and whereas doubts may be entertained whether the powers of the said commissioners to alter the close time or close season as to such fish of the salmon kind as aforesaid, under the provisions of the said first-recited act are still subsisting and unaffected by the provisions of the 9 & 10 Vict.; and for the removal of such doubts, be it enacted, that all the powers and authorities vested in the said commissioners under the said first-recited act relating to the altering the close time or close season for any such fisheries in the said act mentioned, and also for altering any close time or close season for any estuary or portion of the sea-coast, or for any tideways, or for any river or lake above the tideway or portion thereof where the tide ebbs and flows, prescribed and established by the said act of the 9 & 10 Vict., shall be and remain in full force and effect, and may be used and exercised as to any of such close seasons in like manner and subject to like provisions as in the said first-recited act of the 7 & 8 Vict.: provided always, that in case the said commissioners shall decide upon altering any of such close seasons, such change or alteration shall commence and take effect at the expiration of six weeks from the date of the publication of the said decision in the *Dublin Gazette*, anything in the said first-recited act to the contrary notwithstanding.

40. 'And whereas by the 9 & 10 Vict., certain periods are fixed during which fish of the salmon kind shall not be killed, destroyed, or taken, and it is provided that (save as therein-after mentioned, and save in the counties of Antrim, Tyrone, Donegal, Londonderry, Mayo, Kerry, Leitrim, and Sligo,) no fish of the salmon kind

'shall be killed, destroyed, or taken by any person or by any means in or from any part of any river or lake above the tideway, or portion thereof where the tide ebbs and flows, between the 15th of September in each year and the last day of February in the year following, inclusive; provided that in any river or lake above the tideway, or portion thereof where the tide ebbs or flows, no fish of the salmon kind shall be killed, destroyed, or taken between the 1st and 14th of September, both the said days inclusive, by any person by any means whatsoever, save by rods and lines only: and whereas by means of the said provisions the open time for fishing with rods and lines in rivers and lakes above the tideways is shorter by fourteen days than the open time for fishing in any estuary or on the sea-coast, or in the tideway of any river or lake: and whereas it is expedient and equitable to equalize the periods of open time for fishing with rods and lines: be it enacted, that after the passing of this act, as regards all parts of Ireland and the sea-coast thereof (save the said eight counties and the sea-coast thereof herein-before mentioned,) the close time during which it shall not be lawful to kill, destroy, or take fish of the salmon kind, in or from any part of any river or lake above the tideway with rods and lines only, shall be between the 29th of September in each year and the last day of February in the year following, both days inclusive, unless and until such close time shall be altered by the said commissioners under the provisions of the said recited acts and this act.

41. That if any person or persons, not being authorized by the owner, lessee, or occupier of a several fishery as defined under the first-recited act, shall enter into or upon such several fishery for the purpose or under the pretence of killing fish therein or taking fish therefrom, or shall kill fish therein or take fish therefrom, he or they shall for every such offence forfeit and pay a sum not less than 10s. nor more than £5, to be recoverable in a summary way before a justice or justices, as provided by the 5 & 6 Vict.

42. 'And whereas by the 5 & 6 Vict. c. 36, it is provided that the several persons who shall commit any of the offences in the said section mentioned shall forfeit and pay any sums not exceeding the several and respective sums in the said section mentioned: and whereas it is expedient that a minimum penalty should be specified: be it enacted, that every person who shall commit any of the offences in the section specified shall (in addition to any other forfeiture thereby specified) forfeit and pay a sum not exceeding the sum for such offence respectively specified in the said section of the said act, and not less in any case than the sum of 10s.: provided that nothing in this act contained shall legalize any fishery or weir not being legal at the passing of this act.

43. That this act may be amended or repealed by any act to be passed in this present session of parliament.

SCHEDULE to which the foregoing act refers.

Scale of licence duties for each engine, net, instrument, or device used in salmon, trout, pollen, or eel fisheries in districts.

	£	s.	d.
1. Single salmon rods . . .	1	0	0
2. Cross lines and rods . . .	2	0	0
3. Snap nets . . .	1	10	0
4. Draft nets or selnes . . .	3	0	0
5. Drift nets . . .	8	0	0
6. Trammel nets, or draft nets for pollen . . .	1	10	0
7. Pole nets . . .	2	0	0

8. Other nets, or similar engines not named above. . .

Licence Duties, such as shall be fixed by commissioners or conservators as provided by this act.

9. Bag nets	5 0 0
10. Fly nets	5 0 0
11. Stake nets, or stake weirs (Scotch)	15 0 0
12. Head weir	3 0 0
13. For every box, crib, cruive, or drum net in any weir for taking salmon or trout	5 0 0
14. For every gap, eye, or basket in any weir for taking eels	1 0 0

Note.—Fixed fisheries for salmon or eels claimed to be "several fisheries," whether fixed by means of fixed weirs with boxes, cruives, or rails for stopping the fish, or by means of the fish being stopped by rocks or other natural or artificial obstructions, and taken by means of draft or other nets. to be rated at ten per cent. on poor-law valuation, unless such per centage be reduced by the commissioners or by the conservators as provided by this act.

CAP. XCIII.

An act to confirm the incorporation of certain boroughs.
[31st August, 1848.]

CAP. XCIV.

An act to regulate certain offices in the petty bag in the high Court of Chancery, the practice of the common-law side of that court, and the enrolment office of the said court.
[31st August, 1848.]

CAP. XCV.

An act to carry into effect the arrangements of the ecclesiastical commissioners for England for making better provision for the cure of souls in the parish of *Wolverhampton* in the county of *Stafford* and diocese of *Lichfield*.
[31st August, 1848.]

CAP. XCVI.

An act to continue certain turnpike acts for limited periods.
[31st August, 1848.]

CAP. XCVII.

An act to repeal the duties of customs upon the importation of sugar, and to impose new duties in lieu thereof.
[4th September, 1848.]

(To be continued.)

LONDON UNION ASSURANCE OFFICE,
Cornhill; and 70, Baker-street, Portman-square, London;
17, COLLEGE-GREEN, DUBLIN;
and
Espanade, Hamburg.

INSTITUTED IN THE REIGN OF QUEEN ANNE, A. D. 1714.

FIRE, LIFE, ANNUITIES.

LONDON UNION LIFE OFFICE,
81, Cornhill, 9th February, 1849.

The Life Bonus of the Year 1848, of two-thirds of the Profits of the LIFE DEPARTMENT, has been this day declared; and, with the exception of a Reserve of £30,000 (to accumulate towards the next Bonus, in 1853), is payable upon and with the Sum Insured, on Policies effected in Great Britain, Ireland, and Germany respectively, upon the Profit System, and according to the number of Annual Premiums paid on each since the last declaration.

This BONUS, including the previous additions, may be applied either by having the Annual Premiums reduced for the next Seven Years; or, by adding the amount to the Sum Insured; or, the value thereof may be received immediately in Money, at the option of the original holders of the respective Policies, and unless such parties signify their preference in writing, within Three months from the above date, the BONUS will be added to the Sum Insured.

Further particulars can be obtained at the Office, as above, or by written application to the Secretary.
The total BONUS on policies effected in Ireland for £1000, of the longest duration, amounts to £383, and varies in proportion to the amount and date of the Insurances.

THOMAS LEWIS, Secretary.

JOHN GOLD, Stock Broker, Agent, 17, COLLEGE-GREEN,
Dublin.

Notice is hereby given, that Receipts for renewal of Fire Insurances, due on the 25th of March, are now ready for delivery at the Company's Office, and the respective Agents in the Country; same should be renewed on or before the 9th of April next.

An Engine and body of Firemen are in constant readiness to attend Fire, at the Company's Engine-house, No. 10, Crown Alley, rear of the Commercial Buildings.

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This Publication is devoted to such purely practical matters as fall within the province of SOLICITORS and their Managing Clerks. The First Number appeared January, 1849.

Robert Hastings, 13, Carey Street, Lincoln's-Inn; and EDWARD J. MILLIKEN, 15, College Green, Dublin.

IN CHANCERY.

Thomas Kemmis, Esq., Plaintiff.
Sir Richard Nagle, Bart.
Dame Mary Bridget Nagle,
George Pilkington,
Luke M'Donnell; and
John Ennis, Defendants.

PURSUANT to the Decree of Her Majesty's High Court of Chancery, made in this cause, bearing date the 17th day of April, 1847, and on MONDAY, the 23rd day of APRIL next, at the hour of One o'Clock in the Afternoon, at my Chambers, on the Inns Quay, in the City of Dublin, SET UP and SELL to the highest and best bidder, all that and those the LANDS commonly called the DONORE ESTATE, in the County of Westmeath; that is to say, the Manor or reputed Manor of Donore, otherwise Donore, Coolin, Ballinabane, Ballinlahave, otherwise Ballinlahavin, Hospitalstown, Skehane, Garry-cloone, Thelmore; and also all that part of Donore called the Green House Farm, and the Customs and Tolls of the Fairs and Patterns of Donore; and also that part of the Lands of Ballinlahave, called the Red House Farm; and also the Lands of Spittlestown and its sub-denominations; also the Town and Lands of Ballinbrackogue, otherwise Rosemont, Killachunney, otherwise Killachunney, Capperakirk, Ballynegall, and part of Ballintubber, Cloghlah, and Brackneheria, otherwise Bracknehowla; and also the Town and Lands of Alpha-brak, Carna, Killare, Glubbstown, and part of Clochema, Cloonernia, Sresstown, Killinagh, Ardvaun, Garth, and the House and Office of Jamestown—all situate in the County of Westmeath, or a compass part thereof, for the purposes in said Decree mentioned.

Dated this 27th day of February, 1849.

EDWARD LITTON.

For Rentals and further particulars, apply to Mr. RICHARD P. TIGHE, the Plaintiff's Solicitor, No. 30, Middle Gardiner Street; or to VESSEY DALY, Solicitor for the defendants, Sir Richard Nagle, Bart., 81, Blessington Street.

LEGAL AND HISTORICAL DEBATING SOCIETY. ESTABLISHED 1843.

A Meeting of the Members of this Society will be held in their Room, No. 45, MOLESWORTH STREET, on FRIDAY EVENING, the 26th April. Chair to be taken at Eight o'Clock precisely.

Barristers, Law Students, and Graduates of the Universities of Dublin, Oxford, and Cambridge, are eligible for admission.

Members who have changed their residences, or who have friends to propose, are requested to communicate with the Secretary.

JAMES F. WRIGHT, Esq., 11, Lower Ormond Quay.

JAMES O'DRISCOLL,
PROFESSED TROWERS MAKER,
2, ANGLESEA-STREET.

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, at the columns of the paper cannot be occupied with answers to Anonymous Communications—or will the Editor be accountable for the loss of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, April 7, 1849.

THE Irish Jurist

No. 24.—VOL. I.

APRIL 14, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.	Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.	Queen's Bench, including Civil Bill and Registry Appeals.....	{ FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HARR HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.	Exchequer of Pleas, including Manor Court and Registry Appeals.....	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
		Common Pleas.....	{ ROBERT GRIFFIN, Esq., Barrister-at-Law.

DUBLIN, APRIL 14, 1849.

A VERY excellent Bill has been introduced into the House of Commons for the amendment of the Law of Bankruptcy in Ireland, by Messrs. T. O'Brien, J. Reynolds, Grogan, and Napier.

No measure creating a change in the Bankrupt code has been passed in this country since the 6 W. 4, c. 14, whilst on the other side of the channel there has been an unintermitting flow of legislation on the subject.

The Bill before us, adopts extensively the improvements introduced into the English system, and many of the clauses are taken verbatim, or with some slight alteration from the English acts, especially the 5 and 6 Vict., c. 123, or from Lord Brougham's new Bill. We shall state a few of the most prominent sections, and of the more important changes contemplated.

Section 9 reduces the amount of debt, of a petitioning creditor, as follows : a single debt to £50, the debt of two petitioning creditors to £70, and that of three to £100.

A creditor is empowered to file an affidavit, in a prescribed form, of his debt, and of his having delivered to the trader an account of the particulars of his demand, and thereupon the Bankrupt Commissioners are empowered to summon the trader before them, and except he be prepared to admit the debt, and pay the creditor, or otherwise satisfy him within fourteen days after personal service of the summons, or make oath, that he has a good defence to the debt, and give security for payment of it and the costs of action, if he be unsuccessful, he shall be deemed to have committed an act of bankruptcy, on the fifteenth day after the service of the summons, provided a Commission issue, within two months, after filing of the creditor's affidavit.

To guard against the abuse of this process, Section 19, leaves it in the power of the Court, in

which the action is brought, to give the Defendant the costs of the action, if the Plaintiff do not recover the sum mentioned in his affidavit, provided there were no reasonable or probable cause for making the affidavit.

If a trader do not pay or satisfy a judgment debt on which execution may be sued out, not having a set off thereto, within fourteen days after service of notice requiring payment, he shall be deemed on the fifteenth day to have committed an act of bankruptcy, and the same time is limited for disobedience of a decree of a Court of Equity, or an order in Bankruptcy or Lunacy, directing payment of a sum of money.

This Provision is stringent.

A declaration of insolvency, a secret transfer of goods—transfers deemed secret, when possession and removal of goods not made within a month after transfer, or two months before Commission—filing petition for arrangement between trader and creditor, where petition dismissed, are respectively declared acts of bankruptcy.

The present period for suing out a commission of bankruptcy by affidavit of debt and notice to pay, under 3 and 4 Vict., c. 105, s. 8, is forty-one days, the proposed Bill limits the time to twenty-one days, and thus makes the law, in this respect, identical with that of England, 1 & 2 Vict., c. 110, s. 8.

This mode of creating a bankruptcy is retained, that by a fourteen days summons being a mere public proceeding, and therefore, in some cases inexpedient. The amount of the petitioning creditor's debt, under the twenty-one days notice, is left the same as under the existing law.

We do not understand the motive of retaining the larger amount of debt for this mode of proceeding, and the lesser for the more summary process, except that the time for payment is slightly enlarged also.

If a Bankrupt do not dispute the commission

within two months after advertisement of bankruptcy, the Gazette is conclusive evidence against such bankrupt. The 28th section corresponds with 5 & 6 Vict., c. 122, s. 24, except that the latter only allowed twenty-one days to the bankrupt to dispute the commission, which was too short an interval.

The 30th and 10th subsequent sections, relate to the appointment of one or two persons being merchants, brokers, or accountants, or being or having been engaged in trade and *residents in Ireland*, as official assignees of bankrupts. They are taken from 1 & 2 W. 4, c. 56; 11 & 12 Vict., c. 45, s. 26, (the act for winding up joint stock companies,) 5 & 6 Vict., c. 122, 7 & 8 Vict., c. 96.

The appointment is vested in the Lord Chancellor, and this change of the law is likely to prove most thoroughly beneficial.

The official assignees are at once to receive the bankrupt's estate and effects, be paid a percentage on the amount realized—such percentage to be in the discretion of the Commissioners,—and one official assignee is always to act in conjunction with the creditor's assignee, and prior to the appointment of the latter, sell and dispose of the bankrupt's estate.

The 40th section which corresponds with art. 173 of Lord Brougham's Bill, empowers the commissioners to set apart a portion of the bankrupt's pay, or half-pay, &c., and in this particular, to place a bankrupt in the position he would be in if he became an insolvent.

The 51st section suggests a useful improvement in the present law,—it enacts that the warrant of committal for refusing to answer, or not satisfactorily answering, need not specify the questions unanswered, except by reference to the examination or deposition, a copy of which is to be delivered to the prisoner within sixteen hours after committal. At present if a commissioner commit a contumacious bankrupt, every question must be set forth in the warrant of committal.

The present form is thus often very voluminous, sometimes extending over four or five pages closely written. And it is obvious that this system of labour, technicality, and expense was inconvenient.

The 57th section, copied from 5th & 6th Vict., c. 122, s. 38, disentitles a bankrupt to his certificate, if he has lost by gaming or wagering, in one day, £20; or within one year, preceding bankruptcy, £200; or £200 by stockjobbing; or has cancelled or destroyed his books, or made fraudulent entries, concealed his property, or permitted fictitious debts to be proved.

The allowance of the certificate is transferred from the creditors to the commissioners by section 57. This places the law of the two countries on the same footing. In future the certificate need not be signed by any creditor, but any creditor may oppose, and the commissioners must certify to the Chancellor, that the bankrupt has made a full discovery, and in all things conformed, the bankrupt must swear that the certificate was obtained fairly and without fraud, and the certificate must be confirmed by the Chancellor, against which confirmation, any creditor may be heard.

We think this alteration desirable, the more

independent of his creditors, the bankrupt is, the better, and the less probability of underhand transactions. We should wish, however, a power of appeal given to the bankrupt from the commissioners to the Chancellor in the event of their refusing his certificate, we are averse to the constitution of any tribunal final in the first instance.

All contracts or securities to induce creditors to forbear opposition to the allowance of the certificate, are, by section 59, declared void, and the proposed bill goes further than the 40th section of the corresponding English act, 5 & 6 Vict., c. 122, by invalidating, not merely the security, but the bankrupt's certificate. By the 60th section, a penalty of treble the value of money given for forbearance, is imposed on the creditor.

The 63rd section preserves the same percentage of allowance to the bankrupt, after certificate, as at present, but postpones its payment to twelve months after the date of the commission, and makes it dependent on the payment of the requisite dividend to the creditors, and prohibits any allowance to a bankrupt who has not been a trader for twelve months, except in the case of the dividend being under ten shillings, when a discretionary power is given to the commissioners to make an allowance, irrespective of the period of trading, provided it does not exceed three per cent, or £300.

The 67th section provides for the preservation of the proceedings in the bankruptcy, which are to be deposited with the Registrars, who are made responsible for their safety, and they are to be open to inspection on payment of one shilling; under the present loose system, the attorney for the assignee keeps the proceedings, and on his death they are lost, mislaid, or, at all events, generally useless for ulterior purposes.

The 68th section provides that the appointment of the Secretary of bankrupts, and that of the Registrars, shall continue during good behaviour, and upon a vacancy of the office of clerk of enrolments, the office to cease, and the duties to be performed by the secretary. The appointment of the secretary is in the gift of the Chancellor, and the duration of the office has hitherto been measured by that of his own tenure of power, each new Chancellor appointing his own secretary for bankrupts.

It is desirable that competent men should not be removed when they have learned their duties, at the same time, we are not insensible to the value of a rapid succession.

The 69th section provides, that whenever the bankruptcy fund prove insufficient, the salary of the second commissioner and assistant registrar shall be paid out of the suitors fee fund, the latter to be reimbursed, whenever there shall be a surplus in the bankruptcy and compensation fund.

It will be in the recollection of our readers, that the deficiency arose, and in 1845, on argument before the then Master of the Rolls and Sir Edward Sugden, they were of opinion, that the second commissioner had no right to be paid out of the suitors fee fund—an order for that purpose having been made by Lord Plunket. In consequence of this decision, we believe, Sir Robert Peel, then premier, directed payment out of the

consolidated fund, and we are very much disposed to think, that the future payments for both commissioners, should be made thereout likewise. With a view to make the court self-supporting or nearly so, the present scale of fees are too high; and although the suitors fee fund be ample, its surplus may be very well disposed of in diminishing the expense of Chancery documents which, on even the reduced scale, are inordinately extravagant.

The object of the 70th section is to remove any doubt arising on the 7th and 8th Vic., c. 90, s. 36, as to the right of detention of goods under attachment, and provides that they shall be delivered up to the assignees on demand. Goods, *bona fide* seized under an execution, at the date of the commission, cannot be claimed by the assignees, but in that case the process is after judgment; an attachment is but process to compel an appearance. We should rejoice to see a measure brought in by the introducers of the present measure, if not to abolish the process of city attachment altogether, at least greatly to modify it. We know no power capable of being converted into an instrument of greater oppression, than that of issuing a city attachment. The struggling traders of Dublin, are at the mercy of Jew money lenders; to whom they are compelled to resort from the insufficiency of banking accommodation: if the bill be unpaid the affidavit of debt is made, the marshal takes possession, and in the broad glare of day, if the oppressive security be not promptly given, the goods of the trader are swept away to the city stores, and his credit is thereby annihilated; arrest on *mesne* process was sufficiently injurious to credit, but we do believe it was not half so damaging as the seizure of a trader's goods—concealment in the one case was possible, in the other impracticable.

We do earnestly press this subject, more especially upon Mr. Napier, as a member of our own body, and as one whose rising position in the House, will ensure it the attention its importance deserves.

We pass over, for the present, some of the succeeding sections—next week we purpose to give a more minute analysis of the whole Bill—which relate principally to improvements in the working of the Bankrupt Court, and give increased power to the Commissioners to compel the attendance of witnesses. The 89th section, enables three-fifths of the creditors, *after the schedule of the bankrupt shall have been furnished*, to effect a composition, and provides for the superseding of the commission. At present a bankrupt cannot effect this composition, until after his final examination, nor unless nine tenths of his creditors consent; and it is considered that such composition does not bind a creditor who has not proved.

The present measure adopts the same machinery as that used in the Insolvent Court, for giving notice to the creditors, and enacts, section 92, that every creditor named in the schedule, and to whom notice shall have been given, shall be bound by the composition, whether he shall have proved or not.

Clauses from 93 to 110 inclusive, principally taken from Lord Brougham's bill, devise a mode by which, an honest creditor, without undergoing the humiliation of passing through the Bankrupt

Court, may, by act of quasi bankruptcy, vest his property in trustees, obtain protection for his person, and carry out this arrangement with the concurrence of two thirds in number and value of his creditors, unimpeded by the opposition of a hostile or implacable minority.

We cordially approve of these clauses, every one in practice finds how desirable and expedient these private arrangements are, how expeditious, how inexpensive, and how merciful; but they are almost universally thwarted by the malignant contumacy of a few small creditors, actuated either by revenge, malice, or the expectation that their opposition will be bought off.

We care not to conceal the deep indignation which we entertain towards low beings of this class, and we therefore rejoice at seeing a measure likely to be made law, which will give them a death blow.

It is rather anomalous that in this country there should be two concurrent and co-existing systems, applicable to one class of traders. We allude to the banker's acts, and the bankrupt code. The former, though limited to a small class in operation, are obviously the mode to be selected by that class. They possess the advantage to the banker of avoiding public exposure, and their adoption rests with himself. He has only in the first instance, to obtain the concurrence of trustees—the approval of the majority of the creditors may, we apprehend, be *ex post facto*,—but the machinery of the acts, from antiquity and other causes, requires remodelling. It is too expensive;—for example, the deeds of conveyance, are not exempt from stamp duty, and there are practical difficulties in taking proofs of debts; but their original spirit and design was excellent. Uniformity and codification are however, so desirable, that we think they should now be repealed. The sections to which we have last referred are conceived in the same humane spirit which gave the banker's bill existence, and obviate the necessity for their retention. Even without being formally repealed—which we suggest they should—it is probable, if the proposed measure become law, that they will die of disuse.

—♦—
In the case of *Carmichael v. Waterford and Limerick Railway Company* (reported, 1 Ir. Jur. 186), which was an action on the case for executing a *capias ad satisfaciendum*, for the full amount of a judgment; a portion of the judgment debt having been paid, the question arose, whether, in the absence of proof of express malice, malice could be inferred from mere negligence. The facts were, the company had recovered a judgment against the plaintiff (in this action) in the sum of £585, with costs; all of which, except £274 0s. 4d., was satisfied by the plaintiff, notwithstanding which the defendants *wilfully* and *maliciously* caused the plaintiff to be arrested under an execution endorsed for the whole amount. The execution had been issued by the partner of the defendant's solicitor residing in Dublin, in ignorance of the payment made in the country; and the learned Judge who tried the case told the jury, that if the mistake arose from negligence, they were at liberty to infer

malice. This direction the court held to be erroneous, saying, that "the action was maintainable only on the ground of proof of actual malice—malice being the gist of the action."

The case of *De Medina v. Grove* (10 Q. B. 152) and referred to in the argument in *Carmichael v. Limerick and Waterford Railway Company*, turned on a question of pleading, the declaration not having averred either *malice* or *want of probable cause*, merely stating that the defendant "wrongfully and injuriously" had caused the plaintiff to be taken in execution. Wilde, C.J., in delivering the judgment of the court of error, says, "The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause. The question arising upon this record is, whether the action is maintainable without the usual averments of malice and want of probable cause. Even if there be a sufficient statement of malice in this declaration, there is no sufficient statement of want of probable cause. It has been admitted, that the issuing of mesne process is a *prima facie* right, but *a fortiori* is the execution a *prima facie* right." "On the other hand, the plaintiff here might have applied—if the state of facts justified the application—either before the arrest, to have satisfaction entered up, or after the arrest, to be discharged. It might, therefore, be a question, whether, with all proper averments on the record, the proper remedy would be by action; for it might be contended, that what is complained of by the plaintiff is a mere irregularity." This dictum implies, and would go to shew that no action will lie; and we think that the true deduction derivable from the principles stated in the authorities on this branch of the law.

It is almost needless to draw the attention of the reader to the distinction between issuing, and acting on, an execution for more than the actual amount of the judgment, and the case we have been hitherto considering, of a party being arrested for the full amount of a judgment, a portion of which has been paid. In the former case, the very act of executing the process of the court for more than the judgment creditor has himself alleged to be due, is *prima facie* evidence of malice, and none need be alleged, the want of probable cause being apparent in the excess of the writ of execution over the judgment. In the latter, the unsatisfied judgment giving a *prima facie* right, or, in other words, a probable cause, malice—according to the decision in *Carmichael v. Waterford and Limerick Railway Company*—must be averred and proved, or, as we are inclined to think, in accordance with the view of Wilde, C. J., before referred to, there is no ground of action whatever.

In stating this proposition, we are not to be understood as saying, that if the plaintiff in the action had been wilfully and maliciously persecuted, that he is wholly without remedy, because his creditor has this *prima facie* right or probable cause. There is another form of action on the case, in which the creditor so acting would appear to be liable—that for abusing the process of the court, as was suggested in the case of *Heywood v. Cullings* (9 Ad. & El. 288), which, as in both

the cases we have referred to, was an action on the case for a malicious arrest without probable cause. The declaration stated the arrest of the plaintiff, on a second writ for the same debt he had previously been held to bail for. Plea, that the last mentioned action was still depending. On a demurrer to this plea, Lord Denman, C.J., says, "It is contended for the plaintiff, that this is an action for a malicious abuse of the process of the court, by a second arrest for the same cause. I am unwilling to hold, that the action is maintainable; for the defendant, in arresting under a second writ, does not necessarily appear to have done anything which he might not lawfully do." And Coleridge, J., in the same case, in answer to the objection, that an action for the abuse of the process of the court would be a novelty, says, "If an action is not sustainable under such circumstances, we must be prepared to hold, that the process of the court may be abused by a plaintiff for purposes however wanton and malicious. We may suppose the case of a party harrasing the defendant under the forms of law, by maliciously suing out three writs for the same cause on the same day,* and successively arresting the defendant on all three of them. In such a case, the principle of the law allows an action, although in form it may have some novelty." The declaration, not having been specially demurred to, was upheld, on the ground that the averment, without "reasonable or probable cause," might be intended to mean, that the defendant knew he had no ground for the second arrest.

If this case be law—and there appears to be no reason to think otherwise, supported as it is by the judgment of the court, in *De Medina v. Grove*—it would appear clear, that an action for malicious arrest, without probable cause, will not lie, where the creditor employs either mesne or final process, except he be guilty of a malicious abuse, in which case, the question would be one of express malice; and the case of *Saxon v. Castle* (6 Ad. & El. 652), although the arrest complained of, was upon final process, is consistent with this view, as the judgment on which the process issued was only to be entered on a certain condition precedent being performed by the creditor, which was not *bona fide* done. The court held, that the action was well conceived, but arrested the judgment, there being no averment of malice, which they held to be a necessary ingredient in the action.

Independently of direct authority, the view we have been submitting, appears to follow from the principles in which this form of action is founded, and the proof necessary to sustain it. Those rules are, that if there be no probable cause, malice may be inferred, although the jury are not bound to infer it. *Mitchell v. Jenkins*, (5 B. & Ad. 558; S. C. Nev. & M. 301). Secondly—If there be probable cause, no amount of malice, however distinctly proved, will render the defendant liable. Per Parke, J. *Mitchell v. Jenkins* (5 B. & Ad. 588). If then, mesne process gives a *prima facie* right, or probable cause, and that, as was said in the

* As to issuing concurrent writs, see *Fennell v. Desper*, 1 Ir. Jur. p. 64.

judgment of the court, in *De Medina v. Grove*, the reasons are *a fortiori*, with respect to final process. "No amount of malice, however distinctly proved, will render the plaintiff liable." His remedy if the evidence of express malice will warrant the proceeding—must be for the abuse of the process of the court—the form of action which appears to have been adopted in *Porter v. Weston*, (8 Scott. 25).

The statute 7 Anne, c. 7, s. 2, 1r.* affords a remedy for injuries of this nature, by giving treble damages to the party against whom such execution issues, if it appears that the execution creditor has "*wilfully, fraudulently and maliciously*," overcharged him. In *Mills v. Nerney*, (Cook & Alc. 81), the court held, that the three requisites of the statute must concur to complete the liability of the defendant; and that the mere circumstance of an execution being marked for a larger sum than was due, did not *per se*, warrant the jury in finding that it was "*fraudulently, and maliciously over-marked*." This is, we conceive, the same conclusion as that to be derived from an action for abuse of the process of the court, and that to which, in fact, the Court of Queen's Bench have come, in the case of *Carmichael v. Limerick & Waterford Railway Company*; by deciding that the gist of the action was the express malice; a decision which we submit, for the reasons stated, would not be consistent with holding it to be an action for over-marking without probable cause; in which the jury would be at liberty to infer malice.

(Continued from p. 176.)

CAP. XCVIII.

An act to amend the law for the trial of election petitions.

[4th September, 1848.]

Sec. 1. 7 & 8 Vict. c. 103, repealed, except as to acts done, &c. Repeal of 7 & 8 Vict. c. 103, not to revive, 9 G. 4, c. 22, and certain parts of 42 G. 3, c. 106, and 47 G. 3, c. 14.

2. What shall be deemed election petitions.

3. Before petition presented recognizances to be entered into.

4. Persons entering into recognizances to make affidavits of sufficiency.

5. Form of recognizance as set forth in schedule.

6. Persons signing election petition may pay money into the bank, instead of finding security.

7. No petition to be received unless endorsed by the examiner of recognizances.

8. How petitions may be withdrawn.

9. Speaker to appoint examiner of recognizances.

10. In case of illness, &c. of examiner of recognizances, speaker to appoint a fit person to perform the duties.

11. How recognizances are to be entered into.

12. Names of sureties, &c. to be kept in office of examiner of recognizances, and to be open to inspection.

13. Recognizance may be objected to for invalidity, or for insufficiency of sureties.

14. Notice of objections to be published in the office of the examiner, and copies may be taken.

15. Examiner of recognizances to decide on the objections.

16. In case of death of a surety, the petitioner may pay the money into the bank.

17. Examiner of recognizances to report whether or not recognizances are objectionable.

18. Proceedings when the seat becomes vacant, or the sitting member declines to defend his return.

19. Voters may become a party to oppose the petition.
20. Members having given notice of their intention not to defend, not to appear as parties.
21. Provision for cases of double return where the member complained of declines to defend his return.
22. At the beginning of every session the speaker to appoint a general committee.
23. If the house disapprove the first appointment, a new appointment to be made.
24. Disapproval may be general or special.
25. Members not disapproved may be again named in the warrant.
26. For what time the appointment shall be.
27. Vacancies in general committee to be made known to the house, and proceedings suspended.
28. General committee may be dissolved in certain cases.
29. How vacancies shall be supplied, and reappointments made.
30. Speaker to fix the time and place of first meeting of committee. General committee to be sworn.
31. Members necessary to enable the committee to act.
32. Committee to regulate their own proceedings.
33. Clerk to keep minutes of proceedings, to be laid before the house.
34. During suspension of proceedings speaker may adjourn any business before the general committee.
35. Members wholly excused from serving.
36. Names of members claiming to be excused to be called over.
37. Members temporarily excused from serving.
38. Members temporarily disqualified from serving.
39. A corrected list, distinguishing the excused or disqualified members, to be printed, and distributed with the votes.
40. List may be further corrected during three days.
41. Selection of members to serve as chairmen of election committees.
42. List to be divided into five panels.
43. General committee to correct the panels from time to time.
44. Power to transfer to another panel the names of members obtaining leave of absence.
45. For supplying vacancies, and increasing the chairmen's panel.
46. Election petitions to be referred to the general committee; who shall make out a list of the same.
47. Where notice of vacancy, or that the sitting member declines to defend his return, is received by the general committee, proceedings to be suspended.
48. Provision for cases where more than one petition.
49. Committees to be chosen for petitions according to their order on the list.
50. Committees to be appointed for petitions standing over on a prorogation of parliament.
51. Notice of time, &c. when any committee will be chosen shall be published with the votes. Notice of suspension of proceedings to be published; and sent to returning officer by post.
52. Provision for cases where the sitting member does not defend, and no party has been admitted to defend.
53. General committee empowered to change the day for choosing election committees.
54. Notice of petitions and panels.
55. Lists of voters intended to be objected to shall be delivered to the clerk of the general committee.
56. Committee for trying petitions to be chosen.
57. In case general committee do not agree in choosing a committee to try the petition, they shall adjourn.
58. Chairman to be chosen by the members on the chairman's panel, and his name communicated to the general committee.
59. Members upon chairmen's panel to make regulations.
60. When committee chosen, the parties to be called in to hear the names read over.
61. General committees to proceed in order with all the petitions appointed for that day.
62. Within a certain time parties may object to members on account of disqualification.

* 3 Geo. 1, c. 15, s. 17, Eng. analogous.

63. *If general committee allow the disqualification, a new committee to be chosen.*
64. *In the new committee, members not before objected to may be included.*
65. *When committee chosen, notice to be sent to every member thereof.*
66. *If any member chosen proves a disqualification, another committee to be chosen.*
67. *Select committee to be reported to the house.*
68. *Members of select committee to be sworn.*
69. *Members of committee not present within one hour after four o'clock to be taken into custody by the serjeant at arms.*
70. *If any such member is not present within three hours after four o'clock, the proceedings to be adjourned.*
71. *If all the members do not attend after adjournment, the committee to be discharged.*
72. *Petitions and lists to be referred to committee, and time and place of meeting appointed by the house.*
73. *Committee not to adjourn for more than twenty-four hours without leave of the house.*
74. *Evidence to be confined to objections specified in the lists.*
75. *No member of committee to absent himself. Committee not to sit until all be met. On failure of all meeting within one hour, to adjourn.*
76. *Absentees to be directed to attend the house.*
77. *Committee not to be dissolved by the death or absence of not more than two members.*
78. *Committee reduced to less than three by the non-attendance of its members to be dissolved unless by consent.*
79. *When committee is deliberating, the room to be cleared.*
80. *Questions to be decided by a majority.*
81. *Names of members voting for or against any resolution to be reported to the house.*
82. *Committees to be attended by a short hand writer.*
83. *Committee empowered to send for and examine persons, papers, and records. Witnesses misbehaving may be reported to the house, and committed to the custody of the serjeant at arms.*
84. *How oaths to be administered.*
85. *Giving false evidence to be perjury.*
86. *Committee to decide, and to report their decision to the house.*
87. *Committee may report their determination on other matters to the house.*
88. *Committees not dissolved by the prorogation of parliament.*
89. *Costs where petition reported frivolous or vexatious.*
90. *Costs where opposition reported frivolous or vexatious.*
91. *Costs where no party appears to oppose a petition.*
92. *Costs upon frivolous objections to voters.*
93. *Costs upon unfounded allegations.*
94. *Costs, how to be ascertained.*
95. *Persons appointed to tax costs empowered to examine on oath.*
96. *Recovery of costs when taxed.*
97. *Persons paying costs may recover a proportion from other persons liable thereto.*
98. *Recognizances when to be estreated, &c.*
99. *Transmission of recognizances of parties in Ireland or Scotland through the post.*
100. *Monies received under recognizances to be paid into the bank, and applied in payment of costs.*
101. *Surety may pay money into the bank in discharge of his recognizance.*
102. *Where money has been paid into the bank, the examiner of recognizances to order payment of expenses, and transfer the residue to the account of the party.*
103. *Returning officer may be sued for neglecting to return any person duly elected.*
104. *Commencement of act.*
105. *Provision for election petitions remaining at the close of the present session.*
106. *No stamps on recognizances or affidavits.*
107. *Short title.*

108. *Interpretation of act.*

109. *Act may be amended, &c.*

Be it enacted, that 7 & 8 Vict. c. 103, shall be repealed, except as to any act or proceeding incident to any election petition under the said recited act, all which acts and proceedings shall have effect, and shall, save as herein-after provided, be continued and completed as if this act had not passed: provided, that this enactment shall not revive 9 G. 4, c. 22, nor so much of 42 G. 3, c. 106, and 47 G. 3, c. 14, as requires the parties appearing before any select committee to interchange lists of the votes and names of voters to which either of the parties intends to object, and statements in writing respecting the matters which either of the said parties mean to insist upon, or as provides that no witness shall be examined to anything not specified in such lists or statements.

2. That every petition presented within the time from time to time limited by the house for receiving election petitions, and complaining of an undue election or return of a member, or complaining that no return has been made according to the requisition of any writ, or complaining of the special matters contained in any such return, and which petition shall be subscribed by some person who voted or had a right to vote at the election to which the same relates, or by some person claiming to have had a right to be returned or elected thereat, or alleging himself to have been a candidate at the election, shall be deemed an election petition.

3. That before any petition shall be presented a recognizance shall be entered into by one, two, three, or four persons, as sureties for the person subscribing such petition, for the sum of £1000, in one sum, or in several sums of not less than £250 each, for the payment of all costs and expenses which shall become payable by the person subscribing the petition to any witness summoned in his behalf, or to the sitting member or other the party complained of in such petition, or to any party who may be admitted to defend such petition.

4. That every person who enters into any such recognizance shall testify upon oath in writing to be sworn at the time of entering into the said recognizance, and before the same person by whom his recognizance is taken, that he is seised or possessed of real or personal estate (or both,) above what will satisfy his debts, of the clear value of the sum for which he is bound by his said recognizance; and every such affidavit shall be annexed to the recognizance.

5. That in every such recognizance shall be mentioned the names and usual places of residence or business of the persons becoming sureties, with such other description of the sureties as may be sufficient to identify them easily: and such recognizance may be in the form or to the effect set forth in the schedule to this act, with such alteration as may be necessary for the circumstances of each case.

6. That any person by whom an election petition is signed may, instead of procuring a recognizance for the full amount of the sum herein-before required, pay into the bank of England, to the account of the speaker and examiner of recognizances, any amount of money, not being less than £250; and in such case the person by whom the petition is signed shall be required to find sureties for so much only of the sum of £1000 as the sum paid into the bank falls short of that sum; and no money shall be deemed for the purposes of this act to be paid into the bank of England until a bank receipt or certificate for the same is procured, and delivered to the examiner of recognizances.

7. That no election petition shall be received until at the time it be endorsed by a certificate under the hand of the examiner of recognizances, that the recognizance has been entered into and received by him, with the affidavit thereunto annexed, and if the recognizance have not been taken for the whole amount, that a bank receipt or certificate for so much money as the recognizance falls short of £1000 has been delivered to him, as herein-before required.

8. That the petitioner may, at any time, withdraw the same upon giving notice in writing under his hand, or under the hand of his agent, to the Speaker, and also to the sitting member or his agent, and also to any party who may have been admitted to oppose the prayer of such petition, that it

is not intended to proceed with the petition; and in such case the petitioner shall be liable to the payment of such costs and expenses as have been incurred by the sitting member or other party complained of in such petition, and also by any party admitted to oppose the prayer of such petition, to be taxed as herein-after provided.

9. That the Speaker of the House of Commons shall appoint a fit person to be examiner of recognizances; and such person shall hold his office during the pleasure of the Speaker, and shall execute the duties of his office conformably to such directions as he may receive from the Speaker.

10. That in case of the illness, temporary disability, or unavoidable absence of the examiner of recognizances, the Speaker may appoint a fit person to perform the duties of examiner of recognizances during such illness, disability, or absence; and throughout this act the expression "Examiner of Recognizances" shall be deemed to include and apply to the person so appointed.

11. That every recognizance required shall be entered into, and every affidavit shall be sworn, before the examiner of recognizances or a justice of the peace, and the said examiner, and also every justice of the peace, is empowered to take the same; and every such recognizance and affidavit taken before a justice, being duly certified by such justice, shall be delivered to the examiner of recognizances.

12. That on or before the day when any such petition is presented to the house, the names and descriptions of the sureties, as set forth in the recognizance, shall be entered in a book to be kept by the examiner of recognizances in his office; and the said book, and also the recognizance and affidavits, and the bank receipt for any money paid into the bank of *England*, shall be open to the inspection of all parties.

13. That any member petitioned against, or any electors petitioning and admitted parties to defend the election or return, may object to any such recognizance that the same is invalid, or that the same was not duly entered into or received by the examiner of recognizances, with the affidavit annexed as herein-before required, or on the ground that the sureties or any of them are insufficient, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same; provided that the ground of objection shall be stated in writing by objecting party or his agent, and shall be delivered to the examiner of recognizances within ten days, or not later than 12 o'clock of the eleventh day, if the surety objected to reside in *England*, or within fourteen days, or not later than 12 o'clock of the fifteenth day after the presentation of the petition if the surety objected to reside in *Scotland or Ireland*: provided that if either such eleventh or such fifteenth day happen to be a *Sunday, Good Friday, or Christmas day*, such notice of objection may be delivered to the examiner of recognizances not later than 12 o'clock of the following day.

14. That as soon as any such statement of objection is received by the examiner of recognizances, he shall put up an acknowledgement thereof in his office, and shall appoint a day for hearing such objections, not less than three, nor more than five days from the day on which he received such statement; and the petitioner and his agent shall be allowed to examine and take copies of every such objection.

15. That at the time appointed, the examiner of recognizances shall inquire into the alleged objections, on the grounds stated in the notice of objection; and for the purpose of such inquiry the examiner of recognizances may examine upon oath any persons tendered for examination, and may also receive in evidence any affidavit relating to the matter in dispute, sworn before him, or before any master of the High Court of Chancery, or justice of the peace, each of whom is hereby authorised to take and certify such affidavit; and the examiner of recognizances may adjourn the said inquiry from time to time, until he decide on the validity of such objection, and he may award costs to be paid by either party, which costs shall be taxed and recovered as herein-after provided for the costs and expenses of prosecuting or opposing election petitions; and the deci-

sion of the examiner of recognizances shall be final and conclusive.

16. That if any surety die, and his death be stated as a ground of objection before the end of the time allowed for objecting to recognizances, the petitioner may pay into the Bank of England, on the account of the speaker and the examiner of recognizances, the sum for which the deceased surety was bound: and upon the delivery of a bank receipt for such sum to the examiner of recognizances within three days after the day on which the statement of such objection was delivered to the examiner of recognizances, the recognizances shall be deemed unobjectionable, if no other ground of objection thereto be stated.

17. That if the examiner of recognizances have received any statement of objection to the recognizances, and have decided that such recognizances are objectionable, he shall forthwith report to the speaker that such recognizances are objectionable; but if he shall have decided that such recognizances are unobjectionable, or if he have not received any such statement of objection, then, as soon as the time herein before allowed for stating any such objection has elapsed or as soon as he has decided upon the statement of objection, the examiner of recognizances shall report to the speaker that the recognizances are unobjectionable; and every such report shall be final and conclusive; and he shall make out a list of all election petitions on which he has reported that the recognizances are unobjectionable, in which list the petitions shall be arranged in the order in which they are so reported upon; and a copy of such list shall be kept in the office of the examiner of recognizances, and shall be open to the inspection of all parties.

18. That if at any time before the appointment of a select committee to try any election petition, the Speaker of the House of Commons be informed, by a certificate in writing subscribed by two of the members of the said house, of the death of any sitting member whose election or return is complained of, or of the death of any member returned upon a double return whose election or return is complained of, or that a writ of summons has been issued under the Great Seal of *Great Britain* to summon any such member to parliament as a *Peer of Great Britain*, or if the House of Commons have resolved that the seat of any such member is by law vacant, or if the House be informed by a declaration in writing subscribed by any such member, and delivered to the Speaker within fourteen days after the day on which any such petition was presented, that it is not the intention of such member to defend his election or return, in every such case notice shall be sent by the Speaker to the general committee of elections, and to the members of the Chairmen's Panel, and also to the sheriff or other returning officer for the county, city, borough, district of burghs, port or place, to which such petition relates; and such sheriff or other returning officer shall cause a true copy of such notice to be affixed on or near the door of the county hall, or town hall, or of the parish church nearest to the place where such election has usually been held; and such notice shall also be inserted, by order of the Speaker, in one of the next two *London Gazettes*, and shall be communicated by him to the House.

19. That at any time within 14 days after the day on which any election petition was presented, or within 21 days after the day on which any notice was inserted in the Gazette, to the effect that the seat is vacant, or that the member will not defend his election or return, or if either of the said periods expire during a prorogation of parliament, or during an adjournment of the House of Commons for the *Easter or Christmas* holidays, then, on or before the second day on which the House meets after such prorogation or adjournment, any person who voted or had a right to vote at the election to which the petition relates may petition the House of Commons, praying to be admitted as a party to defend such return, or to oppose the prayer of such petition; and such person shall thereupon be admitted as a party, together with the sitting member, if he be then a party against such petition, or in the room of such member if he be not then a party against the petition; and every such petition shall be referred by the house to the general committee of election herein-after mentioned.

20. That whenever the member whose election or return is so complained of, has given notice of his intention not to defend the same, he shall not be afterwards allowed to appear or act as a party against such petition, and he shall also be restrained from sitting in the House of Commons, or voting on any question until such petition has been decided upon.

21. That if in the case of an election petition complaining of a double return the member whose return is complained of in such petition have given notice as that it is not his intention to defend his return, and if no party, within the period herein-before allowed, have been admitted to defend such return, then, if there be no election petition complaining of the other member returned on such double return, the last-mentioned member or other the persons who subscribed the petition complaining of such double return may withdraw such petition by letter addressed to the Speaker; and thereupon the order for referring such petition to the general committee of elections shall be discharged, and the house shall give the necessary directions for amending the said double return, by taking off the file the indenture by which the person so declining to defend his return was returned, or otherwise, as the case may require.

22. That in the first session of every parliament, on the day after the last day allowed by the House of Commons for receiving election petitions, and in every subsequent session, as soon as convenient, the Speaker shall by warrant under his hand appoint six members of the House who are willing to serve, and against those whose return no petition is then depending, and none of whom is a petitioner complaining of any election or return, to be members of a committee to be called "The General Committee of Elections;" and every such warrant shall be laid on the table of the House, and, if not disapproved by the House in the course of the three next days on which the House meets for the despatch of business, shall take effect as an appointment of such general committee.

23. That if the house disapprove any such warrant the Speaker shall, on or before the third day on which the house meets after such disapproval, lay upon the table of the house a new warrant for the appointment of six members, qualified as aforesaid, and so from time to time until six members have been appointed not disapproved by the house.

24. That the disapproval of the warrant may be either general in respect of the constitution of the whole committee, or special in respect of any member named.

25. That the Speaker may, name in the second or any subsequent warrant any of the members named in any former warrant whose appointment has not been disapproved by the house.

(To be continued.)

William Cuffe, Esquire,
Plaintiff,
Thomas Young, Esquire, and
others,
Defendants.

John Morgan, and Catherine
Morgan, his Wife, Plaintiffs.
Thomas Young and Nassau
Stephens, Executors of
William Cuffe, Esquire,
deceased, Defendants.

IN PURSUANCE of the Decree made in the first of these Causes, bearing date the 28th day of November, 1844, and the several Orders bearing date the 17th day of November, 1845, 23rd day of February, 1846, and 10th day of June, 1846, I will, on Tuesday, the 24th day of April next, at the hour of One o'clock in the Afternoon of said day, at my Chambers, on the Inns Quay, city of Dublin, SET UP and SELL to the highest and fairest bidder, ALL THAT AND THOSE the Freehold House and Premises at ROSTREVOR, situate in the County of Down, the property of the late Wheeler Barrington, deceased, for the purposes in said Decree mentioned.

Dated this 31st day of March 1846.

For MASTER BROOKE,
EDWARD LITTON.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 61, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, April 14, 1846.

THE Irish Jurist

No. 25.—Vol. I.

APRIL 21, 1849.

Price { Per Annum, £1 10s.
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The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, APRIL 21, 1849.

We are glad to find the Courts of law protecting the interests of occupying tenants, and *that* even in their absence—we are glad to find them construing the strict terms of an act of parliament in favor of industry, and the encouragement of agricultural exertion.

To enable the landlord, without injury to himself, to act with humanity to the tenants in the occupation of land, for the recovery of which he may have obtained an *habere*, the 9 & 10 Vict. c. 111, was passed; in the 8th section of this act, it is provided, "That it shall be lawful for the sheriff, or his bailiff or officer, upon the consent in writing of the lessor of the plaintiff, or the attorney of the plaintiff, to execute any writ of *habere facias possessionem*, in any action of ejectment, or any civil bill decree for the recovery of the possession of lands and tenements, without removing therefrom, or disturbing the possession or occupation of any undertenant or occupier, who shall, at the time of the execution of such writ or decree, sign with his or her name, or mark, attested by such sheriff, or officer, an acknowledgement according to either of the forms, Nos. 1 and 2, in the schedule to this act annexed." This section of the act enables the landlord, if so disposed, to leave the occupying tenants in possession. The schedules referred to *appeared* to place the tenants, as to the continuance of their occupation, entirely in the power of the landlord, the tenants being required to acknowledge, that they "held or occupied the lands and tenements now in their respective occupation, by the leave and license, and for and on behalf of, and at the *will* of the landlord; and that they will severally and respectively, when required by the landlord or his authorized agent or receiver, deliver up to the said landlord, or his authorized agent or receiver, the possession of the said lands and premises in their respective occupation." And

under this acknowledgment it was supposed that the landlord could at once have the *habere* renewed, and the occupying tenants put out of possession.

The Court of Queen's Bench have held very differently in *Lessee Knox v. Gildea*, reported in (11 Irish Law & Equity Reports, p.198). An application was made for liberty to renew an *habere*, where tenants were allowed to remain in possession under the provisions of this act. It was held that, "an application should have been made to the tenants to deliver up possession, or else a notice served on them, of the intended application to the court," and when at length, on the affidavit of service of the conditional order, and of the demand of possession, the order was made absolute—it was made so, with a stay of execution until the 1st of November, on the ground that in the interval which had elapsed, the tenant might have cropped the land. Landlords may complain of this decision, and look upon it as a breach of faith with them, that they were induced by the statute to permit the occupying tenants to remain in the possession of their holdings, distinctly on the terms, that they would be enabled to recover possession of them at a moment's notice, when an opportunity might occur of disposing of them to advantage, and which opportunity might be lost by the obstacle thus occasioned by the court.

When it is considered, that the leaving of the occupying tenants thus in possession, is at the option of the landlord in the first instance, and that the object of the statute was to protect the tenant from unnecessary hardship; the decision cannot be objected to. To induce a tenant to crop his land, by thus leaving him in possession, and to enable a landlord to eject him the moment he had his land so cropped, would be to expose him to more serious injury, than that from which this statute was enacted to protect him.

We fear, however, that this decision, equitable as it is, will have the effect of rendering the statute inoperative: a landlord having obtained an *habere*,

after, perhaps, tedious and expensive proceedings, will hardly be induced to adopt a course by which his actual possession of the lands would be deferred in all likelihood for another year.

◆

To the Editor of the Irish Jurist.

SIR.—I send a copy of observations and suggestions which I lately forwarded to a Member of Parliament, and which, it appears to me, may not be out of place to publish in your paper, if you consider them worth insertion.

Your obedient Servant,
S.

Observations and Suggestions as to the Transfer of the Equity Jurisdiction of the Court of Exchequer to the Court of Chancery.

THE proposed change (which, as to England, has been effected by the 5th Vic. c. 5) is desirable, on the grounds recited in the preamble of that statute, which applies equally to the Irish Court, in which the law business exceeds in extent that of any of the law courts.

2ndly. Because it is of great public importance that one uniform system of equity should be administered in this country :

Instead of, as at present, witnessing that frequent conflict of opinion between the decisions of the two Irish courts on many points of great importance, and, in particular, on the construction of modern and recent Acts of Parliament, so derogatory to the character of the general administration of justice.

3rdly. Because, owing to the quantity of law business (which is largely in arrear), the court can devote but a short period, during the law Terms, to equity business; and, as the Chief Baron usually sits at Nisi Prius during the Equity sittings after Term, cases involving any serious point, which may have been partly heard during the Term, will not be proceeded with in his absence, and are thus postponed, from Term to Term, to the delay and loss of suitors.

4thly. Because the administration of law and equity by the same court has been found inconvenient, and tends greatly to delay both classes of suitors, and because of the loss of time arising from conferences and consultations on the bench, incident to its being composed of several persons.

5thly. Because the practice of the Court of Exchequer, even with the recent reforms (under the acts 6 & 7 Vict. c. 55 and 78, and the General Orders thereunder), is, in many respects, more dilatory, unsatisfactory, and expensive, than that of the Court of Chancery.

It appears, indeed, to be conceded on all hands, that the proposed change would be advantageous to the public, and the sole ground of objection to its adoption seems to be one of finance—that it would entail expense which the present state of the revenue cannot afford to meet. Now, this is manifestly erroneous in fact; and the following statement shews that the alteration may be effected, not only without loss, but be actually made a means to add to the public income.

Except the Chief and Second Remembrancer, and the Accountant-General and his clerk, the officers of the Equity side of the Exchequer are paid *by fees*, whilst in the Court of Chancery the officers (save the examiners and secretaries) are paid fixed salaries, and the fees received are accounted for to the public fund, or, in many instances, are paid in the form of Equity fund stamp duties.

By a transfer of the business to Chancery, the fees, and stamp duties in respect of fees, would thenceforward go to the public account, and the following officers would be dispensed with (subject, of course, to their right to life compensation, in case they might not be appointed to offices in Chancery):—

	Salaries or Estimated Emoluments.
The Second Remembrancer (salary)	£1,000 0 0
His clerk, - - - - -	50 0 0
The Registrar and clerk, say, -	1,500 0 0
Assistant-Registrar and clerk, say, (The Registrar's ordinary clerks might be transferred to the corresponding offices in Chancery.)	750 0 0
Two Examiners and clerks, - - -	1,800 0 0
Secondary and Clerk of the Writs, -	950 0 0
Their clerks, - - - - -	200 0 0
Accountant-General and his clerks, (salaries) - - - - -	461 3 1
	£6,711 3 1

For want of returns, the amount of the emoluments of officers paid by fees *at present receivable*, are stated from general reputation, and, as is believed, under the mark. The exact amount may be ascertained by the returns furnished by those officers to the Treasury, pursuant to the act 6 & 7 Vic. c. 55, ss. 13 & 14. By a late return to the House of Commons, the gross income of the above officers is £10,441 2s. 10d.; but it will be found, that in this, the officers have included the amount of *compensation* to which they are for life entitled, in consequence of the diminution of fees occasioned by the 6 & 7 Vic. c. 55, which was estimated on the average of the fees received by cash for the seven years previous to November, 1842, and which included the great temporary additions caused by the proceedings for the recovery of tithe composition. Thus the income of the Secondary is returned as £8,069 17s. 4d.

The fees payable in Chancery for the same quantum of business, would realise to the consolidated fund, a much larger amount than the corresponding fees in the Exchequer—the office fees being in many instances much higher in the former court, *e. g.* a common order of two sheets in the Exchequer, costs 3s. 1d. (4 Geo. 4, cap. 70, Table 4). In Chancery, 12s. 6d. (general order, 25th January, 1837), although owing to the difference of practice, the expense to suitors is nearly the same in both courts. The present Chief Remembrancer, and his Examiner might be transferred to Chancery; the former as a fifth Master at his present salary, (£2000,) with a right to succeed, on a vacancy occurring amongst the present Masters.

The fiscal and Revenue duties at present performed by the Chief Remembrancer, might easily be transferred to and transacted by the Master, at the law side of the court, who has scarcely any duty to perform beyond a general superintendence over the other officers.

The Court of Chancery, with the addition of a fifth Master, could with its present machinery, beyond doubt, transact the *whole* Equity business of Ireland. There is no arrear of business in the Court of Chancery, or the Rolls Court. The Master of the Rolls concluded his business on the 13th of March last; the Lord Chancellor, with an unusually heavy list, about two days later,—and if those courts should continue their sittings for even near the periods during which the English Equity Judges sit, there can be no doubt, but that the entire Equity business could be by them efficiently discharged without the necessity of creating a Vice-Chancellor, and if so, an addition of at least £6000 a-year, would result to the Revenue.

The present staff of Chancery, (with the addition of a few copying clerks, who would be remunerated by the increased fees on the additional business), is unquestionably adequate to transact the entire business, including the proposed addition.

Suppose, however, it should turn out that an additional Equity Judge would be required, the expense thereby to be entailed would be:—

A Vice-Chancellor. (Salary and jurisdiction, similar to that of the Master of the Rolls.)	-	£3,969	4	7
An additional Registrar, (the Exchequer Registrar to be the first, and the future patronage of this and the other offices, to be vested in the Vice-Chancellor),	-	1000	0	0
Crier and train-bearer,	-	140	0	0
A clerk in court, (same as Rolls Court, and an Exchequer officer, might receive the first appointment),	-	600	0	0
		£5709	4	7

Thus even creating an additional Judge, the change could be effected without loss to the consolidated fund.

Again, a Vice-Chancellor might be selected from the Barons of the Exchequer, and that vacancy filled up by a transfer of one Judge from the Common Pleas—for the business of which three Judges would seem sufficient; and a Queen's Counsel might be selected to act, as is frequently the case, as a Judge of Assize.

A BILL INTITULED AN ACT FOR THE AMENDMENT OF THE LAW OF BANKRUPTCY IN IRELAND.

1. Date of commencement of this act.
2. Laws at variance with this act repealed.
3. Petitioning creditor's bond may be dispensed with.
4. Person against whom a commission has issued on proof of probable cause for believing that he is about to quit Ireland, or to remove or conceal his goods with intent to defraud creditors, may be ar-

rested, and shall also have authority to seize his books, papers, monies, goods and chattels, where-soever they may be found, &c.

5. Any person so arrested, or whose books, &c., are seized, may apply for his discharge forthwith, or that the petitioning creditor do shew cause why his books, &c., should not be delivered up. Commissioner may make such order as seems to him fit. Order may be appealed from.

6. Any person so arrested may apply for his discharge forthwith. Commissioner may discharge the person or not. Order of commissioner may be appealed from.

7. No person liable upon an act committed more than 12 months prior to issuing of commission.

8. Act of bankruptcy committed within a year of the issuing of a commission whether prior or subsequent to petitioning creditor's debt, sufficient to support adjudication.

9. Requisite amount of petitioning creditors debt. For single debt of such creditor, or of two or more partners £50, of two creditors £70, three or more creditors £100.

10. Persons herein specially named liable to become bankrupts.

11. Creditor of a trader making affidavit of his debt, and of his having required payment, commissioner may summon the trader.

12. Manner of proceeding on summons of trader by a creditor.

13. Trader not attending summons, or refusing to admit the demand, and not making deposition of belief of a good defence thereto, and not paying or compounding within a certain time, or giving bond for payment, to be deemed to have committed an act of bankruptcy.

14. Trader signing an admission of demand in form prescribed, and not paying, securing or compounding within a certain time, an act of bankruptcy.

15. Trader admitting part only of a demand, and not making deposition of a good defence to the residue and not paying, securing, or compounding for sum admitted, and as to residue not paying or compounding or entering into bond to pay any sum recovered with costs, an act of bankruptcy.

16. What shall be deemed a refusal of admission of debt. Commissioner may enlarge the time for admission of demand.

17. Admission of debt signed elsewhere than in court, if attested by attorney of trader may be filed, and have the same force as an admission signed by a trader on his appearance before commissioners under the summons.

18. Trader summoned on affidavit of debt to have such costs as the commissioners shall think fit. Or commissioner may direct the costs to abide the event of any action for the debt.

19. Wherever a creditor plaintiff shall not recover the amount sworn to in his affidavit of debt filed against a trader, if such affidavit be made for such amount without probable cause, the trader defendant shall be entitled to costs.

20. Trader not paying, securing, or compounding for a judgment debt, upon which the plaintiff might sue out execution, within 14 days after notice requiring payment, an act of bankruptcy.

21. Trader disobeying order of any court of equity, or order in bankruptcy or lunacy, for payment of money, after service of order for payment on a peremptory day fixed, an act of bankruptcy.

22. Trader filing a declaration of insolvency in the office of the secretary of bankrupts, an act of bankruptcy.

23. Secret transfer of goods shall be deemed an act of bankruptcy.

24. Transfer of goods and chattels when to be deemed a secret transfer within the meaning of last section. Proviso to save right of *bona fide* purchaser or holder for value without notice. Proviso for assignment of vessels under 3 & 4, Wm. IV. cap. 55.

25. Filing petition for arrangement between a trader debtor and his creditors, with the concurrence of a certain number thereof to be an act of bankruptcy if petition dismissed.

26. Manner of making a debtor a bankrupt by affidavit of debt and notice to pay. Creditor to file an affidavit of debt, and serve notice requiring payment within 21 days.

27. If commission not proceeded on by petitioning creditor within 3 days, any other creditor may proceed on it.

28. If bankrupt shall not proceed to dispute the commission and prosecute with effect, the Gazette to be conclusive evidence of the bankruptcy, as against the bankrupt and against persons whom the bankrupt might have sued had he not been adjudged bankrupt. Saving present rights for which any proceedings are pending.

29. Provision for debtor to the bankrupt's estate paying the debt into court when sued by the assignees within the time for bankrupt to dispute.

30. One or two persons being merchants, brokers, or accountants, or persons who have been engaged in trade, or resident in Ireland, shall be chosen by Lord Chancellor to act as official assignees. Their duty.

31. Commissioners may take security by recognition or of Guarantee Society.

32. Official assignees to receive bankrupt's estate and effects. How to apply same.

33. Proviso restricting the authority of the official assignee.

34. Lord Chancellor may remove official assignees, and may fill up vacancy in their number.

35. Power to appoint official assignees to act with the existing assignees under commissioners now pending, and to whom the latter shall deliver over effects.

36. Official assignee may act until creditors assignee appointed. May sell the property, if commissioner so order. And make allowance to bankrupt for his support. Property vested in official assignee to go to his successor.

37. To exempt official assignee from personal responsibility.

38. Debtor and creditor account to be furnished by official assignee to creditors assignee before dividend.

39. Remuneration to official assignee.

40. Pay, half-pay, and pensions of bankrupts to be applicable for the benefit of creditors.

41. Audits and dividends to be had and made

whenever the commissioner thinks fit after the time appointed for the bankrupt's last examination.

42. Commissioner may order three month's wages or salary to clerks or servants.

43. Commissioner may order wages not exceeding 40s. to labourer or workman.

44. Search-warrants may be granted.

45. In cases of member of a firm being bankrupt, the commissioners, upon application, may authorize actions or suits in name of the assignee of the bankrupt and the remaining partner. Partner to have notice of such application, and may shew cause against it. Commissioner may direct partner to have part of proceeds.

46. Bankrupt not surrendering or submitting to be examined, or making discovery of his estate and effects, or not delivering up his estate, books, &c. or concealing, &c., to the value of £10, guilty of felony, and liable to transportation or imprisonment with or without hard labour.

47. Commissioner may enlarge the time for the bankrupt surrendering himself. Commissioner may order that bankrupt shall be free from arrest for three months after final examination.

48. Bankrupt destroying or falsifying any of his books, &c., or making false entries guilty of a misdemeanor, and liable to imprisonment, with or without hard labour.

49. Bankrupt, within three months of his bankruptcy, having obtained goods on credit under false pretence, or removing, concealing, &c., goods so obtained, guilty of a misdemeanor.

50. Bankrupt arrested under warrant from commissioner may be committed.

51. Warrant of committal for unsatisfactory answering or refusing to answer, need not specify questions. Copy of examination to be furnished to the person committed.

52. Obstructing the messenger, &c., a misdemeanor.

53. Commissioner may order release of bankrupt who may be in prison at time of obtaining protection.

54. Commissioner may order release of bankrupt in execution under a *Ca Sa* after a certain term of imprisonment.

55. Prosecution against bankrupt for any offence under this act may be ordered by the commissioner acting in the prosecution of the commission.

56. Bankrupt may be discharged by certificate of conformity in manner hereinafter prescribed. Discharge of bankrupt not to release or discharge a partner or person jointly bound.

57. Bankrupt not entitled to certificate if he has lost by gaming £20 in one day, or £200 within twelve months; or £200 by stock-jobbing; or concealed or destroyed books, &c.; or made fraudulent entries, or concealed any property, or permitted fictitious debts to be proved.

58. On the application of bankrupt, commissioner may appoint a sitting, of which twenty-one days notice in Gazette. Creditor may oppose. Commissioner may grant at discretion. Certificate not to be a discharge unless commissioner certify a full conformity.

59. Contracts or securities to induce creditors to

forbear opposition to be void. Certificate of bankrupt to be also void.

60. Penalties for obtaining money, goods, &c. as an inducement to forbear opposition or consenting to allowance or confirmation of certificate.

61. Bankrupt having obtained his certificate free from arrest. Certificate to be evidence of the bankruptcy and proceedings. Bankrupts in execution may be ordered to be discharged.

62. Bankrupt not liable upon any promise to pay debt discharged by certificate, unless such promise be in writing.

63. Allowance to bankrupts. £5 per cent., and not exceeding £400 as soon as 10s. paid in the pound. £7 10s. per cent. and not exceeding £500 if 12s. 6d. £10 per cent. and not exceeding £600 if 15s. Allowance not payable till twelve months after date of commission, and then only, if requisite, amount of dividends paid. And not to be payable to any bankrupt who has not been a trader for 12 months. If at expiration of twelve months, the dividend paid be under 10s., or if no dividends paid, bankrupt may be allowed not exceeding £3 per cent. or £300, although not a trader for twelve months.

64. One partner may receive allowance though others not entitled.

65. Interest allowed upon all debts or sums certain proveable, though not agreed for. From time debt is payable by virtue of some written instrument, or if none, from time of demand in writing.

66. Duplicate copy of schedule deposited with the registrars by bankrupt before final examination, and open to inspection.

67. When proceedings cease file to be deposited with the registrars.

68. Registrars and secretary of bankrupts to hold office during good behaviour.

69. 1st Vict. c. 48. Whenever bankruptcy fund insufficient, the salaries of second commissioner of bankrupt and assistant-registrar shall be paid out of the Suiters Fee Fund.

70. Commissioners may permit mortgagees to bid at sale.

71. Goods and chattels under seizure by virtue of attachment shall, upon demand, be delivered up to any person appointed by the commissioner.

72. Before whom affidavits are to be sworn.

73. Rules to be made for regulating the forms of proceedings and practice to be observed in prosecuting commissions.

74. Warrants to be under hand and seal, and every summons to be in writing under the hand of a commissioner.

75. How summons may be served where the party is keeping out of the way. Delivery of copy of notice or summons to the wife or servant or some adult inmate, shall be equivalent to personal service.

76. Punishment of persons giving false evidence, or swearing or affirming anything which shall be false.

77. Application of forfeitures.

78. All bills of solicitors and attorneys to be taxed by one of the registrars of the Court of Bankruptcy, subject to review.

79. Bills of auctioneers, appraisers, valuers, and accountants, to be settled in the same manner.

80. Power to commissioner with consent of cre-

ditors to remove creditors assignee, and appoint another in his stead.

81. 6 W. 4, c. 14. Personal and real estate of bankrupt to vest in the new assignee by virtue of appointment. The removed assignee shall fully account.

82. Actions or suits not be abated by removal of assignees.

83. Costs may be awarded by commissioner of bankrupt. Persons brought up by warrant may be ordered to pay the costs of bringing them up.

84. Orders of commissioners of bankrupt for payment of money or costs, to be enforced by writs out of Chancery.

85. Persons capable of giving evidence respecting trading or act of bankruptcy; or suspected of having bankrupt's property and being in prison, may be brought for examination under warrant from commissioners of bankrupt.

86. Bankrupt in custody in England or Scotland or Ireland to be brought before the commissioners.

87. Depositions, &c. under commissions may be entered of record without order of Lord Chancellor being necessary. Certificate of entry endorsed to be evidence of the entry. Fee of 1s. payable on search for any such record.

88. Where second or other commission is issued against one or more partners, proceedings under second commission shall be stayed and form part of first commission if Chancellor so order.

89. Three-fifths in number and value of creditors of bankrupt may accept a composition.

90. Mode of voting in deciding upon such composition.

91. How notice shall be given to the creditors.

92. Creditors served with notice, bound to accept the composition agreed to, whether they shall or not have proved their debts under the commission.

93. Any debtor unable to meet his engagements with his creditors and unable to obtain their consent to a deed of composition, may with the concurrence of two-thirds in number and value petition the commissioners.

94. Petition to be in form in Schedule I, and supported by affidavit.

95. Commissioners privately to examine into matter of petition, and if satisfied may allow the same *de bene esse*, and appoint meeting of creditors, and may grant protection during examination, and after allowance *de bene esse* of petition.

96. How notice shall be given to the creditors.

97. Commissioner to examine into matter of petition. If resolution of creditors not confirmed, petition shall be dismissed and protection cease.

98. Commissioners may renew protection, and if petitioning debtor be in custody, may order release, &c.

99. Commissioner to appoint a registrar of the court, or one of the principal petitioning creditors to preside at the meeting of the creditors.

100. If, at first meeting, major part in number and value, or nine-tenths in value, or nine-tenths in number, whose debts exceed £20 assent, another meeting to be called.

101. If, at second meeting, three-fifths in number and value of all the creditors present agree to accept,

&c., resolution to be binding on all, provided one full third in number and value be present.

102. Creditors to vote according to balance due to them on account fairly stated.

103. Resolution to be submitted to the Commissioners, and the Commissioners if they think it reasonable after hearing creditors for and against, to approve and confirm the same, and to cause it to be filed, and to grant certificate of protection.

104. Estate to vest in trustee if any be appointed.

105. Resolution to be enrolled, and copy of it to be evidence.

106. Trustee to file account every six months, or oftener if required.

107. If petitioning debtor has not made a true discovery, &c. he may be summoned and examined.

108. If any difficulty arise as to execution of resolution &c. a special meeting may be called.

109. When resolution or agreement has been carried into effect, commissioner to give petitioning debtor a certificate thereof and such certificate to operate as a certificate of conformity.

110. Commissioners on being satisfied that trustee has fully performed his trust, to give him a certificate thereof, and such certificate to be a full release and acquittance for all matters done by such trustee.

111. Commissioners of the Treasury authorized to grant superannuation allowances to commissioners and registrars of Court of Bankruptcy in Ireland. Accounts of such allowances to be laid before Parliament.

112. Nothing contained in act 3 and 4 Vict. c. 105, s. 22, shall entitle a judgment creditor to any preference over other creditors. Saving such judgments as have been the subject of some legal decision before the passing of this Act.

113. Recites 3 and 4 Vic. c. 105, s. 12. Judgments shall before 1st day of 1849 be entered on all warrants of attorney executed on or before 1st November, 1840, if not already entered. Otherwise such warrants of attorney shall in certain cases, be deemed fraudulent and void.

114. A book or index of the names, descriptions and additions of persons granting warrants of attorney to be kept which shall be open to inspection on payment of sixpence.

115. Lord Chancellor to settle fees, &c.

116. Construction of act.

117. Act may be altered this session.

(Continued from p. 184.)

26. That after the appointment of the general committee every member appointed shall continue to be a member of the committee until the end of that session of parliament, or until he cease to be a member of the House of Commons, or until he resign his appointment (which he may do by letter to the Speaker,) or until the general committee report that he is disabled by continued illness, or until the committee be dissolved.

27. That in every case of vacancy in the general committee of elections the Speaker, on the first day on which the house meets after such vacancy is known by him, shall make known the vacancy to the house, and thereupon all proceedings of the general committee shall be suspended until the vacancy is supplied.

28. That if the general committee of elections report to the house that, by reason of the continued absence of more

than two of its members, or by reason of irreconcilable disagreement of opinion, the said committee is unable to proceed in the discharge of its duties, or if the house resolve that the general committee of elections be dissolved, the general committee shall be thereby forthwith dissolved.

29. That every appointment to supply a vacancy in the general committee, and every re-appointment of the general committee after the dissolution thereof, shall be made by the Speaker by warrant, laid upon the table of the house on or before the third day on which the house meets after the dissolution of the committee or notification of the vacancy, and the warrant shall be subject to the disapproval of the house, as is provided in the case of the first warrant for the appointment of the general committee; and upon any re-appointment of the general committee the Speaker may, re-appoint any of the members of the former committee who are then willing and not disqualified to serve on it.

30. That the Speaker shall appoint the time and place of the first meeting of the general committee of elections, and the committee shall meet at the time and place so appointed; but no member shall act upon such committee until he have been sworn at the table of the house, truly and faithfully to perform the duties belonging to a member of the said committee, to the best of his judgment and ability, without fear or favour.

31. That no business shall be transacted by the general committee of elections unless four members be then present; and no appointment of a select committee by the general committee, shall be of force unless at the least four members then present of the general committee agree in the appointment.

32. That the general committee shall make regulations for the order and manner of conducting the business to be transacted by them.

33. That the general committee shall be attended by one of the committee clerks of the house selected for that purpose by the clerk of the house, and such committee clerk shall make a minute of all the proceedings, in such form and manner as shall be directed by the committee, and a copy of the minutes so kept shall be laid before the House of Commons.

34. That if at the time of the dissolution or suspension of the proceedings of the general committee there be any business appointed to be transacted by such general committee on any certain day, the Speaker may adjourn the transaction of such business to such other day as to him seems convenient.

35. That every member more than 60 years old shall be excused from serving on election committees, provided that on or before the reading over of the names of such excused members, or upon his afterwards becoming entitled to make such claim, he claim to be excused, by declaring in his place, or in writing under his hand delivered to the clerk at the table, that he is more than 60 years old; but no member shall be so excused who does not claim to be excused before he is chosen to serve.

36. That in the first session of every parliament, on the next meeting of the house after the last day allowed for receiving election petitions, and in every subsequent session on the next meeting of the house after the Speaker has laid on the table his warrant for the appointment of the general committee of elections, the clerk of the house shall read over the names of all the members who have so claimed to be excused.

37. That every member having leave of absence shall be excused from serving on election committees; and if any member offer any other excuse, either at the reading over of the said names or at any other time, the substance of the allegations shall be taken down by the clerk, in order that the same may be afterwards entered on the journals, and the opinion of the house shall then be taken thereon; and if the house resolve that the said member ought to be excused he shall be excused from serving on election committees for such time as to the house seems fit, but no member shall be so excused who does not claim to be excused before he is chosen to serve; and every member who has served on one election committee, and who within seven days after such committee has made its final report notifies to the clerk of

the general committee his claim to be excused from so serving again, shall be excused during the remainder of the session, unless the house resolve, upon the report of the general committee, that the number of members who have not so served is insufficient; but no member shall be deemed to have served on an election committee who on account of inability or accident has been excused from attending the same.

38. That every member who is a petitioner complaining of an undue election or return, or against whose return a petition is depending, shall be disqualified to serve on election committees during the continuance of such disqualification.

39. That the clerk of the House of Commons shall make out an alphabetical list of all the members, omitting the names of such members as have claimed to be excused from serving on election committees; and the clerk shall also distinguish in such list the name of every member then excused or disqualified, and shall also note in the list every cause of such excuse or disqualification, and the duration thereof; and such list shall be printed, and distributed with the votes of the house, and the names of all the members so omitted shall be also printed, and distributed with the votes.

40. That during three days next after the day of the distribution of such corrected list further corrections may be made by leave of the Speaker, if it appear that any name has been improperly left in or struck out, or that there is any other error in such list.

41. That the list so corrected shall be referred to the general committee of elections; and the general committee shall select, in their discretion, six, eight, ten, or twelve members, whom they think duly qualified to serve as chairmen of election committees; and the members so selected shall be formed into a separate panel, to be called the chairmen's panel, which shall be reported to the house; and while the name of any member is upon the chairmen's panel he shall not serve on an election committee otherwise than as chairman; and every member on the chairmen's panel shall be bound to continue upon it till the end of the session, or he cease to be a member of the house, or until, by leave of the house, he be discharged from continuing upon the chairmen's panel: provided that every member of the chairmen's panel who has served on one or more election committees, and who notifies to the clerk of the general committee of elections his claim to be discharged, shall be so discharged; and every such member shall be excused from serving upon any election committee, either as chairman or otherwise, during the remainder of the session; but no member of the chairmen's panel shall be deemed to have served on an election committee who on account of inability or accident has been excused from attending the same.

42. That after the chairmen's panel has been so selected, the general committee shall divide the members on such list into five panels, as to them seems most convenient, but so that each panel may contain as nearly as may be the same number of members, and they shall report to the house the division so made; and the clerk shall decide by lot the order of the panels so settled, and shall distinguish each of them by a number denoting the order in which they were drawn; and the panels shall then be returned to the general committee of elections, and shall be the panels from which members shall be chosen to serve on election committees.

43. That the general committee of elections shall correct the said panels by striking out of them the name of every member who ceases to be a member of the house, or who from time to time becomes entitled and claims to be wholly excused from serving on election committees, and by inserting in one of the panels to be chosen by the general committee, at their discretion, the name of every new member of the house not entitled and not having claimed to be wholly excused, and shall also distinguish in the manner aforesaid in the said panels the names of the members for the time being excused or disqualified for any of the reasons aforesaid; and the general committee shall, as often as they think fit, report to the house the panels as corrected; and as often as the general committee reports the said panels to the house they shall be printed, and distributed with the votes.

44. That when leave of absence for a limited time has been granted by the house to any member, the general committee of elections may transfer the name of such member from the panel in which it has been placed to some other panel subsequent in rotation, having regard to the length of time for which such leave of absence has been granted, and to the number of select committees then about to be appointed.

45. That whenever any member of the chairmen's panel ceases to be a member of the house, or is by leave of the house discharged from continuing upon the chairmen's panel, or is so discharged by reason of service, the general committee shall select another member to be placed upon the chairmen's panel; and in case it at any time appear to the general committee that the chairmen's panel is too small, they may select two, four, or six additional members to place upon it, so nevertheless that the chairmen's panel shall not at any time consist of more than eighteen members, without the leave of the house first obtained.

46. That all election petitions received by the house shall be referred to the general committee of elections, for the purpose of choosing select committees, to try such petitions; and the Speaker shall communicate to the house and to the general committee every report by the examiner of recognizances to him concerning the recognizances to any election petition; and in every case in which any election petition is withdrawn, or the examiner of recognizances reports to the Speaker that the recognizances are objectionable, the order for referring such petition to the general committee of elections shall be discharged, and no further proceeding shall be had upon such petition; and the general committee shall make out a list of all election petitions in which the examiner of recognizances has reported to the Speaker that the recognizances are unobjectionable, and in which the proceedings are not suspended, in which list the petitions shall be arranged in the order in which the were so reported upon; and in every case in which the proceedings in any petition inserted in such list are afterwards suspended the petition shall be struck out of the list, and shall be again inserted at the bottom of the list at the end of such suspension of proceedings.

47. That when notice of the death or vacancy of the seat of any member petitioned against, or that it is not the intention of such member to defend his election or return, is given to the general committee of elections by the Speaker, the general committee shall suspend their proceedings in the matter of the petition referred to in such notice, until 21 days after the day on which notice of such death or vacancy, or intention not to defend, has been inserted in the Gazette, under the provision herein-before contained, unless the petition of some person claiming to be admitted as a party in the room of such member be sooner referred to them.

48. That when more than one election petition relating to the same election or return are referred to the general committee of elections, they shall suspend their proceedings in the matter of all such petitions until the report of the examiner of recognizances upon each of such petitions, is received by them; and upon receipt of the last of such reports they shall place such petitions at the bottom of the then list of election petitions, and such petitions shall be dealt with as one petition.

49. That the general committee of elections shall choose the committees to try the election petitions in the order in which such petitions stand in such list, and they shall determine how many committees shall be chosen in each week for trying such petitions, and the days on which they will meet for choosing such committees, having regard to the number of select committees then sitting, and to the whole number of such committees then to be appointed, and they shall report to the house from time to time the days appointed by them for choosing such committees.

50. That if parliament is prorogued after any election petition has been presented, but before the appointment of a select committee to try such petition, the general committee of elections appointed in the following session shall, within two days after their first meeting, in case the sureties have been then reported unobjectionable, appoint a day and hour for selecting a committee to try the petition so stand-

ing over: provided that if the number of petitions so standing be so great that the times for selecting committees to try the whole thereof cannot, in the judgment of the general committee, be appointed within two days after their first meeting, the said general committee shall, within two days after their first meeting, appoint the times for selecting committees to try so many of the said petitions as the said general committee deems convenient, and shall afterwards, as soon as conveniently may be, appoint the times for selecting the committees to try the remainder of such petitions.

51. That notice of the time and place at which the committee will be chosen to try any election petition shall be published with the votes, not less than 14 days before the day on which such committee is appointed to be chosen; and in case the conduct of the returning officer is complained of, such notice shall be sent to him through the post, not less than 14 days before the day on which such committee is appointed to be chosen; and every such notice shall direct all parties interested to attend the general committee of elections, by themselves or their agents, at the time and place appointed for choosing the select committee; and if (after any such notice has been published with the votes, or sent to the returning officer as aforesaid,) the proceedings in the matter of such petition become suspended, notice of such suspension shall be published with the votes; and in case the returning officer is complained of, such notice shall be sent to him through the post.

52. That if notice of the death or vacancy of the seat of any member petitioned against, or that it is not the intention of such member to defend his election or return, have been inserted in the Gazette, by order of the Speaker, and no party has been admitted to defend such election or return, then, if the conduct of the returning officer is not complained of, it shall not be necessary to insert such petition at the bottom of the then list of petitions; but the general committee of elections shall meet for choosing the select committee to try such petition after the expiration of the time allowed for parties to come in to defend such election or return, and not less than one day's notice of the time and place appointed for choosing such committee shall be given in the votes; and in such case it shall not be necessary to deliver to the clerk of the general committee of elections a list of the voters intended to be objected to, as herein-after is required.

53. That the general committee of elections may change the day and hour appointed for choosing a select committee to try any election petition, and appoint some subsequent day and hour, if it be expedient so to do, giving notice in the votes of the day and hour so appointed; and in every case in which any such change is made by them they shall forthwith report the same to the house, with their reasons.

54. That notice shall be published with the votes, of the petitions for each week, and of the panel from which committees will be chosen to try such petitions, and each panel shall serve for a week, beginning with the panel first drawn, and continuing so in rotation in the order in which they were drawn, and not reckoning those weeks in which no select committee is appointed to be chosen.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, April 21, 1849.

THE Irish Jurist

No. 26.—Vol. I.

APRIL 28, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 6d.

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DUBLIN, APRIL 28, 1849.

HOUSE OF COMMONS.—NOTICE OF MOTION.

"Mr. Osborne.—Select Committee to enquire into the state of the law, as respects the appointment of Receivers of the Courts of Chancery and Equity Exchequer in Ireland, and the effect of the present laws and regulations of the said Courts, in the management of estates under their control; and how far the same has conduced to the improvement of the said estates, and the condition of the tenantry, or the contrary."

In a very few days, Mr. Osborne will move for a Committee of the House of Commons, to enquire into the system adopted by the Court of Chancery in the management of estates under its control, with the ultimate object of proposing a plan for its amendment.

We copy above the notice of motion, as it appears in the parliamentary papers, and we can entertain no doubt whatever that the Committee will be appointed. Every person acquainted with the subject, admits the hugeness of the evil of the present system, and the desirableness of its reform. We have from time to time shewn how pernicious it has been to owner, occupier, creditor, and the country.

It was adopted by the court under the extraordinary hallucination that its authority would be but short-lived, and that any description of management would answer for a temporary purpose; that, in short, estates only required an *ad interim* protection—provided they were kept safely, it mattered little how they were kept. The tediousness of Chancery proceedings has long been proverbial, and property once under the control of the court, was long before the day of its emancipation came—emancipation from a dominion the most cumbrous, the most costly, the most unimproving, the most deadly it was possible to conceive.

Sir Edward Sugden endeavoured to reform Chancery practice, to abridge the period for the conduct of a suit, to check jobbing in the appointment of Receivers, to establish a code of rules for their guidance, and did, in fact, compile an admirable set of orders for the management of the court practice, in its various ramifications. But much more was required.

There is no lightning speed for the Court of Chancery. Causes, from the inertness of parties conducting them, will still "drag their slow length" along, and estates will still for years upon years either be subjected to the present wasting system of receiverships, or to an improved one. Not merely is this to be expected, but from the recent course of legislation, which makes it easy to encumber, difficult to sell, when the reverse would be right legislation, the entire encumbered property of Ireland seems likely to fall an easy victim to the Court of Chancery. The increase of properties placed under its control since 1835—when the 5 & 6 W. 4, c. 55, was passed—has been inordinately great; it now shows a rental of one million and a half sterling, and a surface of country covering nearly one-ninth of the whole island.

The return of last session, from which we have so often quoted, is indeed an instructive document; it was the largest ever yet presented to parliament, the bare expense of printing it was, as estimated, over £1000. To save the country this expense, it has not been printed in full, and the little tabular summary taken from it gives a most inadequate idea of the facts capable of being developed; but suggests a few salient points. We are satisfied there is a mine of information to be not gleaned, but gathered, from the document itself, and we trust to see it printed in extenso, or in the form of a digest.

Much knowledge can be, however, derived from the *precis* to which we have alluded.

Properties coming under the court free from arrear, at once change their nature; and the column

of arrears in the Receiver's account, soon becomes greater than that of receipts; on the average, increasing from the date of his appointment, as we have shewn, p. 86, eleven fold.

And this loss accrues to the estate, whilst the tenants, deprived of a fostering hand, cease to thrive. How could they thrive, when over a rental of nine hundred thousand per annum, not one shilling is expended on improvements? How could they thrive, when they live under a Court which makes them pay £10 for a lease, and gives that lease but for seven years, pending the cause? The Court thus not only does not make improvements, but renders it hopeless that a tenant will improve. He has no fixed interest in the soil, and how can it be expected that he will expend money upon a farm, when his tenure is so short-lived and so insecure?

Again, from its centralization, the Court cannot assist by employment. Thus, no employment, no improvement, no permanency, are afforded by the *ad interim* proprietor.

If Mr. Osborne's Committee does no more than alter this state of things, it will do much. Why should not the Court do, in *causes*, what they do in *minor matters*? The Chancellor—we presume, so convinced of the evils of the present seven years' leasing system—by a very recent general order, has directed, that, in all lunacy and minor matters, leases should be granted for a fixed period, even for a term of 21 years. The same power should be exercised in all cases. This reform is exceedingly simple.

So is that of dispensing with the heavy cost for leases. At present the tenant is required to enter into recognizances himself, and two sureties, for payment of the rent. This stringency is not required in private estates, where rents are vastly better paid; and the practice should be abolished, and a much more wholesome one substituted, of giving a summary remedy by eviction in case of non-payment of rent. At present there is an absolute encouragement held out to the tenant to fall into arrear, the rent, according to the practice of the Court, not being demandable for five months until after it has become due. This is a senseless practice; the Receiver has no power to stir during that interval, except by special application, on a statement of facts. He should have a discretionary power to collect when he can, but not to keep the money one hour beyond its receipt. Thus, he would not be urged on by an improper desire to collect money and turn it to his own use until the day of accounting came, and would be, at the same time, invested with a power, which, in case of fraud or fraudulent preference, it is most desirable for the Court, and the sureties for the tenants, the Receiver should have.

The present system of accounting is also most expensive, unsatisfactory, and objectionable. Neither creditor, nor owner, nor any party interested, can know anything of the management of the property, or of the progress made in the receipt of the rents, until the Receiver comes to pass his accounts; and is even then unable to scrutinize, investigate, or object, without incurring the expense

of taking out a copy of the account, and appearing by his solicitor in the Master's office.

This requires to be altogether altered and reformed. Both owner and creditor have a right to the fullest, easiest information, and that the accounts of an estate under the management of the Court should be kept in the plainest and clearest manner, and that they should at all times be open to the inspection of every party interested in the cause or matter.

The return also shews the enormous amount allowed annually in costs, and which, we think, an analysis of the return would prove, falls short of the actual amount.

It is impossible to suppose that a more inexpensive system cannot be devised, than the present,—say, £30,000 for costs, and £50,000 for Receivers' fees,—£80,000 a-year. We affirm, the properties might be better managed for one-half the amount.

The Committee must grapple with this branch of the subject; this must be their peculiar duty. They will see that the present body of Receivers are not men, generally speaking, at all adapted for their duties. How is it possible that practising barristers, apothecaries, or attorneys, residing in Dublin, can efficiently discharge the onerous duties of the management of landed property in Ireland? And the great majority of Chancery Receivers are of such a class, or, if not, men totally unconnected with agriculture or the management of land.

At present the Receivers are a multitudinous mass, indiscriminately selected, distinct heads over small properties, or if over large ones, often non-resident, whilst their bailiffs are a low, uneducated class. It may be true, that as human nature is constituted, the duty of a Receiver will be best performed where the remuneration is on an *ad valorem* scale, and that object may be kept in view as a premium to industry; but in our judgment there should be a fixed salary, and the situation dependant upon the efficient discharge of the duties. What a happy change from the present system, if the local manager were a good agriculturist, and a resident moral agent. This is perfectly practicable, and forms one of the principal features of the proposed change. Estates under the Court of Chancery are now confessedly the most mismanaged and uncared for in Ireland—perhaps on the face of the whole habitable globe—they are hot-beds of destitution, covering with a blight every adjacent property. Under the system we propose they would be pattern estates; agriculture, instead of relapsing, would progress; the tenantry would not die of destitution; the property given in pledge to the court would either be restored to the owner in an improved condition, or be sold, not as now at a depreciated, but at an enhanced value. Thus creditor and debtor, and the country at large, would be alike benefitted.

How excellent a change, and how easy of accomplishment. We shall dwell no longer on gloomy retrospects; the evils have been great, they must be abated; we now look forward with the energy of hope to see them struck down and for ever.

In a former number of this journal, (ante, p. 146, *Mia.*) we considered the question, what or whether there was any warranty of title annexed to a contract—not under seal—for the sale of land. The result we then conceived to be deducible from the cases, was, that an implied covenant or contract in law was created of an ability to give that interest in the land the vendor proposed to give. We now propose to consider the analogous question, as arising from the sale of specific chattels, in which the same rule, if not applied by the existing law, we trust will ere long be adopted as a settled principle.

In a recent case, *Morley v. Attenborough*, (13 Jur. 282,) the question was raised, whether the law annexed to the sale of a specific chattel an implied agreement on the part of the vendor, of an ability in him to convey, or, as stated by Mr. Baron Parke, “Where there is a bargain and sale of a specified, ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title, or has it merely the effect of transferring such title as the vendor has?”

The facts on which the question arose were as follows:—The plaintiff was the purchaser of a harp, sold by auction as an unredeemed pledge. The harp had been pledged by a person who had no title, and the real owner obliged the plaintiff to give it up, after it had been delivered to him by the defendant. Of the want of title in the pawnor, the defendant was ignorant. Under these circumstances, the Court was of opinion that there was no implied warranty of title—“that the vendor must be considered as selling merely the right to be pledge which he himself had.”

The judgment of the court is not confined to the application of the legal principles applicable to the facts before them. The rule is laid down, that generally no such implied warranty exists; but that it would be inferred from the usage of the trade, where the articles were purchased in a shop professedly carried on for the sale of goods. The judgment was principally founded on the rule of the old law—one, we think, ill adapted to the circumstances of the present generation, and which the enlightened spirit of modern law-givers has done much to dissolve.

When all sales took place in market overt—the then sole recognised place of sale—the common law annexed to that sale a complete title against all except the crown, and, subsequently, a prosecutor to whom restitution was ordered by the 21 Hen. 8, c. 11. This rule of the common law gave effectual protection to the vendee. The question we are now discussing could not arise except in sales in places not recognised as legitimate for the purposes of sale, and then the vendor gave no implied warranty, the vendee having notice of the infirmity in the place of the sale, was entitled to no redress, except for the deceit, if the vendor wilfully made a fraudulent representation of title; and this was the case of *Sprigwell v. Allen* (41. 91). There the defendant bought the horse

in Smithfield, being a market overt; in the absence of any statement to the contrary, the inference was, that he believed himself possessed of a title as against the whole world; and, as the plaintiff could not have purchased in the market—else he also would have had good title, having purchased without notice of the infirmity in his vendor's title—he was bound to allege in the declaration that the defendant had sold the horse fraudulently, or knowing it not to be his own horse, which the plaintiff failed to prove. This is the oldest and the leading case on this branch of the law, and has been followed in all the subsequent cases.

The practice of selling in market overt all goods adapted for ordinary purposes, having almost wholly ceased, to follow fairly the analogy afforded by the former state of the law, the correct rule would appear to be, that the purchaser should, in every instance, have an implied warranty of title where the subject matter of sale is purchased in its known and customary place of sale, the place of resort for those requiring the thing to be purchased; viz., in a shop, as put by Mr. Baron Parke, for the sale of that particular class of goods. The indefeasible title given to the vendee amounted to an implied warranty; and, as the common law, when circumstances changed, did not follow up this rule, by giving an absolute title out of market overt, yet we think in lieu thereof its principles attached an implied warranty of title where the purchase was made in the place customarily used for such transactions; and, if not, then the vendee purchased on his own responsibility, and was remediless if his vendor's title was incomplete, unless he had an express warranty, or had averred and could prove fraud.

The judgment in the principal case appears to us to establish this proposition. Mr. Baron Parke, in his judgment (p. 285), after stating what appeared to him to be the general rule, “that there is no implied warranty of title on the sale of goods,” says, “the question on each case where there is no warranty in express terms, will be, whether there are such circumstances as to be an equivalent to such a warranty. *Usage of trade*, if proved, as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the *very nature of the trade* may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; and we do not suppose there can be any doubt, that if articles are bought in a *shop* professedly carried on for the sale of goods, the shop-keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased.” These rules, or, rather, exceptions to the rule of non-warranty, appear to include every species of sale made in the place customarily used for that purpose.

The case of *Burnet v. Rollitt*, (11 Jur. 827,) illustrates this question. There, one person, having purchased a carcass of pork from a professed butcher, did not remove it immediately; another person, asking the butcher to sell the same meat, was referred to the first purchaser, who thereupon sold to the second. The meat proved

to be unfit for use; and the Court held that no implied warranty of quality was created by this contract, the vendor not being a professed dealer. This, it will be observed, was a question of warranty of quality, not of title. But it shews the different view the law takes of a person professing a particular duty or business, and of a person acting otherwise than in their ordinary calling.

A contemporary legal journal (13 Eng. Jur. 141, part 2,) observing on this case, says:—"That so far as the judgment of the Court proceeded on the supposed analogy between warranty of title and of quality, the analogy is deficient, as, a shop-keeper does not warrant the quality of the goods sold by him, though he is now to be considered as warranting title." To these observations we cannot assent. To us the analogy appears extremely close, if not complete. No doubt, a shop-keeper does not, in every case, warrant the quality of goods sold by him, because they are capable of examination by the vendee; but so it is in the case of warranty of title; where it is in the power of the purchaser to ascertain, or the circumstances of the sale are such as to put him upon enquiry as to the state of the title, no implied warranty will arise, *Bayley v. Meril*, (Cro. Jac. 386;) *Dyer v. Hargrave*, (10 Ves. 507.) On the other hand, where the purchaser has no opportunity of examining the goods, merely ordering them from the shopkeeper, there is an implied warranty as to their fitness for the particular purpose they are required for, as in *Burnet v. Rollitt*, the Court holding that if the purchase had been from a professed dealer, and under the same circumstances which occurred with the defendant, in that case there would have been an implied warranty of the quality of the meat, at least its fitness for use, (See *Browne v. Edginton*, 2 M. & Gr. 279. *Chanter v. Hopkins*, 4 M. & W. 399; *Jones v. Bright*, 5 Bing. 533.) The conclusion arrived at by the same Journal,—that as no implied warranty of quality arose from the contract, when the purchaser has had full opportunity himself of examining the subject of the purchase, that consequently the maxim *causat emptor* was inapplicable to the case of warranty of title of goods, where the purchaser has not the means of exercising his own judgment, is, we think, deficient in analogy, if the rule we conceive deducible from the authorities be the true one, viz: that in cases of warranty, whether of title or quality, if the purchaser have the means of ascertaining the true state of facts, he takes on himself the responsibility, and no warranty is created.

If, on the contrary, the vendor has the sole means of knowledge, and the subject be purchased in the usual place of sale, under ordinary circumstances, and there is nothing in the sale such as would put a cautious purchaser on inquiry, a warranty of title will be implied.

The decision of the Court on the particular case before them, is in direct accordance with the view we have taken. The sale being notoriously of unredeemed pledges, the purchaser, in the view of the law, must have been aware that he could have no better title than his vendor had, which, necessarily was one qualified by the laws respecting pawnbrokers.

This decision, though not in terms, in principle establishes the rule followed in the civil law, in that of France and America,—viz, of implying warranty of title by the vendor of goods; the exceptions, to the general rule stated by Mr. Ben Parke, appearing to include almost every species of legitimate sale. To hold otherwise would leave every purchaser at the mercy of his vendor, and would cast a doubt on the *bona fides* of every contract, highly injurious to the interests of a commercial country.

Court Papers.

Chancery.—Easter Term.

April 23.—The following gentlemen took the usual oath on being called to the bar.

John Thomas Lloyd, Nicholas Alexander Ball, John Neale M'Kenna, William James Sidney, William Pender, Richard Waring Pittar, John Creighton Gray, Thomas Perry Lynch, Edward Falconer Litton, William Herbertson Jones, James Edward Jackson.

LIST OF CAUSES UNDISPOSED.

Kirkwood v. Lloyd, report, exceptions and merits.
Farrell v. Fleming, pleadings and proofs.
Jacob v. Taylor, ditto ditto.
Twycross v. Moore, ditto ditto.
Dimesdale v. Hemming, ditto ditto.
Simpson v. Synge, pleadings and proofs, order pro con.
Smith v. Robinson, plead. & p., bill & an., order pro con.
Newport v. Scott, report, exceptions and merits.
Londonderry & Coleraine Railway v. Dimesdale, plead. & p.
Woodrooffe v. Grace, pleadings and proofs, order pro con.
Alston v. Alcock, pleadings and proofs.
Hillhouse v. Tyndal, ditto ditto.
Baily v. Swan, ditto ditto.
Lyle v. Lyle, report and merits.
Plunket v. Reilly, bill and answer.
O'Grady v. Barry, pleadings and proofs.
Ruble v. English, pleadings and proofs, order pro confessa.
Reynolds v. Kelly, reports and merits.
Hinds v. Same, ditto ditto.
White v. White, pleadings and proofs for dismissal.
Mara v. Tibeaud, report and merits.
Barron v. O'Brien, ditto ditto.
Same v. Maunsell, ditto ditto.
Carberry v. Cox, report, exceptions and merits.
Molloy v. French, report and merits.
Kelly v. Hayes, plead. & proofs, ord. pro con., bill & answer.
Same v. Same, ditto ditto.
Murphy v. Linde, report and merits.
Balfie v. Colgan, pleadings and proofs.
Barton v. Stewart, ditto ditto.
Bayly v. O'Connor, ditto ditto.
Callaghan v. Callaghan, report and merits.
Fagan v. Fagan, ditto ditto.
Molony v. Scollard, pleading and proofs, order pro confessa.
Blakeney v. Blakeney, ditto ditto.
Marshall v. Hovendon, return of commission.
Hayden v. Hearne, pleadings and proofs, order pro con.
Fishe v. Lawder, report and merits.
Orr v. Foster, bill and answer, order pro confessa.
Balfie v. Balfie, pleadings and proofs.
Burrows v. Attorney-general, report and merits.
Clarke v. Lawder, ditto ditto.
White v. White, pleadings and proofs.
Bond v. Coane, ditto ditto.
Garland v. M'Alister, ditto ditto.
Murray v. Murray, pleadings and proofs, order pro con.
Gordon v. Mahony, pleadings and proofs.
Rowland v. Macdonnell, pleadings and proofs, ord. pro con.

Ronan v. Dickson, pleadings and proofs.
 Hatchell v. O'Reilly, ditto ditto.
 Humphreys v. Bowen, bill and answer.
 Maturin v. Wilson, pleadings and proofs.
 Shuldham v. Chesney, bill and answer, order pro confesso.
 Knox v. Molloy, pleadings and proofs, order pro confesso.
 Forbes v. Bryan, reports and merits.
 Andersen v. Walker, pleadings and proofs.
 Ouge v. Jones, re-hearing.
 Warnock v. Eccles, ditto ditto.

(Continued from p. 192.)

55. That the parties complaining of or defending the election or return complained of in any election petition shall, except in the case herein-before provided for, by themselves or their agents, deliver in to the clerk of the general committee lists of the voters to be objected to, giving in the said lists the several heads of objection, and distinguishing the same against the names of the voters excepted to, not later than 6 o'clock on the 6th day next before the day appointed for choosing the committee to try the petition; and the said clerk shall keep the lists in his office open to the inspection of all parties.

56. That the general committee at the time and place appointed for choosing the committee, shall choose from the panel in service four members, not specially disqualified for being appointed on the committee to try such petition, by reason of having voted at the election, or by reason of being the party on whose behalf the seat is claimed, or related to him or to the sitting member by kindred or affinity in the first or second degree according to the canon law.

57. That if four members then present of the general committee of elections do not agree in choosing a committee to try any election petition the general committee shall adjourn the choosing of that committee, and of the remaining committees appointed to be chosen on the same day, to the following day, and the parties shall be directed to attend on the following day, or if such following day happen during an adjournment of the house, then on the day to which the house stands adjourned, and so from day to day until all such committees are chosen, or until the general committee of elections is dissolved, as herein-before provided; and the general committee shall not in any case proceed to choose a committee to try an election petition until they have chosen a committee to try every other election petition standing higher in the list aforesaid, the order for referring which has not been then discharged, except where the day originally appointed for choosing a committee has been changed under the provision herein-before contained.

58. That on the day appointed by the general committee to choose an election committee the members upon the chairmen's panel shall select one of such members to act as the chairman of such election committee, and when they have been informed by the general committee that four members of such election committee have been chosen they shall communicate the name of the member so selected by them to the general committee; but no member shall be so selected who would be disqualified from serving on such committee if not upon the chairmen's panel: provided always, that if, with reference to any petition for trying which they are about to appoint a chairman, the members of the chairmen's panel receive notice from the Speaker, under the provision herein-before contained, of the death or vacancy of the seat of the sitting member petitioned against in such petition, or that it is not his intention to defend his seat, they shall suspend their proceedings with regard to the appointment of a chairman to try such petition until the day appointed by the general committee of elections for selecting a committee to try such petition.

59. That the members upon the chairmen's panel may make such regulations as they find convenient for securing the appointment or selection of chairman of election committees, and for distributing the duties of chairmen among all of them.

60. That as soon as the general committee of elections has chosen four members to try any election petition, and

has received from the members of the chairmen's panel the name of a chairman to serve, the parties in attendance shall be called in, and the names of the members so chosen and of the chairman shall be read to them.

61. That after hearing the said names the parties present shall be directed to withdraw, and the general committee may proceed to choose another committee to try the next petition appointed for that day, and so on until all the committees appointed to be chosen on that day are chosen, or until the choosing of any committee is adjourned as aforesaid; and after any such adjournment the general committee shall not transact any more business on that day, except with regard to those petitions for trying which committees have been previously chosen.

62. That within half an hour at furthest from the time when the parties to any election petition have withdrawn, or if the parties to any other election petition be then before the general committee of elections, then, after such other parties have withdrawn, the parties in attendance shall be again called before the general committee in the same order in which they were directed to withdraw; and the petitioners and sitting member, or such party as may have been admitted to defend the return or election, or their agents, beginning on the part of the petitioners, may object to all or any of the members chosen, or to the chairman, as being then disqualified or excused for any of the reasons aforesaid from serving on the committee for the trial of that election petition, but not for any other reason.

63. That if at the least four members then present of the general committee be satisfied that any member so objected to is then disqualified or excused for any of the reasons aforesaid, the parties present shall be again directed to withdraw, and the general committee shall proceed to choose from the same panel another committee to try that petition; or if the member to whom any such objection is substantiated be the chairman, they shall send back his name to the members on the chairmen's panel, and the members on the chairmen's panel shall proceed to choose another chairman to try that petition, and shall communicate his name to the general committee, and so as often as the case requires.

64. That in the second or any following committee the general committee may, if they think fit, include any of the members previously chosen by them to whom no objection has been substantiated; and no party shall be allowed to object to any member included in the second or any following committee who was not objected to when included in the committee first chosen.

65. That when four members and a chairman have been chosen, to none of whom any objection has been substantiated, the clerk of the general committee of elections shall give notice in writing to each of the members so chosen; and with every such notice shall be sent a notice of the grounds of disqualification and excuse from serving, and of the time and place when and where the general committee will meet on the following day; and notice of the time and place of such meeting shall be published with the votes.

66. That the general committee shall meet on the following day at the time and place mentioned; and if any such member then and there prove, to the satisfaction of at least four members then present of the general committee, that for any of the reasons aforesaid he is disqualified or excused from serving on the committee for which he has been so chosen, or if any such member prove, to the satisfaction of at least four members then present of the general committee, that there are any circumstances in his case which render him ineligible to serve on such select committee, such circumstances having regard solely to the impartial character of the tribunal, the general committee shall proceed to choose a new committee to try that petition, as if that member had been objected to by any party to the petition; and if within one quarter of an hour after the time mentioned in the notice no member so appear, or if any member so appearing do not prove his disqualification or excuse, to the satisfaction of at least four members then present of the general committee, the select committee shall be taken to be appointed.

67. That at the meeting of the House of Commons for the despatch of business next after any such select committee has been appointed the general committee of elections shall

report to the house the names of the select committee appointed, and shall annex to such report all petitions referred to them by the house which relate to the return or election of which such select committee is appointed to try the merits, and all lists of voters which shall have been delivered to them by either party, and such report shall be published with the votes.

68. That at or before 4 o'clock on the next day on which the house meets for the despatch of business after such report the five members chosen to be the select committee shall attend in their places, and shall before departing the house be sworn at the table by the clerk well and truly to try the matter of the petitions referred to them, and a true judgment to give according to the evidence, and shall be taken to be a select committee legally appointed to try and determine the merits of the return or election so referred to them, and the legality of such appointment shall not be called in question on any ground whatever; and the member so appointed from the chairman's panel shall be the chairman of such committee; and they shall not depart the house until the time for the meeting of such committee is fixed by the house.

69. That if any member of the said select committee do not attend in his place within one hour after 4 o'clock on the day appointed for swearing the said committee (provided the house sits so long, or if not, then within the like time on the following day of sitting,) or if, after attending, any member depart the house before the said committee is sworn, unless the committee be discharged, or the swearing of the said committee be adjourned, he shall be ordered to be taken into the custody of the serjeant at arms for such neglect of his duty, and shall be punished or censured, at the discretion of the house, unless it appear, by fact specially stated, and verified upon oath, that such member was by a sudden accident or by necessity prevented from attending.

70. That if any such absent member be not brought into the house within three hours after 4 o'clock on the day first appointed for swearing the said committee (provided the house sits so long, or if not, then within the like time on the following day of sitting,) and if no sufficient cause be shown whereon the house dispenses with the attendance of such absent member, the swearing of the committee shall be adjourned to the next meeting of the house; and all the members of the said committee shall be bound to attend in their places, for the purpose of being sworn, on the day of the next meeting of the house, in like manner as on the day first appointed for that purpose.

71. That if on the day to which the swearing of the said committee is so adjourned all the members of the committee do not attend, and be sworn, within one hour after 4 o'clock (provided the house sits so long, or if not, then within the like time of the following day of sitting,) or if on the day first appointed for swearing the said committee sufficient cause be shown to the house before its rising why the attendance of any member of the committee should be dispensed with, the said committee shall be taken to be discharged; and the general committee shall meet on the following day, or if such following day happen during an adjournment of the house, then on the day to which the house stands adjourned, and shall proceed to choose a new committee from the panel on service for the time being, in the manner hereinbefore provided, and notice of such meeting shall be published with the votes.

72. That the house shall refer the petitions and lists annexed to the report of the general committee of elections to the select committee so appointed and sworn, and shall order the said select committee to meet at a certain time, within 24 hours of their being sworn at the table of the house, unless a *Sunday*, *Christmas day*, or *Good Friday*, intervene; and the place of their meeting shall be some convenient room or place adjacent to the House of Commons.

73. That every such select committee shall meet at the time and place appointed for that purpose, and shall proceed to try the merits of the election petition so referred to them, and they shall sit from day to day, *Sunday*, *Christmas day*, and *Good Friday* only excepted, and shall never adjourn for a longer time than 24 hours, unless a *Sunday*, *Christmas day*, or *Good Friday* intervene, and in such case not

more than 24 hours, exclusive of such *Sunday*, *Christmas day*, or *Good Friday*, without leave from the house, upon motion, and special cause assigned; and if the house be sitting at the time to which such select committee is adjourned, then the business of the house shall be stayed, and a motion shall be made for a further adjournment for any time to be fixed by the house: provided that if such select committee have occasion to apply or report to the house, and the house be then adjourned for more than 24 hours, such select committee may also adjourn to the day appointed for the meeting of the house.

74. That no evidence shall be given before the select committee, or before any commission issued by such committee, against the validity of any vote not included in one of the lists of voters delivered to the general committee, or upon any head of objection to any voter included in any such list other than one of the heads specified against him in such list.

75. That no member of any such select committee shall absent himself from the same without leave from the house, or an excuse allowed by the house at the next sitting thereof, for the cause of sickness, verified upon the oath of his medical attendant, or for other special cause shown upon oath, and in every such case the member to whom such leave is granted or excuse allowed shall be discharged from attending, and shall not be entitled again to sit or vote on such committee: and such select committee shall never sit until all the members to whom such leave has not been granted, nor excuse allowed, are met; and in case all such members do not meet within an hour after the time appointed for the first meeting of such committee, or within an hour after the time to which such committee has been adjourned, a further adjournment shall be made, and reported to the house by their chairman, with the cause thereof.

76. That every member whose absence without leave or excuse is so reported shall be directed to attend the house at its next sitting, and shall then be ordered to be taken into the custody of the serjeant at arms, and shall be punished or censured, at the discretion of the house, unless it appear, by facts stated, and verified upon oath, that such member was by a sudden accident or by necessity prevented from attending the said select committee.

77. That an election committee shall not be dissolved by reason of the death or necessary absence of one or two members thereof only, but the remaining members shall thereupon constitute the committee; and if there ever be occasion for electing a new chairman on the death or necessary absence of the chairman, the remaining members of the committee shall elect one of themselves to be chairman, and if in that election there be an equal number of votes the member whose name stands foremost in the list of the committee as reported to the house shall have a casting vote.

78. That if the number of members able to attend any such select committee be, by death or otherwise, reduced to less than three, and so continue for the space of three days, such select committee shall be dissolved (except in the case herein-after provided,) and another shall be appointed to try the petition referred to such committee; and the general committee and members of the chairman's panel shall meet for that purpose as soon as conveniently may be after the occasion arises, at a day and hour to be appointed by the general committee, and notice of such meeting shall be published with the votes; and all the proceedings of such former committee shall be void and of no effect: provided, that if all the parties before the committee consent, the two remaining members of the committee, or the sole remaining member if only one, shall continue to act, and shall thereupon constitute the committee.

79. That whenever any such select committee thinks it necessary to deliberate among themselves upon any question arising in the course of the trial, or upon the determination thereof, or upon any resolution concerning the matter of the petition referred to them, as soon as they have heard the evidence and counsel on both sides relative thereto, the room where they sit shall be cleared, if they think proper, whilst the members of the committee consider thereof.

80. That all questions before the committee, if for the time being consisting of more than one member, shall be decided by a majority of voices; and whenever the voices

are equal the chairman shall have a casting voice; and no member of the committee shall be allowed to refrain from voting on any question on which the committee is divided.

81. That whenever the select committee is divided upon any question, the names of the members voting in the affirmative and in the negative shall be entered in the minutes of the said committee, and shall be reported to the house, with the questions on which such divisions arose, at the same time with the final report of the committee.

82. That every such committee shall be attended by a short-hand writer, appointed by the clerk of the House of Commons, and sworn by the chairman truly to take down the evidence, and from day to day, as occasion requires, to write or cause the same to be written in words at length.

83. That every such select committee may send for persons, papers, and records, and may examine any person who has subscribed the petition which such select committee are appointed to try, unless it otherwise appear to such committee that such person is an interested witness, and they shall examine all the witnesses who come before them upon oath, which oath the clerk attending such select committee may administer; and if any person summoned by such select committee, or by the warrant of the Speaker, (which warrants the Speaker may issue as he thinks fit,) disobey such summons, or if any witness before such select committee give false evidence or prevaricate, or otherwise misbehave in giving or refusing to give evidence, the chairman of such select committee, may at any time during the course of their proceedings report the same to the house for the interposition of the authority or censure of the house, and may, by a warrant under his hand directed to the serjeant at arms, or to his deputy or deputies, commit such person (not being a peer of the realm or lord of parliament) to the custody of the said serjeant, without bail or mainprize, for any time not exceeding 24 hours, if the house be then sitting, and if not, then for a time not exceeding 24 hours after the hour at which the house stands adjourned.

84. That where in this act anything is required to be verified on oath to the House of Commons, the clerk of the House of Commons may administer an oath for that purpose, or an affidavit for such purpose may be sworn before any justice of the peace or master of the high Court of Chancery.

85. That every person who wilfully gives false evidence before the House of Commons, or before any election committee, or before the examiner of recognisances or taxing officer of the House of Commons, under the provisions of this act, or who wilfully swears falsely in any affidavit shall, on conviction thereof, be liable to the penalties of wilful and corrupt perjury.

86. That every such select committee shall try the merits of the return or election complained of in the election petition referred to them, and shall determine by a majority of voices, whether the sitting members or either of them, or any and what other person, were duly returned or elected, or whether the election be void, or whether a new writ ought to issue, which determination shall be final between the parties; and the house, on being informed thereof, shall order such report to be entered in their journals, and shall give directions for confirming or altering the return, or for ordering a return to be made, or for issuing a writ for a new election, or for carrying the said determination into execution.

87. That if any such select committee come to any resolution other than the determination above mentioned, they shall, if they think proper, report the same to the house, and the house may confirm or disagree with such resolution, and make such orders thereon as to them seems proper.

88. That if the parliament be prorogued after the appointment of any select committee for the trial of any election petition, and before they have reported their determination thereon, such committee shall not be dissolved by such prorogation, but shall be thereby adjourned till 12 o'clock on the day immediately following that on which parliament meets again for the despatch of business (*Sunday, Good Friday, and Christmas day, always excepted;*) and all proceedings of such committee and of any commission to take evidence issued under the authority of such committee shall be of the same force and effect as if parliament had not been

so prorogued; and such committee shall meet on the day and hour to which it is so adjourned, and shall thenceforward continue to sit from day to day, until they have reported to the house their determination on the merits of such petition.

89. That whenever any committee appointed to try an election petition reports to the house that such petition was frivolous or vexatious, the parties, (if any,) who have appeared before the committee in opposition to such petition, shall be entitled to recover from the persons, or any of them who signed such petition, the full costs and expenses which such parties have incurred in opposing the same, such costs and expenses to be ascertained in the manner herein-after directed.

90. That whenever such committee reports to the house that the opposition made to any such petition by any party appearing before them was frivolous or vexatious, the persons who signed such petition shall be entitled to recover from the party with respect to whom such report is made the full costs and expenses which such petitioners have incurred, such costs and expenses to be ascertained in the manner herein-after directed.

91. That whenever no party has appeared before any such committee in opposition to such petition, and such committee reports to the house that the election or return, on the omission or insufficiency of a return complained of in such petition, was vexatious or corrupt, the persons who signed such petition shall be entitled to recover from the sitting members (if any) whose election or return is complained of in such petition (such sitting members not having given notice of their intention not to defend the same,) or from any other persons admitted by the house to oppose such petition, the full costs and expenses incurred in prosecuting the petition, such costs and expenses to be ascertained in the manner herein-after directed.

92. That if any ground of objection be stated against any voter in any list of voters intended to be objected to, and if such select committee be of opinion that such objection was frivolous or vexatious, they shall report the same to the House of Commons, together with the other matters relating to the said petition, and the opposite party shall in such case be entitled to recover from the party on whose behalf any such objections were made the full costs and expenses incurred by reason of such frivolous or vexatious objections, such costs and expenses to be ascertained in the manner herein-after directed.

93. That if either party make before the said select committee any specific allegation with regard to the conduct of the other party or his agent, and either bring no evidence, or such evidence that the committee is of opinion that such allegation was made without any reasonable or probable ground, the committee may make such orders for the payment, by the party making such unfounded allegation, to the other party, of all costs and expenses incurred by reason of such unfounded allegation, such costs and expenses to be ascertained in the manner herein-after directed.

94. That the costs and expenses adjudged by any such select committee to be paid, or which otherwise may become payable, under the provisions of this act or the said recited act of the 8th Vic., to any party prosecuting or opposing or preparing to oppose any election petition, or to any witness summoned to attend before any committee, under the provisions of this or the said recited act, shall be ascertained in manner following; (that is to say,) on application made to the Speaker of the House of Commons by any petitioner, party, or witness, for ascertaining such costs and expenses, not later than three calendar months after the determination of the merits of such petition, or after any order of the house for discharging the order of reference of such petition, to the general committee of elections, or after the withdrawal of any petition as herein-before provided, the Speaker shall direct the same to be taxed by the examiner of recognisances or by the taxing officer of the House of Commons; and the said examiner or taxing officer shall examine and tax such costs and expenses, and shall report the amount thereof, together with the name of the party liable to pay the same, and the name of the party entitled to receive the same, to the Speaker, who shall, upon application made to him, deliver to the party a certificate, signed by himself, expressing the

amount of the costs and expenses allowed in such report, with the name of the party liable to pay the same, and the name of the party entitled to receive the same; and such certificate so signed by the Speaker shall be conclusive evidence for all purposes whatever as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof; and the party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same.

95. That the examiner of recognizances or the said taxing officer may examine upon oath any party claiming any such costs or expenses, and any witnesses tendered to him for examination, and may receive affidavits sworn before him, or before any master of the high Court of Chancery, or any Justice of the peace, relative to such costs or expenses.

96. That the party entitled to such taxed costs and expenses, or his or her executors or administrators, may demand the whole amount, so certified, from any one or more of the persons liable to the payment thereof, and in case of nonpayment thereof, on demand, may recover the same by action of debt in any of Her Majesty's courts of record at Westminster or Dublin or in the court of session in Scotland, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum mentioned in the said certificate; and the said plaintiff shall, upon filing the said declaration, together with the said certificate and an affidavit of such demand, be at liberty to sign judgment as for want of plea by nil dicit, and take out execution for the said sum so mentioned in the said certificate, together with the costs of the said action, according to due course of law; provided that the validity of such certificate (the handwriting of the Speaker thereunto being duly verified) shall not be called in question in any court.

97. That in every case any person from whom the amount of such costs and expenses have been so recovered may recover in like manner from the other persons, or any of them (if such there be) who are liable to the payment of the same costs and expenses, a proportionate share thereof, according to the extent of the liability of each person.

98. That if any person having subscribed an election petition presented under this act, or under the said recited act of the 8th Vict., neglect or refuse, for the space of seven days after demand, to pay to any witness summoned on his behalf before any committee under the provisions of this or the said act the sum so certified by the Speaker, under the authority of this or the said act, to be due to such witness, or if such petitioner neglect or refuse, for the space of six months after demand, to pay to any party opposing the said petition the sum so certified by the Speaker to be due to such party for his costs and expenses, and if such neglect or refusal be, within one year after the granting of such certificate, proved to the Speaker's satisfaction, by affidavit sworn before any master of the high Court of Chancery (and such master is hereby authorized to administer such oath, and is authorized and required to certify such affidavit under his hand,) in every such case every person who has entered into a recognizance relating to such petition under the provisions of this or the said recited act shall be held to have made default in his said recognizance, and the Speaker of the House of Commons shall thereupon certify such recognizance into the Court of Exchequer in England if the person who entered into such recognizance reside in England, or into the Court of Exchequer in Ireland if such person reside in Ireland, or into the Court of Exchequer in Scotland if such person reside in Scotland, and shall also certify that such person has made default therein, and such certificate shall be conclusive evidence of the validity of such recognizance and of such default; and the recognizance, being so certified, if the person who entered into such recognizance reside in England, shall be delivered by the clerk or one of the clerks assistant of the House of Commons into the hands of the Lord Chief Baron or one of the barons of the Court of Exchequer in England, or of some officer appointed by the court to receive the same, or if such person reside in Ireland or Scotland shall be transmitted through the post, in manner herein-after mentioned, to the Chief Baron of the

Court of Exchequer in Ireland, or to one of the judges of the court of session discharging for the time the powers and duties of the Court of Exchequer in Scotland, as the case may require, and in every such case such delivery or transmission of such recognizance shall have the same effect as if the same were estreated from a court of law, and the validity of such certificate (the handwriting of the Speaker thereunto being duly verified) shall not be called in question in the said court.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6, FLEET-STREET, in the Parish of St. Andrew, and published at 13, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, April 23, 1849.

THE Irish Jurist

No. 27.—VOL. I.

MAY 5, 1849.

Price {Per Annum, £1 10s.
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DUBLIN, MAY 5, 1849.

On Thursday, the 26th of April, Lord John Russell introduced his plan for an amended Poor Law. On the same night, the Solicitor-general for England an amended Encumbered Estates bill, also a bill for conversion of leases for lives renewable for ever into *fee-farms*; and intimated that it was the intention of government next session to introduce a measure with respect to judgments—the effect of which will be, we apprehend, to repeal portions of the 3 & 4 Vic. c. 105, and make judgments no longer a charge upon land. He hinted also that it was in contemplation to improve the system of registration in this country.

Important measures all. Last year we were so inured to revolutions in the political world, that there is now no amount of legal revolution that we cannot contemplate with fortitude, if not with calmness. And are we not tried? We are threatened with the extinction of three-fourths of the business of the Court of Chancery, and with it the annihilation of our own.

We do not, however, acquiesce in these gloomy anticipations. Moments of depression may arrive in the legal as in the mercantile world; but, if our profession be necessary and useful to the public, we shall survive these periods of distress.

At the moment we write, when the hands of the Court of Chancery are full, we believe there never was a time when the scale of remuneration was less. The terms on which our leading men do business here, would amaze our brethren in London; and with the return of prosperity, *oh quando dies veniet*, will return a different class of business. It is a mistake to suppose that the distress of the country is beneficial to lawyers, and equally a mistake that the Courts of Equity will fall into disuse if the country prosper;—it is, in point of fact, then that they come into most active and beneficial operation.

But however much or little the interests of the legal professions may be concerned, the consideration of them is utterly unimportant, when compared with the effect that may be produced upon the country.

With the experience of the Incumbered Estates Act of last session before our eyes—our predictions of its failure now admitted on all hands—we may be excused for pausing before we come to a conclusion as to the likelihood of the new measure having a very extended operation.

It was judicious in the extreme of the Premier to let it follow as a supplementary statement of the poor law; for except the dread of indefinite poor law pressure be removed, there will be no purchasers. The certainty of the rate never exceeding a certain limit—if there were no rate in aid, a subject still left in the dark—will give to the new measure a chance of success, which its cumbrous predecessor had not, and a good harvest would give it a greater one. It will be conceded, that for the operations of barter, buyers are essential, and they have been much more wanted than legislation. We do not depreciate the effect of the latter, but the former is indispensable; and however sound legislation may invite the buyer, his zest for the bargain will be contingent on the quality of the article for sale. We anticipate more benefit from a sound system of poor laws, than from a temporary Commission. When we take away the glare and glitter of novelty, we shall find this Government Commission will be little more than the Court of Chancery, going, if it goes at all, a little quicker. The chief utility which we anticipate, as its lasting result, will be that it will be found it is possible to abridge the time now consumed by solicitors, and a precedent for celerity may be established. We earnestly hope that safety may not be sacrificed to speed.

The chief proposed excellence of the bill is the gift of a parliamentary title. We know that to the public generally, and, no doubt justly, an infeasible title on a skin of parchment presents a

powerful inducement to purchase, and the present position of a portion of the country does justify strong measures to unsettle property, and by the aid of a new tribunal, to free land from its load of incumbrances. We do not object to the principle, but we conceive the legislature imposes upon the proposed Commissioners a task of greater difficulty than is generally imagined, if they seek to do this effectually and justly. As we understand the statement of the Solicitor-general, he proposes not merely to sell the lands, but at once to distribute the purchase-money. For this object the Commissioners will have the power to make and vary rules. On those rules hinge the fate of the measure; on them it stands or falls. The legislature shifts the whole difficulty on a tribunal the offspring of to-day, to die to-morrow, with no further appeal than to the judicial committee of the privy council.

The rules will just be tested, when the period of their dissolution has arrived; either the Commission will merge into the Court of Chancery, or the Court of Chancery into the Commission.

The fact is this; after the statement of Sir Robert Peel, ministers found they could rest no longer on the *laissez-faire* system, and they bring in a bill with a disingenuous disavowal of its real originator, and a flimsy story of its having been suggested by the idea of a West India Commission. It has not the merit of originality, nor has it the boldness of Sir Robert Peel's plan. It leaves its use to choice, and we question much whether it will not be disused. If Sir Robert's idea had been carried out, there was a power of doing a great national benefit. The Government took possession of a province bought with Government money, and distributed it as they thought best. The present Bill falls short; it leaves to the choice of owner and incumbrancer the resort to the new measure, and establishes a new, untried tribunal, necessarily more arbitrary than the Court of Chancery, for the adjudication of questions of property, priority, and legal rights.

And this court is vested with the most unconstitutional power—that of determining the right of appeal to the judicial committee. In other words a tribunal is appointed not only to *try*, but to determine whether the *trial* is to be absolutely conclusive and irreversible. Except the force of public opinion can be brought to bear on the Commissioners, the veto thus given them is the most arbitrary conceivable. A most wholesome check given by our happy constitution was a right of appeal *ex debito iustitiæ*; that right kept judges in awe, gave security to the suitor, and we regret exceedingly to observe any precedent for its abridgement.

Such extensive prospects were held out by the first act for the sale of Incumbered Estates, that, taught by the experience of its failure, our readers will think it but wise, if we caution them against forming exaggerated ideas of the present. Its success will depend on so many causes—the character and capacity of the Commissioners—their orders—the confidence that their proceedings will inspire—the enactment of an improved poor law—the cessation of the potato disease—the inducements held out to capitalists—the forbearance or harshness of creditors—the desire of the owner to

part or to retain—and the innumerable extrinsic causes which legislation cannot provide for, and yet which sway the land market.

Legislation of this extraordinary character presupposes the bankruptcy of the property to be sold; and, if such be the fact—as it unquestionably is in many instances—it is well worthy of consideration, whether all creditors should not, in this land bankruptcy, be levelled, as they are in cases of traders; or, as a nearer approximation to justice, that the prior incumbrancer should suffer an *ad valorem* abatement calculated by the value of the land when the investment was made, and its value when sold.

When the inheritor dealt with the incumbrancer, he had, in many instances, a sufficient, if not a superabundant security; the combined effects of famine and legislation have reduced one-half the value of his lands. Is it equitable that all this loss should fall on the pious, and none on the prior creditor? Nay, further, is it just that it should all fall on the inheritor? Most certainly, debt has drawn on him a heavy punishment; severely does he suffer for his own sins, or, what is much more likely, for the sins of his forefathers. By recent legislation, a blow is struck at the fixity of property. "Ancient nobility is an honourable thing, which hath stood the waves and the weathers of time." The feudal principle had grown up as a sentiment which had long obtained, and was long cherished. The tendency of legislation since Peter Thelluson's time, has been to offer facilities to unsettle, and the design is now "to give currency to land."

We do not deprecate the attempt; we think it necessary that incumbered properties should be emancipated; but we wish to guard against an emancipation which is regardless of all vested rights, and all settled principles.

We cannot close this article without adverting to the fact, that all legislative activity for Ireland is entrusted in the House of Commons, to English lawyers. Time was, when Irish lawyers introduced measures affecting the laws of Ireland. Time was, when the British senate was adorned by the eloquence and the learning of members of the Irish Bar—time was, when every Irish government insisted on, at least, one law officer of the Crown being a member of the House of Commons; but now, *now avons changés tout cela*, though never since the Union was there a greater necessity for Irish legislators. The Solicitor General for England introduces, and ably introduces, we admit, a measure deeply affecting the real property of Ireland; the English Attorney General defends the Irish Attorney General, for his system of retrenchment in crown prosecutions, a system by which briefs were put into the hands of counsel when the prisoner was arraigned, and when, without time for preparation, they were expected to prosecute.

We care not of what party he may be, but we are satisfied there is no Irish lawyer, with a spark of professional feeling, who does not feel it a discredit and a disgrace that we have no legal representative on the ministerial side of the House, in times and crises such as these.

A PLAN for the more effectual relief of the destitute poor in Ireland has at length been proposed, on the responsibility of her Majesty's Government. The Poor-law of 1837, so tenaciously clung to despite of the remonstrances of every one having any knowledge of Irish affairs, has at length been acknowledged as unequal to the difficulties of the present crisis. The Prime Minister, having in vain sought for advice from a convention of the Irish Members, has plagiarised some confiscatory ideas from the plan of Sir Robert Peel, and, mingling these with notions of his own, has produced a measure which contemplates the *advantage* of getting rid of incumbered proprietors, without the least regard to the terms on which they may be deprived of their estates, or to the extent to which their sale may satisfy the claims of incumbrancers.

That a nominal landlord, who is unable to perform the duties which properly attach to the owners of land, should be compellable to give place to others who can perform those duties, is a principle which we have always advocated; but, that a landlord should be compelled to part with his estate, at the depreciated value to which the mismanagement of the Government of the country for the last three years has reduced it, we consider in the utmost degree inequitable. Many proprietors, who have done the utmost that could be done, to alleviate the condition of their tenantry, and to raise the value of their estates, will, by this enactment, be literally beggared; and incumbrancers, who lent their money but a few years since on unquestionable security, will, in many cases, find that the proceeds of the sale will not reach their claims, and because the Government would persist in applying to a pauperized country a principle which might profitably be applied to a rich and prosperous one.

We can understand that a rich proprietary might be induced or compelled to provide profitable employment for able-bodied paupers, by being taxed for their support; but we cannot understand, how the taxation of pauper proprietors could lead to any such beneficial result. That the Government should not undertake the employment of a pauper population, but, should use means to induce or compel owners of land to employ them, as a general principle, we admit; but we assert, that general rules should not be applied in cases where there is no possibility of their success—supporting a population in idleness, at the expense of a ruined proprietary, to compel them to employ that population—is one of these cases. That this principle is at length deserted, is apparent from the introduction of a *maximum* with regard to the rate, on separate divisions and unions—one of the most important alterations proposed in the present bill. When a Government deserts a principle, it should not be forgotten that some consideration is due to those interests which have been injured—nay, in some instances, destroyed—by the adoption of and perseverance in it.

Late, as the proposition of a *maximum* has come, we hail it as an alteration of great importance and value, not so much, however, to the interests of the present proprietors, as the distressed unions (who

will find 7s. 6d. in the £1, in many instances a tax beyond their ability to pay) as to the interests of incoming proprietors or farmers. These men will make their purchases, or adjust their rents with a full knowledge of the amount of taxation to which they will be liable; and in these instances, as far as they are concerned, it will be as if there were no poor rate whatever—they will either allow for the poor rate in the purchase-money, or in the rent; so that in either case the whole weight will fall on the present proprietor. However, this limitation may (and does seem calculated to) have the effect of inducing capitalists to speculate in land—and this, even on such terms, it is of great importance to encourage.

We do not know on what principle to account for the next proposition of the Premier, namely, that the Poor Law Commissioners shall have the power to settle the past liabilities of certain electoral divisions. If the poor rate be a primary charge on property, and if a judgment can be obtained to enforce the payment of it, we do not see why, in every instance, the proprietor should not be made to pay; nor do we see why, with justice, arrears should be remitted to one proprietor, when another proprietor has been held liable. The latter proprietor might, with as much justice, demand that his money should be refunded to him, as the former expect that his arrears should be remitted; besides, this provision rewards the non-paying proprietor, and would no doubt encourage a similar course of conduct. With regard to persons who are not owners, the same reasoning applies; their interests are worth something, and if the poor rate can be collected in no other way, these interests should be sold. A tenant will scarcely be allowed to hold a farm without paying rent, and if he can pay rent, his non-payment of the poor rate should be no reason for striking off the arrear. Waste, untenanted lands are not in a very different position; they too are worth something—at least worth the amount of poor rate due on them; and when it is remembered that each "settlement of past liabilities" increases the rate to which the property of the industrious farmer or owner will be liable, it is clearly only justice to this useful class, that property, whether in the occupation of owners, of farmers, or waste, should be held liable for rates which other property in the division or union, has been compelled to pay.

The avowed object of the confiscatory part of this bill, is, that by the introduction of men with capital and enterprise in the room of the present proprietors, employment may be afforded to the able-bodied poor, who may thus be enabled to earn their own subsistence. The same object, avowedly, is aimed at by the reduction in size of electoral divisions and unions, thus rendering it possible that the exertions of a few improving proprietors should sensibly affect the amount of poor-rate. We find some difficulty in reconciling these avowals with the statement of the Premier, "that it would not be useful to make a farther division of unions, unless, at the same time, some provision were made for new work-houses." If the Premier has any confidence in his own plan, he should contemplate such a reduction in the present extent of pauperism as

would render the present work-house accommodation amply sufficient. From what we have seen, heard, and read on the subject of work-houses, we consider them most objectionable institutions—destructive to the morality and self-dependence of their inmates—confining large masses of poor, only to expose them to the ravages of fever or cholera. Far from wishing for the multiplication of work-houses—we would very sincerely rejoice in the diminution of their number. Lord John, however, seems to contemplate the permanent establishment of pauperism, and recommends the diminution of the size of unions rather, as affording facilities for a more convenient distribution of the paupers, by increasing the number of poor-houses, than as supplying anything in the way of stimulus to the exertions of proprietors.

We accept that part of the bill which proposes to render jointures and rent-charges by way of life annuities, liable for poor-rate, as a promise of a change in the principle of taxation. We cannot assent to the proposition, that any person, in consequence of possessing a peculiar species of property, should be allowed to plead an exemption from contribution for the support of the poor.

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A BILL INTITULED AN ACT FOR CONVERTING THE RENEWABLE LEASEHOLD TENURE OF LANDS IN IRELAND INTO A TENURE IN FEE.

Whereas many lands in Ireland are held under leases and under-leases respectively, with covenants for perpetual renewal, and great expense is constantly incurred in procuring renewals under such covenants, and much litigation and inconvenience arise from such tenures; and it is expedient that such tenures should be converted, in manner herein-after provided, into tenures and fee, and that, except as herein excepted, all leases and under-leases of lands in Ireland, with covenants for perpetual renewal, granted or made after the passing of this act, should operate and take effect in manner herein-after mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that where lands in Ireland are held under any lease in perpetuity, the owner of such lease in perpetuity, at any time after the passing of this act, and whether the time for renewal has or has not arrived, may require the owner of the reversion to execute a grant, according to the provisions of this act, of the lands comprised in such lease; and the owner of the reversion, upon being so required as aforesaid, shall execute a grant to the owner of such lease of an estate of inheritance in fee simple in such lands, subject to a perpetual yearly fee-farm rent, of such amount as herein-after mentioned, to be charged upon such lands, and to be payable on the same days and times as the yearly rent made payable by such lease, and subject to the like covenants and conditions for securing the payment of such fee-farm rent as are contained in such lease,

with respect to the rent thereby reserved, and with and subject to such other covenants, conditions, exceptions and reservations (save covenants to grant or to accept and take a renewal of such lease and such covenants, conditions, exceptions, and reservations as may be commuted as herein-after mentioned) as are contained in such lease, and then subsisting; and where lands in Ireland are held under any under-lease in perpetuity of any degree of tenure, the owner of such under-lease, at any time after the passing of this act, and whether the time for renewal has or has not arrived, may require the owner of the lease or under-lease in perpetuity out of which such first-mentioned under-lease is derived, or the owner of the estate of inheritance which may have been granted in respect of the lease or under-lease, out of which such first-mentioned under-lease is derived, to execute a grant according to the provisions of this act, of the lands comprised in such first-mentioned under-lease, and the owner so required, shall thereupon execute a grant to the owner of such under-lease of an estate of inheritance in fee simple in such lands, subject to a perpetual yearly fee-farm rent, of such amount as herein-after mentioned, to be charged upon such lands, and to be payable on the same days and times as the yearly rent made payable by such under-lease, and subject to the like covenants and conditions for securing such fee-farm rent, as are contained in such under-lease with respect to the rent thereby reserved, and subject to such other covenants, conditions, exceptions, and reservations (save covenants to grant, or to accept and take a renewal of such lease, and such covenants, conditions, exceptions and reservations as are commuted as herein-after mentioned) as are contained in such under-lease, and then subsisting; and upon the delivery of every such grant as aforesaid, to the owner requiring the same, he shall execute and deliver to the owner executing such grant, a counterpart thereof; and every such grant and counterpart shall be prepared by the owner by whom the grant is made, and the expense of the preparation and execution of such grant and counterpart shall be paid by the owner to whom the grant is made: provided always, that the owner required to make any such grant as aforesaid, shall not be obliged to execute such grant until, where the time for renewal of the lease or under-lease by the owner of which the grant is required has not arrived, all such arrears or sums, if any, of or in respect of rent as, if the time had arrived for renewal of such lease or under-lease, and a bill had been filed for the renewal thereof, would have been required by a Court of Equity to be paid on such renewal, and where the time for renewal of such lease or under-lease has arrived, or where there has not been a renewal of such lease or under-lease at or after the time at which the same might have been last renewed according to the covenant for renewal, all such arrears or sums, if any, of or in respect of rent, and, also, all such fines and fees, if any, such interest as would have been required by a Court of Equity to be paid on renewal of such lease or under-lease, are paid; provided also, that no owner required to execute any such grant as aforesaid shall be obliged to execute such grant where the

right of renewal is lost both at law and in equity ; and where any owner required to execute any such grant as aforesaid, disputes the right of the party requiring such grant, to require the execution of such grant, such owner shall, within one calendar month after he is so required as aforesaid, serve on the person by whom such grant has been required, a notice in writing, stating that the right to require such grant is disputed, and the grounds on which such right is so disputed.

II. And be it enacted, that the fee-farm rent to be made payable by every such grant as aforesaid, shall, when the lease or under-lease (as the case may be) to the owner of which the grant is made renewable without fine, or upon payment of a peppercorn or other merely nominal fine of like nature, be of the like amount as the yearly rent made payable by such lease or under-lease, and shall, where such lease or under-lease is renewable upon payment of a fine or fines not merely nominal, be of and amount equal to the aggregate amount of the yearly rent made payable by such lease or under-lease, and the value of the renewal fine or fines and fees (if any), such value to be estimated or computed with regard to the probable duration of the subsisting term, the average duration of life, and the respective periods for renewal, but without regard to, and exclusively of any penal rents or sums made payable upon neglect, delay, or refusal to apply for or take renewal, and to be ascertained as herein-after mentioned, if the parties differ about the same.

III. And be it enacted, that where any subsisting exception or reservation contained in the lease or under-lease in perpetuity, by the owner of which a grant is required as aforesaid, or any right under covenant, or otherwise annexed or belonging to the reversion or estate, from the owner of which a grant is required, interferes with the proper cultivation of the lands comprised in such lease or under-lease, the owner of such lease or under-lease requiring such grant as aforesaid may (if he think fit) require that such exception, reservation, or right should cease, wholly or partially, and in such case the grant shall be modified accordingly, and the fee-farm rent to be made payable by such grant shall be increased by such an amount as is equivalent to the value of such exception, reservation, or right, in so far as it is made to cease as aforesaid, such amount to be ascertained in manner herein-after mentioned, in case the parties differ about the same.

IV. Provided always, and be it enacted, that where any right to timber, timber trees, woods, underwood, or underground woods, turbaries, mines, minerals, quarries, or royalties, whether under express exception or reservation contained in the lease or under-lease in perpetuity or otherwise, is annexed to or belongs to the reversion or estate from the owner of which a grant is required, it shall not be lawful for the owner of the lease or under-lease in perpetuity requiring the grant to require that such right should cease, either wholly or partially, but in every such case the owner of the reversion or estate from the owner of which the grant is required and the owner of the lease or under-lease requiring the grant may agree that such right should cease or

pass under the grant, either wholly or partially, and in such case the grant shall be modified accordingly, and the yearly fee-farm rent to be made payable by such grant shall be increased by such an amount as is equivalent to the value of such right, so far as it is made to cease or pass as aforesaid.

V. And be it enacted, that, where the owner required to execute such grant as aforesaid, and the owner requiring the same shall so agree, a part of the lands comprised in the lease or under-lease by the owner of which such grant is required, and not comprised in any inferior under-lease in perpetuity, may be allocated in fee simple in lieu of the fee-farm rent which would have been made payable by such grant or of any portion thereof, or such fee-farm rent, or any portion thereof, in lieu of which land is not allocated as aforesaid, may be made payable out of any sufficient part only, to be specified in the grant, of the lands comprised in such lease or under-lease, and the residue of the lands shall be discharged therefrom ; and where land is allocated as aforesaid, the same shall, by the same grant, be conveyed or surrendered by the owner of the lease or under-lease to the owner to whom the fee-farm rent in lieu of which or of a portion of which the same is allocated would have been payable.

VI. And be it enacted, that from and after the execution of such grant to the owner of a lease in perpetuity, or to the owner of an under-lease in perpetuity, as aforesaid, such grant shall, where such grant is made to the owner of a lease in perpetuity, bind all persons interested in the reversion and in such lease, and all persons bound by such lease, and such reversion shall be converted into an estate of inheritance in fee simple in the fee-farm rent made payable by such grant, and the conditions, exceptions, and reservations therein contained, and all rights annexed or belonging to such reversion, saved by and not commuted under this act ; and such grant shall, where such grant is made to the owner of an under-lease in perpetuity, bind all persons interested in the lease or superior under-lease, or the estate of inheritance granted in respect thereof by the owner of which the grant is made, and in the under-lease to the owner of which the grant is made, all persons bound by such under-lease ; and the estate held under such lease or superior under-lease, or such estate of inheritance as aforesaid, shall be converted into an estate of inheritance in fee simple in the fee-farm rent made payable by such grant, and the conditions, exceptions, and reservations therein contained, and all rights annexed or belonging to the estate by the owner of which such grant is made, saved by and not commuted under this act ; and each such estate of inheritance in fee simple as aforesaid shall be transmissible and descendible in like manner as if the same were an estate of inheritance in fee simple in reversion in the lands, on which the fee-farm rent is charged by the grant creating the same, having incident thereto the conditions, exceptions and reservations contained in the same grant, and such rights respectively as aforesaid ; and the estate of inheritance created under every such grant as aforesaid in the lands comprised therein, save any part thereof allocated in lieu of a fee-farm rent or any portion thereof under the provision herein contained, and the estate of inheritance so created as

aforesaid in the fee-farm rent made payable by such grant, and in any land so allocated as aforesaid, shall from and after the execution of such grant be respectively vested in the same persons, for the same estates and interests, and be respectively subject to the same uses, trusts, provisos, agreements, and declarations, and be respectively charged with and subject to the same charges, liens, judgments, incumbrances, and equities, as the estate held under the lease or under-lease in perpetuity to the owner of which the grant is made, and the reversion or estate by the owner of which the grant is made, were respectively vested in, subject to, and charged with immediately before their conversion into such respective estates of inheritance as aforesaid was effected, or as near thereto as the different nature of the estates and the circumstances of each case will admit; but all land allocated as aforesaid shall remain subject to all demises and tenancies inferior in tenure to the lease or under-lease by the owner of which such land may have been so allocated.

VII. And be it enacted, that the conversion of any estate under this act shall not prevent or prejudice the operation of any devise, bequest, or testamentary appointment, made before such conversion of such estate, or any interest therein, but such devise, bequest, or testamentary appointment shall operate upon the estate or interest created or acquired under this act, as fully and effectually, to all intents and purposes whatever, as the same would have operated upon the respective estate or interest previously subsisting if no such conversion had taken place.

VIII. And be it enacted, that no conversion under this act of any estate shall operate to give dower or curtesy to the widow or husband of any person becoming entitled under this act to an estate of inheritance, in any case where the estate converted would not have been liable to dower or curtesy, and such widow or husband was married to such person before such conversion, or to defeat or affect any rights of lords of manors, or of owners of reversions in fee simple, to escheats, fairs, markets, franchises, rights, liberties, privileges of chase or free warren, hunting, hawking, fowling, piscaries, fisheries and rights of fishing, or any rights in any mines or minerals, quarries, or royalties within or under the lands included in any estate converted under this act, save in so far as the same may be commuted under this act.

IX. And be it enacted, that all covenants by law implied on the part of the landlord or tenant upon any lease or under-lease in perpetuity to the owner of which a grant is made under this act shall be implied upon such grant, and every covenant for payment of rent, and every other covenant contained in pursuance of this act in any such grant aforesaid, in substitution for a like covenant in the lease or under-lease to the owner of which such grant is made, where such last mentioned covenant is of such a nature as that the burden thereof doth by law run with the land, and bind the assignee of such lease or under lease, and every covenant implied under this act upon any such grant where the burden of the implied covenant for which the same is in substitution was upon the owner of such lease or under-lease, shall run with the estate in fee sim-

ple into which the estate held under such lease or under-lease is converted under this act, and the owner or assignee for the time being of such estate in fee simple shall be chargeable upon such covenants in the same manner and to the same extent as if he were owner or assignee of the term or interest created by such lease or under-lease, and such term or interest, and the estate out of which such lease or under-lease was derived, were still subsisting, and the benefit of such covenants shall run with the estate into which such estate is converted under this act, and the owner or assignee for the time being of the estate created by such conversion shall have the full benefit of such covenants, and be entitled to maintain actions thereon; and every covenant contained in pursuance of this act in any such grant as aforesaid, in substitution for a like covenant in such lease or under-lease as aforesaid, where such last mentioned covenant is of such a nature as that the burden thereof doth by law run with the estate out of which such lease or under-lease was derived, or bind the assignee of such estate, and every covenant implied under this act upon any such grant where the burden of the implied covenant, for which the same is in substitution was upon the owner of the estate out of which such lease or under-lease was derived, shall run with the estate into which such estate is converted under this act; and the owner or assignee for the time being of the estate created by such conversion shall be chargeable upon such covenants in the same manner and to the same extent as if he were owner or assignee of such estate so converted, and such estate and lease or under-lease were still subsisting, and the benefit of such covenants shall run with the estate in fee simple into which the estate held under such lease or under-lease is converted under this act, and the owner or assignee for the time being of such estate in fee-simple shall have the full benefit of such covenants, and be entitled to maintain actions thereon.

X. And be it enacted, that where the estate held under any lease or under-lease in perpetuity is converted under this act into an estate of inheritance in fee simple, and such estate was immediately before such conversion subject to any subsisting under-lease or demise at will, or for any greater interest, the fee simple into which such estate is so converted shall be the reversion immediately expectant upon such under-lease or demise, and the rents and services reserved and made payable upon such under-lease or demise shall be incident and annexed to such reversion, and the covenants and agreements, whether express or implied, on the part both of the landlord and the tenant, shall run with the land and with the reversion respectively in the same manner in all respects and to the same extent as if such under-lease or demise had been made by a person seized in fee simple in possession, and the estate in fee simple created by such conversion as aforesaid had been the reversion expectant upon such under-lease or demise; and such conversion shall not prejudice or affect any right of distress, entry, or action which has accrued in respect of such under-lease or demise before such conversion.

XI. Provided always, and be it enacted, that no

grant made by the owner of any lease or under-lease in perpetuity under this act shall prejudice or affect the rights of the owner of the reversion, or of any lease or under-lease superior in tenure, or of the estates into which they may be respectively converted under this act, but all owners, under-lessees, and occupiers for the time being of any land shall have the like rights and equities to be discharged of and indemnified against fee-farm rents created under this act as such owners and occupiers respectively would have had in respect of the rents incident to the several reversions or estates converted into such respective fee-farm rents; and the owners for the time being of all fee-farm rents created under this act shall be subject to and charged with the like liabilities, and shall have the like rights and equities to indemnify and to be indemnified in respect of such fee-farm rents respectively, as they would have been subject to, and would have had in respect of the reversions or estates which have been converted into such respective fee-farm rents, in case this act had not been passed.

XII. And be it enacted, that where the owner of any under lease in perpetuity is entitled to require the owner of the lease or superior under-lease out of which such first-mentioned under lease is derived to procure a renewal of such lease or superior under-lease, the owner of such first-mentioned under-lease may, at the time of requiring the owner of such lease or superior under-lease to execute to him a grant under this act, and whether the time for the renewal of such lease or superior under-lease has or has not arrived, also require the owner thereof to procure a like grant to be made to such owner by the owner from whom he is entitled under this act to require such grant; and where a grant has been made under this act to the owner of an under-lease in perpetuity entitled to require the owner of the lease or superior under-lease in perpetuity out of which such first-mentioned under-lease was derived, to procure a renewal of such lease or superior under-lease, and the owner to whom such grant has been made has not at the time of requiring such grant required the owner of such lease or superior under-lease to procure a like grant to be made to such owner, and such grant has not in fact been made to such owner, the owner of the estate into which the estate under such first-mentioned under-lease has been converted shall, at the time when he might if such last-mentioned estate had not been converted have required the owner of such lease or superior under-lease to procure a renewal thereof, be in like manner entitled to require such owner to procure a grant to be made to him under this act.

XIII. And be it enacted, that where any lands comprised in a lease or under-lease to the owner of which a grant is made under this act of an estate of inheritance are comprised in an under-lease in perpetuity to the owner of which the owner of such lease or first-mentioned under-lease has previously made a like grant in such lands, such first-mentioned grant shall operate to supply or feed the grant so previously made and each like grant (if any) previously made by the owner of each inferior under-lease in perpetuity in the same lands, or any part thereof, between which and the secondly before-mentioned under-lease there is no intermediate under-lease in perpetuity subsisting.

XIV. And be it enacted, that where any fee-farm rent shall be charged upon any lands by any grant made under this act, the acquisition of a part of such lands by the person entitled to such fee-farm rent, whether such acquisition shall be by descent, by purchase, or by escheat, shall operate so as to extinguish only a proportionate part of the rent to which such person shall be entitled, and the remaining part of such rent shall be recoverable out of the residue of such lands in the same manner as the whole rent would have been recoverable if such acquisition had not been made; and in such case such fee-farm rent shall be apportioned by the agreement of the persons interested, and in default thereof, according to the relative amounts of the value of the land so acquired and the value of the residue of such lands, in the same manner as rent-service is now by law apportionable upon an alienation of the reversion in part of the lands.

XV. And be it enacted, that where the owner of any reversion, lease, under-lease, or estate is a minor, idiot, lunatic, feme covert, or is not within the United Kingdom, the guardian, trustee, committee of the estate, husband, or attorney respectively of such owner shall for the purpose of this act be substituted in the place of such owner, and shall and may execute such grants and counterparts, make such agreements, and do all such other acts which such owner, if not under disability or out of the United Kingdom, should and might have executed, made, and done, under this act.

XVI. And be it enacted, that where any fee-farm rent made payable by any grant under this act is greater in amount than the rent reserved by the lease or under-lease in perpetuity to the owner of which such grant is made, the party paying such rent shall be entitled to deduct from the party receiving the same the proper poundage in respect of poor's rate from the portion of such rent which by virtue of this act is added to the amount of rent previously payable.

XVII. And be it enacted, that nothing in this act contained shall be deemed to affect or alter the existing liability of any party or parties, or of any estate or interest in respect of the payment or deduction of rent-charge in lieu of tithe.

XVIII. And be it enacted that the fee-farm rent made payable by any grant under this act, or by any grant made after the passing of this act, shall be recoverable by distress, ejectment for nonpayment of rent, action of debt, covenant, and all other ways, means, remedies, actions, suits, or otherwise, by which rent-service reserved on any common lease or demise for a life or lives is or may be by law recoverable; and all the enactments relating to ejectment for nonpayment of rent, distress, or other remedies for the recovering thereof, shall apply to every such fee-farm rent as aforesaid, as fully and effectually as if the same were rent-service reserved on a lease for a life or lives; and in proceedings by ejectment for nonpayment of such fee-farm rent under the statutes for the time being in force in Ireland in relation to ejectment for nonpayment of rent made applicable under this act to such fee-farm rent as aforesaid, the receipt of such fee-farm rent for three years by the lessor of the plaintiff, or any person or persons through whom he claims, shall have the same force and

effect as a similar receipt of rent-service reserved on any lease for life or lives would have in proceedings by ejectment for nonpayment of such rent under such statutes; and in avowing or making cognizance for any such fee-farm rent in any action of replevin in respect of a distress for such rent, it shall be sufficient for the person avowing or making cognizance to avow or make cognizance generally, that the lands or place on which such distress was made, or from which such distress was fraudulently removed, (as the case may be,) were or was at the time the rent distrained for accrued and still are or is held under a grant made under or after the passing of this act, and that a certain sum or portion of the said rent was in arrear and unpaid, and that the person avowing, or in whose right cognizance is made in respect of the said rent, is the person entitled thereto, without further setting forth such grant, or the title of such avowant or person in whose right such cognizance is made to such fee-farm rent; and in proceeding by action of debt or covenant for nonpayment of the fee-farm rent made payable by any such grant as aforesaid, or non-performance of any of the covenants contained in such grant, or in any other action or proceeding in relation thereto, it shall be sufficient for the plaintiff, or person entitled to fee-farm rent, to set forth in the declaration, or other pleading the grant, and, where the case shall require, the covenants, the non-performance of which he complains of, and aver that the said plaintiff or other person is the person entitled to the fee-farm rent reserved or made payable by such grant; and, where the case may require, interested in the performance of such covenants, without setting forth or deducing his title thereto; and in such actions of replevin, debt, or covenant, or other proceeding founded on such grant as aforesaid, proof that the said plaintiff or other person, or any person or persons through whom he claims, has or have been in the possession or in the receipt of such fee-farm rent for three years, shall be sufficient evidence of the title of the plaintiff or other person thereto, as in cases of ejectment for non-payment of rent under the statutes in force in relation thereto; and if in any such action of ejectment as aforesaid, judgment be given for the plaintiff, and execution executed, or if any entry be made in respect to such fee-farm rent as aforesaid, or by virtue of any condition for re-entry contained in any such grant as aforesaid, then the estate in the lands acquired under such judgment and execution, or by such entry, shall be of the like nature, and shall be subject to the same or the like uses, trusts, charges, liens, equities, rights, and incumbrances, as if such judgment and execution or such entry had been in respect of an estate in reversion, and of a rent or a condition, as the case may be, incident thereto, and such estate in reversion had stood limited to the same uses and trusts, and subject to the same charges, liens, equities, rights, and incumbrances, to which such fee-farm rent stood limited or subject.

(To be continued.)

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Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by **THOMAS ISAAC WHITE**, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by **EDWARD JOHNSTON MILLIKEN**, residing at the same place, all being in the County of the City of Dublin. Saturday, May 5, 1840.

THE Irish Jurist

No. 28.—VOL. I.

MAY 12, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, MAY 12, 1849.

To provide a remedy for an inconvenience in the state of the law, which frequently inflicted injury and loss on both landlord and tenant, the 9 & 10 Vic. c. 111, was enacted.

The inconvenience we allude to, arose from the tenant having six months after the execution of an *habere* in an ejectment for non-payment of rent, during which—on payment of the amount due for rent and costs—he could redeem his interest. During these six months the landlord was placed in much difficulty as to the profitable management of his lands, as he was reduced to the necessity either of occupying the farm himself, or of putting a tenant into it, whom, in the event of the former tenant redeeming, he might find much difficulty in removing; and the tenant, whom a temporary embarrassment might have prevented from meeting his engagements, was dislodged from his farm at a time when his superintendence might have been of the utmost importance. Thus the tenant was sometimes ruined by being deprived of the possession of a farm, which was often found of very questionable value to the landlord.

The act under consideration is calculated to remedy these inconveniences. By the 8th section of it, the landlord is enabled to permit a tenant, against whom he has succeeded in ejectment, to hold his farm until the time allowed him for redemption is on the point of expiring, without prejudice to the right of obtaining immediate possession under the *habere*, at the moment when complete and permanent dominion over the land is restored to the landlord.

The provisions of the 8th section are applicable wherever the sheriff, his bailiff, or officer, is executing any writ of *habere* in any action of ejectment, or any civil bill decree for the recovery of the possession of lands and tenements; and the

extension of these provisions to other cases besides ejectments for non-payment of rent (which class of ejectments alone are contemplated in the other sections of the act) has introduced another element, which may sometimes keep the landlord out of possession of his land for a longer time than he expected or intended.

This new element is thus introduced—a landlord obtaining an *habere* in an ejectment on the title, is in a very different position from a landlord obtaining one in an ejectment for non-payment of rent; in the latter case the tenant has a clear right to regain possession on certain conditions; in the former, there is nothing which the tenant can do which will so entitle him—his continuance or non-continuance in the occupation of the farm, is entirely at the option of the landlord. If the landlord allow him to remain in possession after the execution of the *habere*, under the provisions of this act, he is clearly a tenant at will, in the strictest sense of the word, and acquires that uncertainty of tenure which entitles him, if he sow the land, and is put out before he reaps the crop, to have that crop, and free entry, egress, and regress to cut and carry it away, because he knew not at what time the lessor would enter; except, indeed, the statute break in on the principle of the common law.

That this principle of the common law should be upheld at the same time that the provisions of this statute should be carried out, seems to be the opinion of the Court of Queen's Bench, as expressed in their decision in the case of *Lessee Knox v. Gildea*, alluded to by us in a former number, and reported in the 11 Irish Law and Equity Reports, page 198, where the order to renew the *habere* was made absolute, but with a stay of execution until the 1st of November, distinctly on the ground that in the interval that had elapsed, the tenant might have cropped the land. However, though we admire the solicitude with which the Court regarded the interests of occupying tenants, in this instance

the reason was not sufficient to satisfy us that the order should not be made absolute without any stay of execution. That the tenants *had* cropped the lands would have been (in our opinion) a good cause why execution should have been stayed, to enable them to reap the profits of their industry; but that they *might* have done so, seems hardly sufficient. It appears further, that they had been served with the conditional order, and it might fairly be inferred, that if they had cause to shew, they would not have neglected doing so—that they *might* have cropped their lands, was a good reason for insisting on the service of the conditional order, but no reason for refusing to render it absolute unconditionally, on proof of service, if no cause were shewn.

But, to return—there are two distinct classes of cases to which the provisions of this 8th section apply; namely, cases where tenants under ejectment for non-payment of rent are permitted to remain in occupation for the time during which the law gives them the right of redemption; and cases where a landlord chooses to permit a tenant, ejected on the title, to remain in possession. These two classes differ completely in the circumstances connected with them, and we are prepared for a difference in the rules made by the court, according as a case brought under their notice belongs to one class or to the other. In cases of ejectment for non-payment of rent, the tenant must be supposed to know whether he is about to redeem or not, and will regulate the management of his farm accordingly. In these cases, we are prepared to find the courts—as the six months allowed for redemption are about expiring—renewing *haberes*, and putting landlords into immediate possession without besitation. In cases of ejectment on the title—as the tenant cannot know what the landlord's intention may be—we are, on the contrary, prepared to find the courts making diligent inquiry, as to whether the tenant has been induced, by the indulgence of the landlord, to crop his land, and, in that case, preventing a landlord from taking advantage of the exertions which a tenant might be induced to make in consequence of such indulgence.

We consider the provisions of the 8th section so salutary in their application to the cases of ejectment for non-payment of rent, that we should be glad that they were not only optional, but compulsory. We can easily imagine circumstances where great and unnecessary injury would be occasioned by the landlord refusing to permit under-tenants to continue in occupation of their holdings during the six months allowed for redemption, in the event of the interest being ultimately redeemed.

We can imagine a temporary embarrassment occasioning the non-payment of rent, proceedings in ejectment taken, and an *habere* obtained by the landlord, who refuses to permit the under-tenants to remain in occupation, according to the provisions of the statute; we can imagine a thousand complicated arrangements existing between the mesne landlord and the under-tenants. The superior landlord has it in his power to disturb all these, and to persevere in this disturbance during six months. Supposing the redemption is not

effected till the last moment, and on the supposition that it is effected then, the intermediate disturbance and injury would have been ~~clearly unnecessary~~. All parties would have been put to inconvenience, even the landlord, without advantage to any.

Other sections of this Act contain important amendments in the law as to ejectment for non-payment of rent. It is reasonable that the tenant should have accurate information as to the amount of rent claimed, as well as the amount claimed for costs, in order to his providing for their payment. The provisions also for staying proceedings, at almost every step in the suit, on payment of the amount due and costs incurred up to that period, are of some importance to the holders of land.

DURING the past week, a decision was made by the Court of Exchequer, in the case of *Brady v. Rotheram*, (not yet reported,) as to the effect of a lodgment of money, in discharge of the action, after writ and before declaration. This was the first occasion such a question has been mooted, and the decision of the Court is one which, we apprehend, will have a very considerable influence on the practice of lodging money in discharge of the action, and of changing the venue on the common affidavit.

The action was trover, and after the service of the writ, and before the declaration was filed, the defendant lodged a sum of money in court, and moved on the common affidavit to change the venue. This application was answered by an undertaking to give material evidence in the county where the venue was laid, (the county of the city of Dublin.) At the trial before the Lord Chief Baron, the only material evidence was the defendant's rule on lodging the money. The Chief Baron having refused to non-suit, the plaintiff had a verdict, and the question came before the Court on a motion to change that verdict into a non-suit.

For the defendant, it was contended, that as the lodgment was before declaration, it could not be taken as an admission of a cause of action not disclosed; that it would inflict much hardship on a defendant, who, on being served with a writ indorsed with the amount of debt and costs, as is required in actions *ex contractu*, and being willing to admit a debt of that character, was then to be declared against in trover, and his admission of the former cause of action, used as an admission of the latter. The answer was, that in this case the defendant had acquiesced in the form of action in which he was sued. The Court decided that the lodgment of the money must, in every case, be taken to be an admission of the demand, and consequently, was material evidence. And during the progress of the argument, suggested that, if a defendant, intending to lodge money to one demand, were surprised by a different one being laid in the declaration, it would be competent for him to apply to the Court for liberty to withdraw the money lodged.

This decision is carrying the effect of an admission by the lodgment further than that given it by the Courts at Westminster, the inclination of the later decisions appearing to be rather in favour of

a diminution of its effect. (See Taylor on Evidence, 558, et seq.) This is the only case now on record, in which the lodgment was before declaration; but in future it will, perhaps, be the most advisable period, as, if the plaintiff take the money in discharge, the defendant will be liable merely to the costs of the writ. If the plaintiff goes on, and does not recover more than the sum lodged, according to the decision of the Court of Queen's Bench, in *Kershaw v. Lindsay*, (1, Ir. Jur. 31), the defendant will be entitled to the whole costs; and if the defendant feel himself aggrieved, by any misapprehension as to the nature of the demand in the writ, and that subsequently made in the declaration, he can adopt the suggestion alluded to as having fallen from the Court. Though there is, we believe, no precedent for such a motion, such a one is absolutely necessary to protect a defendant from the inconvenience he would be otherwise subjected to by this decision. On the other hand, the defendant must recollect, that by lodging the money at this period, he deprives himself of the power of changing the venue, except on special grounds.

(Continued from p. 208.)

XIX. And be it enacted, that if in any action or ejectment brought on account of the non-payment of any fee-farm rent made payable by any such grant as aforesaid, pursuant to the statutes for the time being in force in Ireland as to the actions of ejectment for non-payment of rent, judgment be given for the plaintiff, and execution executed, and the person who has made default in payment of the rent, or the person who but for such ejectment would for the time being have been the party to make the payment from time to time thereafter becoming due, do not, within six calendar months from the time of such execution executed, do such acts or take such proceedings as are or may be by law necessary for the redemption of the lands from the said judgment and execution (all which acts and proceedings he is hereby authorized to do and take in the same manner and with the same effect to all intents and purposes as if he were the tenant or lessee of the person causing such ejectment to be brought), then and in every such case it shall be lawful for the owner of or any person having an estate or interest in any fee-farm rent made payable by any such grant as aforesaid out of the whole or any part of such lands, or for the owner of or any person having an estate or interest in the lands out of which such fee-farm rent is payable, or any part thereof, within nine calendar months after such execution executed, to do such acts and take such proceedings for the redemption of the said lands from the said judgment and execution, and for obtaining relief in respect of the same, as under the statutes last aforesaid, any mortgages of a lease might do or take for the redemption of such lease, or his estate or interest therein, from any judgment and execution in any action of ejectment for non-payment of rent pursuant to such statutes, and for obtaining relief in respect of the same; and any redemption made pursuant to such statutes shall operate so as to restore all estates and interests in rents, or in lands which

shall have been defeated by the entry or ejectment; and when such redemption as last aforesaid has been made, or when any such redemption has been made under the statutes aforesaid, by any mortgagee or any other person, which redemption he is hereby authorised to make, all sums of money paid or advanced on account thereof, and the costs thereof, shall be, and be deemed a lien and charge in favour of the person paying the same, his executors or administrators, not only upon the estate or interests of the person making such default aforesaid, but upon all the inheritance in which such estate or interest is subsisting, in priority to all other interests or charges whatever upon such inheritance, save and except any charges created under the acts relating to the drainage of lands, or to the improvement of lands in Ireland; and such sums of money and costs shall also be recoverable by the person paying the same from the person who has made such default, or his representatives, in, and by an action of debt; and all sums of money paid and costs incurred in respect of such lien, or charge by any person damnified thereby, shall also be recoverable by such person, from the person who has made default, or his representatives, in manner aforesaid; and it shall be lawful for any person, having the benefit of such lien or charge, or damnified thereby as aforesaid, to apply by petition in a summary way to the Court of Chancery, or Court of Exchequer at the Equity side thereof, for the appointment of a receiver over such estate, interest, or inheritance, and which receiver it shall be lawful for said court respectively to appoint, and to continue until all such sums of money and costs, with interest, and the costs of such petition, and of the proceedings thereunder, are fully paid and discharged, and to make such order in reference to such petition, as to such courts respectively may seem fit.

XX. And be it enacted, that where the owner of any lease or under-lease in perpetuity of any degree of tenure, of lands in Ireland, has required a grant under this act, and the owner of the reversion, lease or superior under-lease, or estate, from whom such grant has been required, disputes the right to such grant, or in case such owners shall differ as to what covenants, conditions, exceptions, or reservations shall be contained in such grant, or what exceptions, reservations, or rights should be commuted, or otherwise, as to the terms or conditions of such grant or the amount of fee-farm rent to be made payable thereunder, or in case the owner of the reversion, superior lease, under-lease, or estate, who might be required to execute a grant under this act be a minor, idiot, lunatic, feme covert or not within the United Kingdom, and there be no guardian, committee of the estate, husband, attorney, respectively, of such owner competent to act under the provision herein-before contained, or there is or are any arrears of rent, fine or fines, or fees, which under this act might be required to be paid before the execution of a grant under this act, and the owner required to execute such grant, has refused to accept payment thereof, or there is no person to whom the same can properly be paid, or it is not known to whom the same ought to be paid,

it shall be lawful for the owner of the lease or under-lease in perpetuity, who has required such grant, or would be entitled to require the same, as the case may be, to apply to the Court of Chancery in Ireland, or Court of Exchequer in Ireland, on the equity side thereof, in a summary way by petition praying that a grant may be executed to him under this act, or that it may be declared what covenants, conditions, exceptions or reservations should be contained in such grant, or that any such exceptions, reservations, or rights, as aforesaid, may be commuted, or that the terms or conditions of such grant may be settled, or that the amount of the fee-farm rent may be determined, or such other relief as shall be applicable to the case; and every such petition shall be intituled "In the Matter of the Renewable Leasehold Conversion Act," *ex parte* the person who presents such petition, and shall state the date and names of the parties to whom, and the short contents of the lease or under-lease in respect of which the same is presented, and of the last renewal thereof, with the name of the lands, and the parish, barony, and county in which the same are situate, and the nature and extent of the estate or interest of the petitioner in such lease or under-lease, and shall, where the right of the petitioner to a renewal of such lease or under-lease is disputed, state that such a right is disputed, and shall state such other matters as the circumstances of the case may require; and every such petition shall be verified by the affidavit of the person by whom the same is presented, or of his solicitor, attorney, or agent, or otherwise as the court shall consider sufficient, and in all cases under this act the reversion, lease, and under-lease respectively shall be sufficiently represented by the respective owners thereof, and it shall not be necessary to bring before the court any other parties interested in such reversion, lease, and under-lease respectively unless in special cases the court shall otherwise direct.

XXI. And be it enacted, that where such petition as aforesaid is presented in respect of a lease or under-lease the right to a renewal of which is disputed such petition shall be heard by the court, and the court may upon hearing determine the right to such renewal, or retain the petition until such right be established on a bill filed or other proper proceeding taken for such purpose, or may refer the said matter of such petition to the Master or Remembrancer, or make such other order in the matter of such petition as the court may think fit; and such petition shall, days before the hearing thereof, be served by or on behalf of the party presenting the same on the owner of the reversion, lease, under-lease, or estate from the owner whereof the grant under this act was required; and where such petition is presented in respect of a lease or under-lease the right to a renewal of which is not disputed, it shall be in the discretion of the court either to make an order for hearing thereon, or else *ex parte* to make an order referring the matter of such petition to the Master or Remembrancer.

XXII. And be it enacted, that where the matter of any such petition as aforesaid is referred to the Master or Remembrancer, either upon the hearing

or *ex parte*, such Master or Remembrancer shall thereupon proceed to inquire into the matter of such petition, and shall require notice, in such form as he may think fit, of such petition and of the rule or order thereon, and of a time and place for the parties to appear before him, to be served upon the owner of the reversion, lease, under-lease, or estate from the owner whereof the grant under this act was or might be required, or in case such owner be under disability or out of the United Kingdom, and there be no guardian, committee, husband, or attorney, competent to act for such owner under the provision hereinbefore contained, then the Master or Remembrancer may require such substituted service as he may think fit of such notice as aforesaid; and at the time and place fixed by such notice the Master or Remembrancer shall proceed to inquire and ascertain whether the petition is presented by a person entitled to require a grant under the provisions of this act of an estate of inheritance in the lands comprised in the lease or under-lease in perpetuity in respect of which such petition is presented, and in case he so find he shall proceed to ascertain the amount of the fee-farm rent to be made payable by such grant, and to settle the terms and conditions of such grant, in case the parties differ about the same or the nature of the petition shall so require, and when the owner from whom a grant might be required is under disability, and there is no guardian, committee, husband, or attorney as aforesaid of such owner, shall nominate a person to be substituted for the purposes of this act in all proceedings under such petition as aforesaid in the place of such owner; and where there is any arrear or sum of or in respect of rent, or any fine or fines, or fees, which under this act might be required to be paid before the execution of a grant under this act, and the owner required to execute such grant has refused to accept payment thereof, or there is no person to whom the same can properly be paid, or it is not known to whom the same ought to be paid, the Master or Remembrancer shall require the full amount of such arrear or sum of or in respect of rent, and of such fine or fines, with interest thereon, and of such fees, to be lodged, under a special direction of the Master or Remembrancer, in the Bank of Ireland, in the matter of such petition, with the privy of the Accountant-General of the Court, for the use of the party specified in such direction; and the fact of such payment, and the cause or reason of the previous nonpayment of the amount so paid, and the facts relating thereto, shall be stated by the Master or Remembrancer specially in his report.

XXIII. And be it enacted, that the Master or Remembrancer shall make his report in relation to the matter of such petition, and such report shall state the application to the court, and the result of his inquiries and proceedings under the reference, and where the petitioner is entitled to a grant such report shall refer to the draft of the grant as settled or approved by such Master or Remembrancer, and shall state by whom such grant and the counterpart thereof should be executed, or should have been executed if not under disability or out of the United Kingdom, and shall state all such other matters as

to the Master or Remembrancer may seem expedient for carrying into due execution the provisions of this act.

XXIV. And be it enacted, that after the Master or Remembrancer has made his report, notice of the filing of such report shall be served by or on behalf of the petitioner on the party on whom notice of the petition is required to be served; and at any time before the expiration of the next ensuing term after such service it shall be lawful for the petitioner or the party so served, or any other person interested in the matter of the petition or report (such other person first obtaining, on an *ex parte* motion, the leave of the court so to apply,) to apply to the court by motion on notice to the opposite party, or where the application is by any such other person as aforesaid, on notice to both parties to the proceedings under the petition, and to such other persons (if any) as the court may, on such *ex parte* application as aforesaid, have directed, to set aside such report, or to vary or amend the same in any particulars specified in such notice of motion; and thereupon it shall be lawful for the court to make such order in relation to the matters aforesaid as the court may think fit; and the court, if it so think fit, may, upon the hearing of any such motion, either wholly confirm such report, or vary or amend the same in the particulars mentioned in such notice, or in any other particulars, and confirm the same, with such variations or amendments; and in case no such application be made to the court within such time as aforesaid, such report may and shall be confirmed according to the course and practice of the court.

XXV. And be it enacted, that it shall be lawful for the court, upon the hearing of any such motion, made on notice as aforesaid, or upon any application made after the confirmation of the Report, where it may see fit so to do, on account of the disability, absence, or refusal of any person by whom the grant or counterpart respectively should be executed, to order that such grant or counterpart, as the case may be, be executed by the Master or Remembrancer; and every grant and counterpart respectively so executed shall have the same force and effect as if the same had been executed by the owner of the reversion, lease, superior under-lease, or estate, or lease, under-lease, or inferior under-lease, as the case may be, on account of whom the same is so executed by the Master or Remembrancer.

XXVI. And be it enacted, that it shall be lawful for the owner of an under-lease in perpetuity immediately derived out of a lease in perpetuity, where such owner is entitled to require the owner of the lease in perpetuity to procure the renewal thereof, and whether the time for renewal of such lease or under-lease has or has not arrived, to apply to the Court of Chancery, or to the Court of Exchequer at the Equity side thereof, by petition, in manner herein-before mentioned, praying that a grant may be executed to the owner of such under-lease under this act, and also praying that a like grant may be made by the owner of the reversion to and accepted by the owner of such lease in perpetuity; and praying such other relief as may be applicable to the case; and it shall be lawful for the owner of an inferior under-lease in perpetuity entitled to require

the owner of the immediately superior under-lease in perpetuity to procure a renewal thereof, and whether the time for the renewal of such inferior under-lease or of any under-lease superior thereto or of the lease in perpetuity has or has not arrived, to apply by petition as aforesaid, praying that a grant may be executed to such first-mentioned owner under this act, and also praying that the like grant or grants (as the case may require) may be made to and accepted by the owner of the immediately superior under-lease in perpetuity, and to and by the owner of each under-lease in perpetuity (if any) superior to such under-lease (where such owner is under the like obligation to the owner of the immediately inferior under-lease in perpetuity to procure renewal, and to and by the owner of the lease in perpetuity where such owner is under the like obligation to the owner of the immediately under-lease in perpetuity to procure renewal) from the owner or respective owners from whom a grant or grants might be required under this act by such respective owners as aforesaid, and praying all such other relief in relation to such grant or grants as may be applicable to the case; and upon such petition being presented it shall be in the discretion of the court to make an order for hearing thereon, or, *ex parte*, to make an order referring the matter of such petition to the Master or Remembrancer; and all such inquiries, directions, orders, and proceedings shall and may be made, given, and taken in relation to the several grants prayed for by such petition as if such grants had been prayed for by the owners to whom such grants are thereby prayed to be made; and all the provisions herein contained in relation to the proceedings by and before the Master or Remembrancer, his report, and the execution by him of a grant or counterpart upon or after a reference to such Master or Remembrancer under a petition presented under the provision herein-before contained, shall extend and be applicable to a reference to the Master or Remembrancer, under a petition presented under this provision; and where there is any arrear or sum of or in respect of rent, or any fine or fines, or fees, which under this act might be required to be paid before the execution of a grant under this act, and the owner to whom such grant should be made neglects or refuses to pay the same within such time as the Master or Remembrancer or the court may appoint, it shall be lawful for any person interested in the lands to be comprised in the grant or in any fee-farm rent to be made payable out of such lands or any part thereof, and who shall be in this behalf authorised by the Master or Remembrancer or the Court to pay such arrear or sum of or in respect of rent, and such fine or fines, with interest thereon, and such fees; and all sums so paid, and the costs (if any) incurred in relation to such payment, shall be deemed a like lien and charge in favour of the person praying the same, his executors or administrators, and with the like priority as herein-before provided in the case of money paid on account of the redemption of lands from a judgment and execution in ejectment, and the costs of such redemption, subject only to the priority given to the charge and lien created in respect of such money and costs as last aforesaid, and all sums of money

paid under this provision and the costs in relation to such payment, shall also be recoverable by all the like ways and means, with the costs of the proceedings for recovery thereof, as money paid for such redemption as aforesaid and the costs thereof are under the provision herein-before contained recoverable.

XXVII. And be it enacted, that all persons who shall become parties to any proceedings under this act, by making any application to the court, or by submitting to the jurisdiction thereof, or by attending before the Master or Remembrancer in the course of such proceedings, or by otherwise taking part therein, and the representatives of the petitioner, and of all such persons, and all persons claiming under him or them by their act or by act of law subsequent to their becoming subject, shall for the purposes of this act be subject to the jurisdiction of the court, and to all orders of the court and of the Master or Remembrancer in the course of any such proceedings in like manner and as fully as parties to a cause pending in the court are so subject in such cause.

XXVIII. And be it enacted, that in order to enable the Master or Remembrancer to ascertain such particulars as it may be necessary for him to ascertain upon any reference to him under this act, he shall be at liberty to examine upon oath the party who has presented any petition, and to inquire by affidavit and by examination of witnesses, and by other evidence, respecting any of the matters referred to him; and the owner of any lease or under-lease respecting which any inquiry is made as herein-before directed shall, when thereto required by the Master or Remembrancer, produce such lease or under-lease, and all other deeds or instruments under or by virtue of which such owner holds the lands respecting which such inquiry is made, and shall produce and furnish such proof or information as the Master or Remembrancer requires as to the rent, fine or fines, and fees (if any) payable under such lease or under-lease, and as to the existence and the age of the person or persons upon whose life or lives (if any) such lease or under-lease depends, and as to the rent, fines, interest, and fees (if any) which have become due or payable.

XXIX. And be it enacted, that whenever any notice required to be given by this act, or which is required or necessary for carrying into effect any of the provisions of this act, cannot be given or delivered to the person to or for whom such notice is directed or intended, it shall be sufficient for the person obliged to give such notice to leave the same at the last known or most usual place of abode of the person to or for whom such notice is directed or intended, with an inmate of such place of abode aged sixteen years or upwards, if such place of abode be within Ireland, and if the same be not within Ireland, then to serve such notice on the agent or attorney of such person, or the receiver of the rents of his estate, and if such agent, attorney, or receiver cannot be discovered, then it shall be sufficient service of such notice to publish the same at least once in each week, in two successive weeks, by advertisement in the *Dublin Gazette* and in two newspapers published in Dublin, and in one newspaper circulating in the county in which the lands to which the

notice relates or the greater part thereof are situate, and also to give such notice to any principal occupier of any of such lands, or, if the Master or Remembrancer so direct, to send such notice by the post to the last known address of the party on whom the same shall be required to be served, within such period as to admit of its being delivered within the period prescribed, if any, for such notice to be given, or to serve such notice on such person and in such manner as the Master or Remembrancer directs.

XXX. And be it enacted, that the proceeding under this act shall abate or be suspended by any death or transmission of interest, except so far as it shall be deemed necessary for the carrying on of such proceedings that any person not before the court should have notice of or be required to attend such proceedings; and in case of death or transmission of interest, and wherever, after the presentation of a petition under this act, the direction of the court is requisite for carrying on the proceedings under the same, or for effecting the objects thereof, or otherwise relative thereto, it shall be lawful for any person interested in such proceedings to apply to the court for an order for any such purpose, and it shall be lawful for the court to make such order on any such application as it may see fit.

XXXI. And be it enacted, that the costs of all proceedings by and under any petition presented under this act shall be in the discretion of the court.

XXXII. And be it enacted, that all the provisions of this act in relation to the amount of the fee-farm rent to be made payable by a grant under this act, and the covenants, conditions, exceptions, and reservations to be contained in such grant, the commutation of exceptions, reservations, and rights, the allocation of land, and all other provisions of this act concerning such grant and the effect and consequences thereof, shall, so far as the same are consistent with the provisions of this act in relation to the proceedings by and under and consequential upon a petition presented under this act, extend and be applicable to every such grant for or in relation to which a petition is presented.

XXXIII. And be it enacted, for the purposes of this act every person seized of or entitled at law or in equity to the reversion expectant on any lease in perpetuity as tenant in fee simple or in fee tail, general or special, or as tenant in dower or by the curtesy, or for life or lives, or for years determinable on a life or lives, or for a term of years absolute of which forty years or more are unexpired at the time of the application for a grant under this act, and also every feoffee or trustee (for charitable or other purposes whatsoever) of any such reversion as aforesaid, for any such estate or interest therein as aforesaid, (whether such estate or interest be or not determinable upon the execution or fulfilment of any trusts,) who is in the actual receipt of the rent reserved by any lease in perpetuity, and every executor or administrator who in that capacity, or as a special occupant of an estate pour autre vie, or as being entitled to an estate pour autre vie under any statute or otherwise, is in such receipt as aforesaid, and also any archbishop, bishop, parson, or other ecclesiastical person as to a reversion held

by him in his corporate capacity, shall be deemed to be the owner of the reversion; and every person entitled at law or in equity to a lease or under-lease in perpetuity for the whole estate created or agreed to be created by such lease or under-lease, or for any derivative estate (created by any instrument other than an under-lease at a rent) in tail, or quasi in tail, for life or lives, or for a term of years absolute, of which not less than twenty years or more are unexpired at the time of the application under this act for a grant to or by the owner of such lease or under-lease, and also every feoffee or trustee (for charitable or other purposes whatsoever) of any such lease or under-lease in perpetuity as aforesaid, for such estate therein as aforesaid (whether such estate be or not determinable upon the execution or fulfilment of any trusts,) who is in the actual possession of the land or in receipt of the rents payable by the tenants thereof, and every executor or administrator who in that capacity, or as a special occupant of an estate *pour autre vie*, or as being entitled to an estate *pour autre vie* under any statute or otherwise, is in such possession or receipt as aforesaid, shall be deemed the owner of such lease or under-lease in perpetuity; and where a feme covert is entitled to rents and profits for her separate use (whether or not she be restrained from anticipation) she shall, for the purposes of this act, be considered a feme sole: provided always, that no person shall be deemed an owner for the purposes of this act of the reversion, or of any lease or under-lease in perpetuity, by reason of any estate vested in him which has been created by way of mortgage, or for securing the payment of any sum of money, unless he be in the receipt of the rent incident to the reversion, or in possession of the land comprised in such lease or under-lease, or in receipt of the rents payable by the tenants thereof (as the case may be,) but the person who would be deemed the owner for the purposes of this act of such reversion, or lease or under-lease in perpetuity, if such estate by way of mortgage or for securing payment had not been created, shall, notwithstanding such estate, be deemed such owner as aforesaid: provided also, that where several persons in succession have in the reversion or lease or under-lease in perpetuity such estates or interests as would under this enactment entitle each of them to be deemed the owner, such of the said persons shall be deemed the owner for the purposes of this act as is in receipt of the rent incident to the reversion, or in possession of the land comprised in such lease or under-lease, or in receipt of the rents payable by the tenants thereof, as the case may be: or in case the person in such receipt or possession be not entitled to be deemed the owner under this enactment, then the person who has the first such estate or interest as aforesaid in reversion or remainder to or above the estate or interest of the person in such receipt or possession shall be deemed the owner of such reversion, or lease or under-lease in perpetuity; provided also, that in every case in which any person, not being the owner as herein-before defined, is in possession or receipt as herein-before mentioned under any charge, or any sequestration, extent, *elegit*, or other writ of execution, or as a receiver under any decree or order of a Court of Equity,

the person in possession or in receipt of the rents by virtue of such charge, sequestration, extent, *elegit*, writ, decree, or order, shall, jointly with the person who but for such possession or receipt would under this enactment be deemed the owner of the reversion or lease or under-lease in perpetuity, as the case may be, be deemed to be the owner for the purposes of this act of the reversion or lease or under-lease in perpetuity, as the case may be.

XXXIV. And be it enacted, that every person who under the provisions herein-before contained would for the purposes of this act be deemed the owner of the reversion or of a lease or under-lease in perpetuity if the same were not converted under this act, shall, where such reversion, or the estate held under such lease, or under-lease, has been so converted be, deemed for the purposes of this act the owner of the estate created by such conversion.

XXXV. And be it enacted, that every lease of lands in Ireland, for one or more life or lives, with or without a term of years, or for years determinable upon one or more life or lives, or for years absolute, with a covenant or agreement for perpetual renewal, made after the passing of this act, by any person competent to convey an estate of inheritance in fee-simple (and not so made in pursuance of a covenant or agreement entered into before the passing of this act), shall, notwithstanding anything therein contained to the contrary, be deemed to be, and shall operate as a conveyance of the lands specified therein to the intended lessee, his heirs and assigns for ever, at a fee-farm rent equal to the rent expressed to be reserved in such lease, and all reservation of fine or fines upon, or fees for or in respect of such renewal, and all and every covenant contract, or agreement for the payment of such fines or fees, shall be altogether void; and every contract for such a lease entered into, after the passing of this act, by any such person as aforesaid, (not being a renewal of a contract in pursuance of an agreement in that behalf, made before the passing of this act), shall, notwithstanding anything therein contained to the contrary, be deemed to be a contract for a conveyance of the lands specified therein to the intended lessee, his heirs and assigns, a fee-farm rent equal to the rent in such contract proposed to be reserved: and any such fee-farm rent shall be recoverable by all the means and remedies provided for the recovery of fee farm rents, made payable by a grant under this act, and the provisions of this act, so far as the same may be applicable, shall be applied to such cases.

XXXVI. And be it enacted, that the following words and expressions shall, in this act, have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,) words importing the singular number only, shall include the plural number, and the words importing the plural number only shall include also the singular number; words importing the masculine gender only shall include females; the word "person" and the word "owner" shall extend to a body politic, corporate, or collegiate, aggregate or sole; the word "lands," shall extend to messuages, tenements, and hereditaments; the word "lease" shall include a grant or an agree-

ment or contract for a lease or grant; and the word "under-lease" shall include a grant or an assignment or contract for an under-lease or grant, and shall include an under-lease carved out of an under-lease in any degree of tenure; the expression "lease in perpetuity" shall be taken to apply to all cases where any hereditaments have been or shall be, by a lease or contract derived immediately from the freehold and inheritance, demised, leased, or granted, or contracted to be demised, leased, or granted, for one or more life or lives, with or without a term of years, or for years determinable upon one or more life or lives, or for years absolute, with a covenant or agreement, by a party competent thereto, in any of such cases, whether contained in the instrument by which such lease or contract is made or in a separate instrument, for the perpetual renewal of such lease or contract; the expression "under-lease in perpetuity" shall be taken to apply to all cases where any of the land comprised in any such lease in perpetuity or contract for a lease in perpetuity have been or shall be under-leased or granted, or contracted to be under-leased or granted, for one or more life or lives, with or without a term of years, or for years determinable upon one or more life or lives, or for years absolute, with a covenant or agreement, whether contained in the instrument by which such under-lease or contract for an under-lease is made or in a separate instrument, for the perpetual release of such under-lease or contract; and for the purposes of this act an assignment reserving a yearly rent, or a contract for such assignment, shall be deemed to be an under-lease or contract for an under-lease respectively, although the person making such assignment or contract may have parted with or agreed to part with his whole estate in the hereditaments therein comprised; and the word "covenant" shall be deemed to include an agreement; and the word "fine" shall include not only a sum of money, but any heriot, matter, or thing to be given or done upon or for or in consideration of the obtaining of any renewal; and "the Court" shall mean the Court of Chancery or the Court of Exchequer, as the case may be, to which a petition shall be presented under this act; and the word "Master" shall mean any of the Masters in Ordinary of the Court of Chancery; and the word "Remembrancer" shall mean the Chief or Second Remembrancer of the Court of Exchequer.

XXXVII. And be it enacted, that in citing this act in other acts of parliament, or in legal instruments or pleadings, it shall be sufficient to use the expression "The Renewable Leasehold Conversion Act;" and in like manner, in like cases, describing any fee-farm rent payable under the provisions of this act, it shall be sufficient to use the expression "Fee-farm Rent under the Renewable Leasehold Conversion Act."

XXXVIII. And be it enacted, that this act shall extend only to lands situate in that part of the United Kingdom of Great Britain and Ireland called Ireland.

XXXIX. And be it enacted, that this act may be amended or repealed by any act to be passed during this present session of parliament.

Court Papers.

His Honor the Master of the Rolls, has intimated his intention of sitting at 10 o'clock, A. M., on Monday the 13th, and Tuesday the 14th instant, in order to dispose of as many of the motions, still remaining, as possible, as it is his Lordship's intention to rise for the vacation on Tuesday evening.

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Periodicals March 24.

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TERMS OF SUBSCRIPTION—(payable in advance).
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6 FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, May 12, 1840.

THE Irish Jurist

0. 29.—VOL. I.

MAY 19, 1849.

PRICE { Per Annum, \$1 10s
Single Number, 9d.

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DUBLIN, MAY 19, 1849.

The Rate in Aid: a Letter to the Right Hon. the Earl of Roden, K.P. By Isaac Butt, Esq., Q.C.
Dublin: McGlashan.

It is pleasant to find a man of ability and experience devoting leisure moments, snatched from the pursuit of a laborious profession, to the illustration of subjects of great difficulty and national importance. Such an illustration has lately appeared in the form of a letter on the rate in aid, addressed to the Earl of Roden by Mr. Butt. In this letter, the subject of our present notice, the writer does not confine himself to a narrow or partial view of this difficult question. He discusses the whole system of relief under the Irish poor law, noticing, in rapid retrospect, the circumstances and enquiries which led to the enactment of the first act in 1837, tracing its operation to the appearance of the potato blight in 1845, and from thence to the proposal for rate in aid in 1849, demonstrating the ruinous character of a system which increases pauperism at the same time that it diminishes the fund from whence destitution is to be relieved. Entering into statistical details, he points out, firstly, that every acre of cultivated land in England produces, upon an average, very nearly twice as much as the same quantity in Ireland; and, secondly, that the quantity of land on which, in England, two agricultural labourers are located, must in Ireland give sustenance to five, and hence that one great element towards rendering the country self-supporting, must be sought in increasing the productive power of the soil—which the measure of the minister has no tendency to encourage. Viewing the question politically, he points out that the imposition of this tax is to declare the act of Union a nullity; and looking at the purposes to which some of the proceeds of the rate would be applied—in the payment of debts due by some of the southern and western

unions—he shews that it would be almost as just to propose to levy an equal tax on all the properties of Ireland, to pay off the incumbrances that press heavily on some of her proprietors, as to call upon one part of Ireland to repay the sums advanced for building workhouses in another.

But it is easy to indicate the evils of this system—to show that if persevered in it must lead to universal confiscation and beggary—Mr. Butt goes farther, and suggests means by which the country might be rescued from its present calamitous condition. In making his suggestion, our author does not rely on any legislative enactment, *vis viribus* being adequate to work the regeneration he contemplates as possible. He relies, in the first instance, on an effort on the part of Irishmen themselves, to call into action the resources of the country. The prosperity of every country depends upon the exertions and enterprise of the people themselves; to stimulate and aid in such efforts is all that governments and legislatures can effect. He proposes that the Irish gentry should make common cause with their country—that they should endeavour to raise the condition of the mass of her people. Until they are made comfortable, all hope of building up the superstructure of society is vain; and this can be effected only by the determination and energy of Irishmen themselves. He demonstrates the folly of relying solely on the introduction of English capital. “Capital lies around us—it lies in the productive energies of our soil—it lies in our uncultivated wastes—it lies in our teeming fisheries—it lies in the sinews of the men, that famine is wasting from our land.” It is idle to suppose that it will be impossible to find spades for the very labourers whom the poor rate is supporting—to turn this labour into a profitable channel, would require an alteration in the law; but if the Irish gentry do not make an effort to help themselves, it is impossible any act of the legislature can save them.

With this view he proposes that the nobility and

gentry of Ireland should form themselves into a voluntary association, whose care it would be "to obtain and diffuse information as to the available resources of the country—the methods by which they could be best drawn into action—and the means by which our people could be best employed;" followed up by voluntary associations in every district, of which the boards of guardians might form the nucleus, who would devise and forward the best means of employing the poor and elevating their condition—of establishing manufactories, even the rudest, fostering those which were established—stimulating the industry, and instructing the efforts of the population.

Subsidiary to this great combined effort on the part of all interested in the prosperity of the country, Mr. Butt proposes that speedy and effectual assistance should be afforded from the imperial exchequer for the completion of railway communication in Ireland—for the establishment of a packet station on the western coast, and a dockyard in some of our harbours—a thorough amendment of the poor law, basing it on the good old poor law of Queen Elizabeth—the establishment of an Irish board of trade and plantations, with large and extensive powers for the compulsory purchase of reclaimable lands, into whose reclamation and improvement might be absorbed, in part, the surplus labour of the country. He suggests also a measure to regulate emigration.

The most important part (in a legislative point of view) of Mr. Butt's suggestions, are those by which he proposes to provide the funds that may be necessary to carry out the relief of the labouring population, in districts where the local resources are unequal to the task. He proposes,

1st, To tax the property of all absentees.

2nd, To levy a small tax on articles of manufacture imported into Ireland.

3rd, To levy a tax on all official salaries in Ireland, and on all realised property not otherwise liable to poor rate.

4th, That such portions of the revenue as are exclusively raised in Ireland, should be devoted to Irish purposes. The funds thus derived, and which he calculates would amount at least to one million and a half of annual income, he proposes to place at the disposal of his board of trade and plantations.

Whether these enactments and amendments are the very best that could be adopted under the circumstances, we do not here pronounce, further than that they would, if carried out, be a great improvement on the present system, which expects, by a sort of counter-irritation, that Ireland should grow rich under pauperising treatment. Mr. Butt's suggestions as to the combination of Irishmen for their common salvation, are dictated by the most earnest desire to benefit his country; and if he could succeed in rousing the Irish gentry to energy, and in persuading them to unite, he would do more towards this end than one thousand acts of parliament could effect. Whether he will succeed in this effort or not, he has proved to demonstration that great and fundamental alterations are required in the present poor law.

The letter bears the traces of having been thrown

together perhaps too hurriedly, and at intervals, and as rapidly as the ideas suggested themselves to the mind of the writer—that is, with the rapidity of a man of the quickest possible apprehension. The composition is easy, and some passages are in Mr. Butt's best style. He thus describes the appearance of the population in the south of Ireland:—"In the great cities in the South of Ireland—in every step the traveller is beset by famished applicants for relief, protesting that they have not eaten food for days—protests, to the truth of which their emaciated forms and hunger-worn aspect bear too terrible attestation. There are districts in Ireland, in which not one family of a hundred has once known for months the luxury of an unstinted meal. Those who visit the remote parts of Ireland periodically,—gentlemen of a profession, on the circuit, can see the population dwindling away; the strong and hale, and perfect turbulent peasant of a few years ago, is now wasted to the weak and miserable and half-starved peasant that sits, listless and idle, on the flags of the public streets. The crowds of stalwart and sturdy men that used to throng the streets of an assize town, or fill the court-house, when some trial which interested the populace was going on, are now to be seen, or seen wasted and worn, as the component parts of a rabble, that seems like a collection of the dismissed occupants—as, probably, many of them are—of a work-house. The witnesses who come upon the table apparently do not belong to the same race that we remember to have seen occupying their place a few years ago. The very criminals in the dock present a different aspect from those of former times. Famine—famine, want, and misery have stamped their visible impress upon the whole population." Mr. Butt thus truly describes the pauperizing effect of the present poor-law:—"The man who a few years ago was a farmer, with a few acres of land, comfortable and well-to-do in the world, is now in many instances a pauper receiving out-door relief; pressed down by the weight of the poor-rate, he has been unable to maintain himself and his family by the cultivation of his little farm. He abandons it to his landlord, and a struggle with starvation, that, occupying no less time, he may become destitute according to law. The land remains uncultivated and untilled; the poor rates accumulate upon it, and the landlord is obliged to pay them, while at the same time he loses his rent. He must curtail his expenditure, and probably by dismissing some of his labourers: these again are thrown upon the poor-rate, and aggravate and increase the evil that is thus perpetually reproducing itself. As the pauperism of the country increases, the produce of the land is diminished, and the little fund that in the hands of the employers of labour constituted at once the chief support of the labouring population and the capital of reproductive exertion, is transferred, under the name of poor-rate, to the expensive sustenance of the same population as idle paupers; and, producing nothing in return, it perishes in the transfer. The rewards of industry are gone; all that stimulates exertion in any class is destroyed. The landlord looks sullenly on the work of confiscation, which he has no power to arrest or control. The

farmer who has any substance left, begins to think only of emigration, and too often believes himself justified if in his flight he can spoil the Egyptian, by carrying off the landlord's rent; while for the peasant of a little lower class his country presents no object of ambition but a place in the work-house." And again—"The great and fatal mistake committed by the framers of the poor-law for Ireland, was this,—they legislated as if they had to deal with isolated instances of occasional distress—as if their only object should be to provide temporary relief for those who might happen to fall below the ordinary condition of the people; whereas, in truth and fact, to deal with the destitution of Ireland was, in many of its districts, to deal with a whole population sunk in misery—to provide the means of decent and adequate living for a labouring class that had not enough to eat."

We will give but one other quotation, which is pregnant with matter for serious reflection to the proprietary of Ireland, and which ought to urge them to that union and combined exertion which Mr. Butt so energetically recommends:—"Can you not perceive, in this proposition of a rate in aid, and the perseverance in a system of poor-law taxation unaccompanied by one single measure of general relief and general improvement, that the decree has gone forth from the ministry for your destruction—that every measure of social regeneration is to be postponed until you are destroyed—and Ireland left a pliant and plastic mould in the hands of her masters."

The appendix to his pamphlet contains a bold dash at the system of Chancery Receivers. We were glad that the evils of it had not escaped his attention, or the censure of his masterly pen. Whatever may be the judgment of the reader as to the practicability of some of Mr. Butt's suggestions, we are satisfied that he will rise from a perusal of them with the thorough conviction that they have been advanced with the greatest earnestness and sincerest desire of the writer to benefit his suffering countrymen, and to elevate the condition of that country, whose cause he has pleaded with his wonted animation—a cause that we trust he will find not hopeless. Though the body politic may be in spasms, yet her structure and frame are still susceptible of healthy re-animation.

We give elsewhere an analysis of the Bill for the Sale of Incumbered Estates. Its fate, as we have already observed, will depend on so many intrinsic and extrinsic causes, that a *pronunciamiento* upon its efficacy would be as unwise as rash. It may be, that it will be found "to disturb, yet not to settle," or it may be found to work with effectiveness and success. The Court of Chancery had grown into disrepute; it was said to be both dilatory and expensive. Much of this reproach was undeserved; it arose from the complication of interests with which it had to deal—its desire to do perfect justice, to embrace every claim and conclude every right.

Re-construction and reform would have been judicious. We pause before we pronounce our approval on the wisdom of absolute transfer, even

for a limited period, to a tribunal almost absolute, with the power of making its own decisions irreversible.

Until the directions and regulations which the Commissioners (sections 9, 10) are empowered to make shall have been promulgated, we grope, in some measure, in the dark—we are thrown on the wild ocean of conjecture, as to the real bearings of the measure.

It will be seen that the new Judges are not only to sell, but to divide the proceeds; this necessarily involves all the working of an Equity suit. We do not object to the power being vested in the Commissioners; on the contrary, we think it salutary that the same tribunal should initiate and consummate; but we must be satisfied that the power will be prudently, vigilantly, and properly exercised.

The proposed bill goes further than its predecessor, which limited applications to the first incumbrancer, or the incumbrancer having possession of the title deeds. By the 16th section of the present measure, any incumbrancer may, within three years from passing of the act, apply for a sale.

The limitation in the last act had, unquestionably, a tendency to render it nugatory, as the first incumbrancer was little disposed to call in a claim which was reasonably secured, and when there was no better outlet for investment. It has often surprised us, that so few mortgages in Ireland contain a power of sale, the exercise of which extrajudicially, would be equally efficacious, and incomparably less expensive. The frequency of judgments, and the infrequency of mortgages, has been the main cause of the multiplicity of Equity suits and their consequence, judicial sales.

The former act (section 28) contained a saving as to the rights of lessees at a rent, subject to whose lease the owner or incumbrancer should be an owner or incumbrancer, as pointed out by Mr. Smythe, in his work on the late measure. This saving would render necessary registry searches, and abstracts of title. The new bill contains no similar saving, but the Commissioners (section 20) are to ascertain the tenancies of occupying tenants and lessees, and the sale shall be made subject thereto.

We presume the intention is, for the Commissioners to take the burden of inquiry, and to let none devolve on the purchaser. The conveyance is to refer to the tenancies, but there is no saving, as we have mentioned.

There is, after all, something unsatisfactory in a purchaser not being shewn, by an abstract, that every requisition is complied with, every link complete.

The purchaser gets his conveyance and a parliamentary title; but if the entire responsibility of that title be thrown on the solicitor for the vendor, and no inquiry be rendered necessary on that of the purchaser, we question whether title will be as satisfactorily deduced as when there is an assurance of a zealous scrutiny on the part of a purchaser, who knows that he purchases at his own risk, and without warranty.*

* The analysis of the bill, by an uncontrollable fatality, was not ready for this week's publication.

Court Papers.

Exchequer of Pleas.

Directions for Officer upon the issuing of a renewal of a Habere under the 8 & 9 Vic. c. 111.

THE Order for liberty to issue a renewal of an *habere*, under the 8 & 9 Vic. c. 111, shall be an absolute one in the first instance, but shall contain a direction that the same shall be served, together with a notice annexed, signed by or on behalf of the plaintiff's attorney, with the place of his registered lodgings, specified in the terms, or to the effect following:

"All persons served with this order are to take notice that the same is an absolute order of the Court, and that if they have any objection to make thereto, which may entitle them to insist that it should be discharged, varied or limited, such objection can only be made within the time therein specified by a special application to the Court, or one of the Barons thereof for that purpose."

And such order shall direct that the said renewal shall not be executed for three weeks after the service of the Order, and the above notice. And the proper officer, who shall sign the said renewal, shall retain the same in his possession, to be handed by him to the plaintiff's attorney, upon the filing of an affidavit of the service of such order and notice, and the expiration of the time in such order mentioned.

By the Court.

Chancery.

LIST OF CAUSES STANDING FROM EASTER TERM.

Hamilton v. Hamilton, pl. & pfs. bill & ans. ord. pro con.
 Dumoncel v. Dumoncel, pleadings and proofs.
 Byrne v. Carew, pleadings and proofs, ord. pro con.
 Kirkwood v. Lloyd, report, exceptions and merits.
 Farrell v. Fleming, pleadings and proofs.
 Jacob v. Taylor, ditto ditto.
 Twycross v. Moore, ditto ditto.
 Simpson v. Syngé, ditto ditto, ord. pro con.
 Smith v. Robinson, pl. & pfs., bill & ans. ord. pro con.
 Newport v. Scott, report, exceptions and merits.
 Woodroffe v. Grace, pleadings and proofs, ord. pro con.
 Alston v. Alcock, pleadings and proofs.
 Hillhouse v. Tyndal, ditto ditto.
 O'Grady v. Barry, ditto ditto.
 Rubie v. English, pleadings and proofs, ord. pro con.
 White v. White, pleadings and proofs for dismissal.
 Carberry v. Cox, report, exceptions and merits.
 Molloy v. French, report and merits.
 Balfe v. Colgan, pleadings and proofs.
 Bayly v. O'Connor, ditto ditto.
 Hayden v. Hearne, pleadings and proofs, ord. pro con.
 White v. White, pleadings and proofs.
 Gartland v. M'Alistér, ditto.
 Murray v. Murray, pleadings and proofs, order pro con.
 Gordon v. Mahoney, pleadings and proofs.
 Rowland v. M'Donnell, pleadings and proofs, ord. pro con.
 Hatchell v. O'Reilly, pleadings and proofs.
 Maturin v. Wilson, ditto ditto.
 Anderson v. Walker, ditto ditto.
 Ouge v. Jones, Re-hearing.
 Lindsay v. Spotswood, report, exceptions and merits.
 Dimadale v. Hemming, pleadings and proofs.

Queen's Bench.

Paper for Trinity Term not made up. No causes standing from last Term.

Common Pleas.

No causes standing from last Term.

Exchequer of Pleas.

CAUSES IN PAPER FOR TRINITY TERM, 1849.

Demurrer.

M'Manus v. Delany, Mitchell v. Mooney,
 Foley v. Warburton, Lobdell v. Lake,
 Poynter v. Bate, Salaman v. Cullen,
 Grubb v. M'Kenna, Kough v. Power.
 Cahill v. Rait,

Motion to set aside verdict.

Jack, Lessee Talbot v. Guilmartin,
 Lindsay v. Geraghty,
 Wheeler v. Powell,
 Jack, Lessee Walsh v. M'Evoy,
 Ruck v. Brownrigg.
 Horan, Lessee Ferriter v. Littleton,
 Doe, Lessee Featherston v. Boughan.

Bill of exceptions.

Administrator Fitzgerald v. Anderson,
 Lessee Corporation of Drogheda v. Holmes,
 Lessee Gunning v. Corr.

Motion to set aside nonsuit.

Morton v. Administratrix Mahon.

(Continued from p. 200.)

99. That for the purpose of transmitting any such recognizance through the post, the clerk or one of the clerks assistant of the House of Commons, or some other person appointed by the Speaker for that purpose, shall carry such recognizance under a cover directed to the Lord Chief Baron or one of the barons of the Court of Exchequer in Ireland, or to one of the judges of the court of session discharging for the time the powers and duties of the Court of Exchequer in Scotland, as the case may require, to the General Post Office in London, and there deliver the same to the postmaster general for the time being, or to such other person as the said postmaster general shall depute to receive the same (and which deputation such postmaster general is required to make,) who on receipt thereof shall give an acknowledgment in writing of such receipt to the person from whom the same is received, and shall keep a duplicate of such acknowledgment, signed by the parties respectively to whom the same is so delivered; and the said postmaster general shall dispatch all such recognizances by the first post or mail after the receipt thereof to the person to whom the same is directed, accompanied with proper directions to the postmaster or deputy postmaster of the town or place to which the same is directed, requiring such postmaster or deputy postmaster forthwith to carry such recognizance, and to deliver the same to the person to whom the same is directed, who (or some officer appointed by the court for that purpose,) is hereby required to give to such postmaster or deputy postmaster a memorandum in writing under his hand, acknowledging the receipt of every such recognizance, and setting forth the day and hour the same was delivered by such postmaster or deputy postmaster, which memorandum shall also be signed by such postmaster or deputy postmaster, and by him transmitted by the first or second post afterwards to the said postmaster general, or his deputy, at the General Post Office in London.

100. That all monies which shall be received or recovered by reason or in pursuance of the estreating of any such recognizance shall, after deducting all expenses incurred in respect thereof, be forthwith paid by the proper officer for that purpose into the bank of England, to the account of the Speaker and of the examiner of recognizances, and shall be applied by them, in manner herein-after mentioned, in satisfaction, so far as the same will extend, of the costs and expenses intended to be secured by such recognizances.

101. That any person who has entered into any such recognizance may, before the same has been estrated, pay

the sum of money for which he is bound by such recognizance into the bank of *England*, to the account of the Speaker and the examiner of recognizances; and upon production to the examiner of recognizances of a bank receipt or certificate for the sum so paid in, he shall endorse on the recognizance in respect of which such money has been so paid in a memorandum of such payment, and thereupon such recognizance shall, so far as regards the person by or on whose behalf such money has been so paid, be deemed to be vacated, and shall not afterwards be estreated, but such recognizance shall continue to be in force as regards any other person who has entered into the same.

102. That in every case in which any money is paid into the bank of *England* to the account of the Speaker and the examiner of recognizances, a bank receipt or certificate of the amount so paid in shall be delivered to the examiner of recognizances by the person paying in the same, and such money shall, and in such order of payment as the examiner of recognizances with the approbation of the Speaker, thinks fit, be applied in satisfaction of all the costs and expenses for securing payment of which such investment was made, or so much thereof as can be thereby satisfied, and thereafter the residue (if any) shall be paid to or transferred to the account of the party by whom or on whose account the same was paid in.

103. That if any sheriff or other returning officer shall wilfully delay, neglect, or refuse duly to return any person who ought to be returned to serve in parliament for any county, city, borough, district of burghs, port, or place within *Great Britain or Ireland*, such person may, in case it have been determined by a select committee appointed in the manner herein-before directed that such person was entitled to have been returned, sue the sheriff or other officer having so wilfully delayed, neglected, or refused duly to make such return at his election, in any of Her Majesty's courts of record at *Westminster or Dublin*, or in the court of session in *Scotland*, and shall recover double the damages he has sustained by reason thereof, together with full costs of suit; provided such action be commenced within one year after the commission of the act on which it is grounded, or within six months after the conclusion of any proceedings in the House of Commons relating to such election.

104. That this act shall commence and take effect from the end of this session of parliament.

105. That if at the close of the present session of parliament there be any election petitions before the house, the order for taking which into consideration has not been discharged, and for trying which no committees have been appointed, such election petitions shall, in case the sureties relating thereto have been reported unobjectionable, be tried by committees to be chosen under the provisions of this act, and shall be referred to the general committee of elections before any petition presented in the next session; and the general committee shall, within two days after their first meeting, appoint a day and hour for selecting a committee to try every such petition; and if the present parliament be prorogued after the appointment of a select committee for the trial of any such petition as aforesaid, and before they have reported to the house their determination thereon, such committee shall not be dissolved by such prorogation, but shall be adjourned in manner herein-before provided in the case in which parliament is prorogued after the appointment of a select committee for the trial of an election petition, and before they have reported to the house their determination thereon; and in the case of all such petitions as aforesaid, all such further proceedings shall be had with reference thereto as if this act had been in force when such petitions were presented; and the recognizances entered into in respect of such petitions shall be taken to be and remain in force, and shall take effect for securing payment of all costs and expenses which the petitioners shall be liable to pay, as if the same had been entered into under the provisions of this act.

106. That no recognizance entered into, or affidavit sworn, under the provisions of this act, shall require to be impressed with any stamp.

107. That in citing this act it shall be sufficient in all cases to use the expression "the election petitions act, 1848."

108. That in construing this act words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular, unless there be something in the subject or the context repugnant to such construction; and the words "oath" and "affidavit" respectively shall mean affirmation in the case of Quakers, or any declaration lawfully substituted for an oath in the case of persons allowed by law to make a declaration instead of taking an oath.

109. That this act may be amended or repealed by any act to be passed in this session of parliament.

SCHEDULE.

Be it remembered, that on the _____ day of _____ in the year of our Lord 184____, before me *A. B. Esquire* [examiner of recognizances for the House of Commons, or one of Her Majesty's justices of the peace for the _____ of _____] came _____ and acknowledged himself [or severally acknowledged themselves] to owe to our Sovereign Lady the Queen the sum of £1000 [or the following sums, (that is to say,)] the said _____ the sum of _____ the said _____ the sum of _____ the said _____ the sum of _____ and the said _____ the sum of _____, to be levied on his [or their respective] goods and chattels, lands and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is, that if [here insert the names of all the petitioners, and, if more than one, add, or any of them] shall well and truly pay all costs and expenses in respect of the election petition signed by him [or them] relating to them [here insert the name of the borough, city, or county, which shall become payable by the said petitioner [or petitioners] under the elections petitions act, 1848, to any witness summoned in his [or their] behalf, or to the sitting member, or other party complained of in the said petition, or to any party who may be admitted to defend the same as provided by the said act, then this recognizance to be void, otherwise to be of full force and effect.

CAP. XCIX.

An act to further extend the provisions of the act for the inclosure and improvement of commons.

[4th September, 1848.]

CAP. C.

An act to permit the distillation of spirits from sugar, molasses, and treacle in the United Kingdom.

[4th September, 1848.]

CAP. CI.

An act to provide for the expenses of erecting and maintaining lock-up houses on the borders of counties.

[4th September, 1848.]

CAP. CII.

An act to enlarge the powers of an act empowering the commissioners of her Majesty's woods to form a royal park in *Battersea Fields*; to facilitate the raising of monies authorized to be raised by the said commissioners for metropolitan improvements; and to regulate and simplify the mode of keeping the accounts of the commissioners of her Majesty's woods.

[4th September, 1848.]

CAP. CIII.

An act to authorize the application of a sum of money out of the forfeited and unclaimed army prize fund in purchasing the site of the royal military asylum, and in improving such asylum.

[4th September, 1848.]

CAP. CIV.

An act for amending the act for regulating the prison at *Millbank*.

[4th September, 1848.]

CAP. CV.

An act to prohibit the importation of sheep, cattle, or other animals, for the purpose of preventing the introduction of contagious or infectious disorders.

[4th Septem. 1848.]

Sec. 1. *Power to prohibit, by order in council, the importation of sheep, cattle, &c., in order to prevent contagion.*

2. *Power to make, by order in council, regulations for subjecting sheep, &c. to quarantine.*

3. *Cattle, &c. imported contrary to provisions of orders in council to be forfeited. Penalty on importing, &c.*

4. *Orders in council may be revoked in whole or in part from time to time.*
5. *Orders in council to be published in the London Gazette.*
6. *Act may be amended, &c.*

Whereas, in order to prevent the introduction of contagious or infectious disorders among sheep, cattle, horses, and other animals, be it enacted, that her Majesty, by order in council, may prohibit the importation into the United Kingdom, of cattle, sheep, horses, or other animals, either generally or from any place named in such order, for such period as she may deem to be necessary, for the purpose of preventing the introduction of any infectious or contagious disorder among the sheep, cattle, horses, or other animals in this country.

2. That her Majesty, by order in council, may make such regulations for subjecting sheep, cattle, horses, or other animals to quarantine, or for causing the same to be destroyed upon their arrival in this country, or for destroying any hay, straw, fodder, or other article whereby it appears to her that infection or contagion may be conveyed, to make such regulations with respect to the importation of sheep, cattle, horses, or other animals, as may be necessary to prevent the introduction of any contagious or infectious disorder.

3. That if any cattle, sheep, horses, or other animals be imported or attempted to be imported contrary to any order in council made in pursuance of this act, the same shall be forfeited in like manner as goods prohibited to be imported by any act relating to the customs; and all persons importing or introducing or attempting to import the same shall be liable to such penalties as are imposed on persons importing or attempting to import goods prohibited by acts relating to the customs.

4. That her Majesty, by any order in council, may revoke the whole or any part of any order issued by her Majesty in council under this act; and that from and after a day to be named in such order or orders of revocation, such order or orders issued under this act, or such part as shall be specified in such order or orders of revocation, shall cease and determine.

5. That every order in council issued under this act shall, within fourteen days after the issuing, be twice published in the *London Gazette*; and that a copy of every order or orders in council issued under the authority of this act shall be laid before both houses of Parliament within six weeks after issuing the same, if Parliament be then sitting, and if not, then within six weeks after the commencement of the then next session of Parliament.

6. That this act may be amended or repealed by any act to be passed in the present session of Parliament.

CAP. CVL

An act to amend an act of the tenth year of her present Majesty, for rendering valid certain proceedings for the relief of distress in Ireland by employment of the labouring poor, and to indemnify those who have acted in such proceedings. [4th September, 1848.]

- Sec. 1. *Copy of any award made by commissioners of public works to be sent to persons affected by same. Award to be registered.*
2. *Lands mentioned in the award to become chargeable, and award to be conclusive.*
 3. *Award free of stamp duty.*
 4. *Principal, &c. may be paid off within period fixed for repayment.*
 5. *Upon payment of amount due lands to be released.*
 6. *Act may be amended, &c.*

Whereas by an act passed in the 10 & 11 Vict. c. 10, s. 3, intitled, *An act to render valid certain proceedings for the relief of distress in Ireland by employment of the labouring poor, and to indemnify those who have acted in such proceedings*, it is amongst other things enacted, and it is advisable that the said act should be amended in that and other respects; be it enacted, that in all cases in which the said commissioners of public works in Ireland shall make or have already made any award under the said act of the tenth year of Her Majesty's reign, the commissioners of public works shall cause a copy of such award to be trans-

mitted by post, or in such other manner as they shall think fit, to the proprietor or proprietors, as in the said act mentioned, of the lands which shall be the subject of such award; and the said commissioners shall execute a copy or duplicate of every such award as and for a memorial thereof for the purposes of registry, and forthwith cause such award to be registered in the office for the registry of deeds in the city of Dublin; and the registrar of the said registry office, his deputies and assistants, and other officers, shall and he and they are hereby required to register every such award in the same manner as any deed or instrument is registered in the said office, and to file, retain, and enter such duplicate or memorial in the abstract books and indexes of or relating to deeds and memorials registered and kept in the said office; and no fees whatsoever shall be payable for or in respect to such registration, anything in any former act to the contrary notwithstanding.

2. That the lands specified in every such award shall, from and after the registry thereof, become charged with the amount mentioned in such award, with interest thereon at the rate of £3 10s. per centum per annum, such interest to be calculated from the 10th of October 1847, and to be payable by half-yearly instalments on the days and times a such award mentioned; and such amount and interest shall have priority over all charges affecting the same lands; and every such award in respect of the lands therein specified shall be binding upon all persons having any estate or interest in such lands, or lien or incumbrance thereon; and every such award shall be conclusive evidence that all requisites by the said last-mentioned act and this act have been fully complied with; and it shall not be lawful for any person to question the validity of such award of the said commissioners of public works in respect of anything whatsoever done or omitted to be done, or for any other reason whatsoever.

3. That no such award or memorial thereof shall be liable to any stamp duty whatever.

4. That the proprietor for the time being of the lands specified in any such award, at any time within the period fixed by such award for repayment, may pay off in one sum the amount of principal and interest charged upon the said lands, and which may then be due and payable thereon.

5. That upon payment of the sum mentioned in such award, or such portion thereof as may from time to time be due on foot thereof, together with the interest due thereon, and also upon payment of all costs, charges, and expenses (if any) incurred in proceeding to recover the same or in relation thereto, the paymaster of civil services in Ireland for the time being shall execute a release of the lands so charged as aforesaid, at the cost and expense of the party to whom such release shall be granted.

6. That this act may be amended or repealed by any act to be passed in this present session of parliament.

CAP. CVIIL

An act to prevent, until the 1st of September 1850, and to the end of the then session of parliament, the spreading of contagious or infectious disorders among sheep, cattle, and other animals. [4th Sep., 1848.]

- Sec. 1. *Infected sheep exposed for sale may be seized and destroyed, together with pens, hurdles, &c. Penalty on parties exposing cattle for sale, knowing them to be diseased.*
2. *Penalty on persons depasturing diseased sheep, &c.*
 3. *Penalty on persons exposing for sale meat unfit for human food.*
 4. *Privy Council may make Regulations as to removal of Sheep, &c.; as to purifying Yards, Stables, &c., and disposal of Animals dying in an infected state; and as to giving Notice of Appearance of Disease, &c. Penalty for offending against the same.*
 5. *Orders, &c. to be published in Gazette, and in Country Newspapers;*
 6. *And to be laid before Parliament.*
 7. *Penalty for obstructing Persons in the Execution of this Act.*
 8. *Penalties to be summarily recovered before two Justices.*
 9. *Penalties to be levied by Distress.*

10. *In default of Distress, Justice may commit the Offender to Prison.*
11. *Distress, how to be levied.*
12. *Distress not unlawful for want of Form.*
13. *Application of Penalties. Convictions to be returned to Quarter Sessions under 3 G. 4, c. 46.*
14. *Penalties to be sued for within two Months after Commission of Offence.*
15. *Penalty on Witnesses making default.*
16. *Proceedings not to be quashed for want of Form, nor removed by Certiorari.*
17. *Parties aggrieved may appeal to Quarter Sessions, on giving Security.*
18. *Court may make such Order as they think reasonable.*
19. *If suit brought on account of seizure, and the judge shall certify that there was probable cause, plaintiff to have 2d. damages, and defendant fined not more than 1s.*
20. *Act to continue in force for two years.*
21. *Act not to affect the rights, &c. of the city of London.*
22. *Act may be amended, &c.*

Whereas a contagious or infectious disorder, known or described as the sheep pox or variola ovina, now prevails among the sheep in some parts of the United Kingdom, and it is necessary to take measures to prevent such disorder from spreading: be it enacted, that in case any sheep or lambs infected with the said disorder, or any disorder of the like nature, be exposed for sale, or be brought for the purpose of being so exposed for sale, in any market, fair, or other open or public place where other animals are commonly exposed for sale, then and in any such case any clerk or inspector or other officer of such fair or market, or for any constable or policeman, or any other person authorized by the mayor, or by any two justices of the peace having jurisdiction in the place, or any person authorized or appointed by Her Majesty in council, may seize the same, and to report such seizure to the mayor or any justice of the peace having jurisdiction in the place; and such mayor or justice either to restore the same, or to cause the same, together with any pens, hurdles, troughs, litter, hay, straw, or other articles which he may judge likely to have been infected thereby, to be destroyed or otherwise disposed of as he shall deem proper, or as he may be directed in manner herein-after provided; and any person bringing or attempting to bring any sheep, lambs, oxen, bulls, cows, calves, or other horned cattle, into any such market, fair, or open or public place as aforesaid, knowing such sheep, lambs, or cattle to be infected with or labouring under either of such disorders as aforesaid, shall, upon conviction thereof, forfeit and pay for each and every such offence a sum not exceeding £20.

2. That if any person turn out, keep, or depasture any sheep or lambs infected with or labouring under the said disorder in or upon any forest, chase, wood, moor, marsh, heath, common, waste land, open field, road side, or other undivided or uninclosed land, such person shall, on conviction thereof, forfeit any sum not exceeding £20.

3. And whereas it is expedient for the preservation of the public health to make provision for preventing the sale of any meat unfit for human food: be it enacted, that if any meat unfit for human food be exposed or offered for sale in any market, fair, or other open or public place, such clerks, inspectors, constables, policemen, or other persons authorized as aforesaid may seize the same, and report such seizure to such mayor or justice as aforesaid; and such mayor or justice may either order the same to be restored, or to be destroyed or otherwise disposed of as aforesaid; and any person publicly exposing or offering such meat for sale shall, upon conviction, forfeit and pay for each and every such offence a sum not exceeding £20.

4. And for effectually preventing the spreading of contagious or infectious disease, be it enacted, that the lords of Her Majesty's privy council, or any two or more of them, from time to time may make such orders and regulations as to them may seem necessary for the purpose of prohibiting or regulating the removal, to or from such parts or places as they may designate in such order or orders, of sheep, cattle, horses, swine, or other animals, or of meat, skins,

hides, horns, hoofs, or other parts of any animals, or of hay, straw, fodder, or other articles likely to propagate infection; and also for the purpose of purifying any yard, stable, outhouse, or other place, or any waggons, carts, carriages, or other vehicles; and also for the purpose of directing how any animals dying in a diseased state, or any animals, parts of animals, or other things seized under the provisions of this act, are to be disposed of; and also for the purpose of causing notices to be given of the appearance of any disorder among sheep, cattle, or other animals, and to make any other orders or regulations for the purpose of giving effect to this act, and again to revoke, alter, or vary any such orders or regulations; and all provisions for any of the purposes aforesaid in any such order or orders contained shall have the like force and effect as if the same had been inserted in this act; and all persons offending against the same shall for each and every offence forfeit and pay any sum not exceeding £20, or such smaller sum as the said lords or others of Her Majesty's privy council may in any case by such order direct.

5. That all orders and regulations made under this act shall, within fourteen days after the issuing thereof, be twice published in the *London Gazette*; and in case such orders or regulations apply to any particular places or districts, then the same shall also be twice published, within fourteen days as aforesaid, in some newspaper or newspapers circulating in the county or counties within which each of such places or districts, or any part or parts thereof respectively, is or are situated.

6. That a copy of every such order or orders shall be laid before both houses of parliament within six weeks after issuing the same, if parliament be then sitting, and if parliament be not then sitting, then within six weeks after the commencement of the then next session of parliament.

7. That in case any person wilfully obstruct or impede any person acting under the authority of this act, or of any order or regulation made in pursuance of this act, every person so offending, and all others aiding and assisting therein, shall and may be seized and detained by such person so acting under this act, or any person or persons he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace having jurisdiction in the county or place wherein such offence shall be committed, and when convicted before such justice (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises,) shall, in the discretion of such justice, forfeit any sum not exceeding £5, and in default of payment thereof shall and may be imprisoned for any term not exceeding two calendar months, unless the amount of the penalty shall have been sooner discharged.

8. That every penalty or forfeiture imposed by this act may be recovered by summary proceeding before two justices; and upon the exhibition of any information in writing before any justice such justice shall issue a summons requiring the party complained against to appear before two justices, at a time and place to be named in such summons, and every such summons shall be served on the party offending, either in person or by leaving the same with some inmate, at his last or usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the service of such summons, any two justices having jurisdiction may proceed to the hearing of the complaint; and upon proof of the offence, either by the confession of the party complained against or upon the oath of one credible witness or more, such justices may convict the offender, and upon such conviction to adjudge the offender to pay such penalty as may seem fit, and not greater than the penalty or forfeiture specified in this act, as well as such costs attending the conviction as such justices shall think fit.

9. That if forthwith upon any such adjudication as aforesaid the amount of the penalty or forfeiture, and of such costs as aforesaid, be not paid, the amount of such penalty and costs shall be levied by distress, and such justices, or either of them, or any other justice having jurisdiction as aforesaid, shall issue their or his warrant of distress accordingly.

10. That such justice may order any offender so convicted

as aforesaid to be detained and kept in safe custody until return can be conveniently made to the warrant of distress to be issued for levying such penalty or forfeiture and costs, unless the offender give sufficient security, by way of recognizance or otherwise, to the satisfaction of the justice, for his appearance before him on the day appointed for such return, such day being not more than eight days from the time of taking such security; but if before issuing such warrant of distress it shall appear to the justice, by the admission of the offender or otherwise, that no sufficient distress can be had within the jurisdiction of such justice whereon to levy such penalty or forfeiture and costs, he may, if he think fit, refrain from issuing such warrant of distress; and in such case, or if such warrant shall have been issued, and upon the return thereof such insufficiency as aforesaid shall be made to appear to the justice, then such justice shall by warrant cause such offender to be committed to gaol, there to remain without bail for any term not exceeding three months, unless such penalty or forfeiture and costs be sooner paid and satisfied.

11. That where in this act any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the overplus arising from the sale of such goods and chattels, after satisfying such sum of money, and the expenses of the distress and sale, shall be returned, on demand, to the party whose goods shall have been distrained.

12. That no distress levied by virtue of this act shall be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceedings relating thereto, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action upon the case.

13. That all penalties and forfeitures recovered under this act shall be applied as follows: one half thereof shall be paid to the person who shall sue or proceed for the same, and the other half to Her Majesty's use, and shall be paid to the sheriffs of the county, city, or town where the same shall have been imposed, and shall have been duly accounted for by him; and that all convictions before justices, and all fines, forfeitures, or penalties imposed in consequence of such convictions, shall be returned to the court of Quarter Sessions, under the provisions of the 3 Geo. 4 c. 46.

14. That no person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this act for any offence made cognisable before a justice, unless the complaint respecting such offence shall have been made before such justice within two months next after the commission of such offence.

15. That any justice may summon any person to appear before him as a witness in any matter in which such justice shall have jurisdiction under this act, at a time and place mentioned in such summons, and to administer to him an oath to testify the truth; and if any person so summoned shall without reasonable excuse refuse or neglect to appear at the time and place appointed for that purpose, having been paid or tendered a reasonable sum for his expenses, or if any person appearing shall refuse to be examined on oath, or to give evidence before such justice, every such person shall forfeit a sum not exceeding £5 for every such offence.

16. That no warrant of commitment consequent upon any conviction under this act shall be held void by reason of any defect in such warrant, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same; nor shall any conviction, order, or other proceeding in pursuance of this act be quashed or vacated for want of form, nor shall the same be removed by *certiorari* or otherwise into any of the superior courts.

17. That if any person shall think himself aggrieved by any determination or adjudication of any justice with respect to any penalty or forfeiture under the provisions of this act, he may appeal to the general Quarter Sessions for the

county or place in which the cause of appeal shall have arisen, but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties, before a justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon.

(To be continued.)

CHANCERY.

Robert Keating, Esq., Plaintiff.
Richard Garde, Elizabeth Garde,
Widow Gustavus Hamilton,
Henry Pigott, and others,
Defendants.

PURSUANT to the Decree made in this cause, bearing date the 3rd day of March, 1849, I hereby require all persons having Charge and Incumbrances affecting the Lands and Premises in the pleadings in this cause mentioned, to come in before me on or before Thursday the 31st day of June next, and prove their claims, otherwise they will be precluded the benefit of said decree.

Dated this 27th day of April, 1849.

R. LITTON,

LUKE DUFF, Solicitor for Plaintiff, 35, Greenville Street, Dublin.

IN CHANCERY.

Robert Magee and others, Plaintiff.
John Miller and others, Defendants.

PURSUANT to the Decree made in this cause, bearing date respectively the 3rd day of July, 1848, and 20th day of April 1849, I hereby require all persons having Charge and Incumbrances affecting the Estate of the Defendant John Miller, situate in the Town of Belfast, in the County of Antrim, in the Pleadings in this cause mentioned, to come in before me, at my Chambers on the 1st day of June next, and prove the same, otherwise they will be precluded the benefit of the said Decree.

Dated this 1st day of May, 1849.

R. LITTON

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET STREET, in the Parish of St. Andrew, and published at 1A, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, May 19, 1849.

THE Irish Jurist

No. 90.—VOL. I.

MAY 26, 1849.

Price {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, MAY 26, 1849.

AMONGST the contemplated measures of the Session, we have to enumerate one for the consolidation and amendment of the laws relating to Attorneys and Solicitors in Ireland. The design of the measure is to remove some manifest defects, but its language is sometimes obscure, and its enactments not sufficiently distinct or methodized.

It proposes to make all costs, whether for business done in Court or otherwise, taxable; at least, we conclude this to be the design, from the following part of the second section:—"And upon the application of the party chargeable by such bill within such month—(month after service)—it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of Law or Equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other Court, for the Courts of Queen's Bench, Common Pleas, or Exchequer, or any Judge of either (*quere: sic in orig.*) of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the Court in which such reference shall be made, without any money being brought into Court."

This clause comprehends various classes of business; business transacted in a Court of Equity, either altogether or together with business done in a Court of Law, or business hitherto not taxable; business not transacted in any Court, and business transacted exclusively or in part in a Court of Law. In the arrangement of the sentences, although we

understand the meaning to be, that the Courts of Common Law are to have power to refer, when the "whole business" is transacted at common law. The bill in terms only applies to cases where there is "any part" of such business so transacted. But the intention is, that in cases where the costs are wholly legal, or are partly legal and partly equitable, or partly legal and partly for business done out of Court, and in all cases of business done in their own Courts, as the Equity Exchequer; Courts of law will have the power to refer, and in all other cases the Court of Chancery.

Independently of rendering every description of business taxable, no submission of the applicant for taxation, to pay the sum that shall be found due upon such taxation, is required; but by the eighth section payment of the amount may be enforced according to the course of the Court in which such reference shall be made, and a Court of Common Law may order judgment to be entered up for such amount with costs, unless the retainer shall have been disputed previous to the commencement of the taxation. We apprehend, no application for taxation would be made where the retainer was disputed: nor should a reference be permitted, if the relation of attorney and client were matter of controversy.

It is proposed to allow service of the bill either by delivery, as at present, or by sending it through the post, or leaving it at the counting house, client's office of business, dwelling-house, or last known place of abode. We think, in matters of this sort, this postal latitude of service unwise. In proper cases, the Court will substitute service, but legislative laxity on this point is injudicious. The necessity for furnishing the bill is very properly extended to all cases whether by the attorney himself or his representatives. Under the existing law the attorney was required to deliver his bill a month before the commencement of the action, but, singularly enough, it was held, on the construction of the previous statute, to be unnecessary for his executor or administrator

to do so, thus, in all such cases, frustrating the intention of the legislature, to give the client a reasonable time to consider whether the demand were fair or exorbitant.

No reference for taxation is to be made after verdict or writ of inquiry, nor after the expiration of twelve months after the bill has been delivered or sent, except under special circumstances.

The want of summary jurisdiction of courts of law and equity over the representatives of attorneys in cases where such representatives had possession of the client's deeds, occasioned much inconvenience and sometimes gave rise to much extortion; the present measure contains the following proviso:—"That it shall be lawful for the said respective Courts and Judges, in the same cases in which they are respectively authorized to refer a bill, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done, as regards such attorney or solicitor, by such Courts or Judges respectively, where any such business had been transacted in the Court in which such order had been made."

This proviso would appear to relate to cases between Solicitor and Client merely; but the evil is not confined to such cases. Thus, in *Roberts v. Prior*, (not yet reported,) the mortgagees had not obtained possession of the title-deeds; the mortgagor had, subsequently to the mortgage, given them to the solicitor. In a foreclosure suit by the mortgagees, a final decree for sale had been obtained. For the purpose of making out title, an application was made against the representative of the solicitor for the deeds, without prejudice to any lien he might be enabled to establish on the funds to be realized by the sale. It was plain, that against the mortgagees the solicitor or his representative had no lien, and also plain, that, as against the solicitor himself the Court would have complete jurisdiction to enforce the production of the deeds, but the Master of the Rolls held he had no summary jurisdiction against the personal representative, and it had been previously so held in England; although, independently of authority, it would have appeared to us that every representative or assignee of an attorney would be subject to all the equities to which the attorney himself would have been liable; and in the case of the assignee of *Mills v. Lester*, (Hayes, 201,) the Court of Exchequer exercised summary jurisdiction over the assignee of an insolvent attorney, who had unwarrantably obtained possession of papers belonging to the testator of the defendant. There was this distinction between the authority we have cited and the class of cases to which we refer,—that the question arose between the representative of the client and the assignee of the attorney, whilst in *Roberts v. Prior* and similar cases, which are not of unfrequent occurrence, no relation of attorney and client has subsisted. But that distinction is not the ground of decision, the

point being the absence, or the contrary, of summary jurisdiction.

If there be any doubt on the question it would be well to remove it by making the proviso we have cited more explicit and comprehensive.

In the course of our observations we guard ourselves from the expression of any censure upon the introducers of the proposed bill, as deserved either by its language or design, the former being taken *ipsisimis verbis* from the English act of 1843, 6 & 7 Vic. c. 73; the only matter of blame that could attach would be—the following too exactly that measure. No one who has witnessed or suffered from the charges of solicitors in matters not taxable, but must rejoice at the prospect of protection from demands, whose exorbitancy, as in cases of loans, was ill-proportioned to the need of the client. The respectable practitioner never dreads scrutiny, and the knavish one always requires it.

In the recent case of *Delany v. Newland*, (1 Lr. Jur. 238,) a principle has been laid down by the Court of Exchequer, in an elaborate judgment by the Lord Chief Baron, in which he reviewed all the authorities, that in every case where a bill is shown to be tainted with fraud, the onus is thrown upon the holder of proving that he has given value.

This decision will, we trust—at least, in this country—settle a question which the decisions of the Court of Queen's Bench in England, and that of *Howard v. Shaw*, (9 Ir. L. Rep. 335,) in Ireland, had left unsettled. The view taken by Mr. Baron Parke, in *Bailey v. Bidwell*, (13 M. & W. 76,) that "the taint of fraud or illegality afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it," is so perfectly consonant with the ordinary facts in such cases, and those which actually existed in the principal case, as to leave no doubt upon any mind of the correctness of the conclusion of that learned Judge. And such a taint being once thrown upon the holder's title, the propriety of compelling him to prove that which, if true, he can have no difficulty in doing, the whole transaction being peculiarly within his own knowledge, is clearly preferable to that of throwing upon the defendant the onus of proving the absence of any consideration flowing from the holder—a proof which, from the very nature of the thing, is in every stage beset with difficulties, and is probably, in nine cases out of ten, incapable of proof by the defendant.

The only case which created a serious difficulty in the way of the conclusion arrived at by the Court, was that of *Howard v. Shaw*, a case which received much consideration at the bar and on the bench. The decision in the principal case, however, virtually over-rules that of *Howard v. Shaw*, so far as this question is involved, the Court being of opinion that the point did not properly arise in *Howard v. Shaw*, as in that case there was an adequate consideration for the notes, (See judgment, p. 351,) and because the case of *Bailey v. Bidwell* had not been cited to the Court. It is also observable, that the cases referred to and

relied upon in the judgment of the Court in *Howard v. Shaw*, as supporting their view, the one *Smith v. Martin*, (9 M. & W. 304,) in the Court of Exchequer—the other, *Bramah v. Roberts*, (1 Scott, 350,) in the Queen's Bench, were both referable to the particular pleadings before the Courts. In the former, the defendant pleaded fraud—the plaintiff, that he had no knowledge of it when he took the note; the issue then was, as to the knowledge of the fraud, not whether there was any. p. 307, Alderson, B., says, in answer to an argument at the bar, “Assuming that the circumstances of fraud alleged in the plea are admitted as facts by the replication, how do they afford *prima facie* evidence of the plaintiff's knowledge of that fraud. When a plea states facts amounting to fraud, and alleges that the plaintiff had knowledge of them, the *issue*, according to your argument, is on the plaintiff; then, suppose he proves consideration, which way ought the verdict to be? His having given consideration, proves nothing conclusively as to his want of knowledge of the fraud.” In the latter case, the question arose on a demurrer to the replication, which denied the fraud, and stated generally that the plaintiffs had given consideration—i. e. “for moneys advanced by and due and owing to them”—a state of pleading which did not fairly raise the question for which it was relied upon as an authority. In answer to the fraud alleged in the plea, the plaintiff replied, “I have given consideration;”—which, if proved, would in any case be a sufficient answer to the allegation of fraud, unless he was without notice of it. The only question for the Court was, whether he should not have gone further, and set out that consideration more fully, which they thought he was not bound to do.

Court Papers.

Chancery.

LIST OF CAUSES.

Clarke v. Clarke	Thompson v. Ponsonby
Meagher v. O'Meara	Power v. Drake
Smyth v. same	Nixon v. Morgan
M'Farlane v. Campbell	Fawcett v. Davis
Ehrington v. Att.-Gen.	Perrin v. Dolan
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Workman v. Walker	Taylor v. Jackson
Gregg v. Marquis Donegal	Barry v. Cronin
Onge v. Onge	Cloughly v. Jameson
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Phibbe v. Irwin	Cochran v. Brown
Law v. Stafford	Ferrott v. Plummer
Cantwell v. Martin	Calvert v. Calvert
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Warner v. Macrory	Purcell v. Purcell
Johnston v. Earl Glengall	Collins v. Gray
Cooke v. Scott	Fulton v. Walker
French v. Mansell	Same v. Woodward

Vicars v. Gale	Keller v. Burrows
Scanlan v. Towers	Kelson v. Lewis
Duncombe v. M'Carthy	Verschoyle v. Hamilton
O'Ferrall v. Arthur	Brooke v. Horner
Harshaw v. Kidd	Booker v. Murphy
Campbell v. Backett	Bolton v. Loughnane
M'Neill v. Sharpe	Stuart v. Buchanan
Lupton v. Stevenson	Johnson v. Mason
Montgomery v. Stevenson	Christy v. Marston
Jones v. Curtis	Donnelly v. M'Clintock
Woodroffe v. Vero	Ward v. Driscoll
Edwards v. Edwards	Ahern v. Daly
De Morrin v. Henry	Haldane v. Hosford
Reid v. M'Neale	Lewis v. Earl Charleville
Guiry v. O'Loughnane	Bagnall v. Horne
Hall v. Williams	O'Donnell v. O'Donnell
Little v. Crumly	Hagan v. Griffith
Same v. same	Whelan v. M'Donald
Marq. Donegal v. Crommelin	M'Creight v. M'Creight
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Marquis Donegal v. Dunbar	Maher v. Lenigan
Corker v. Coppinger	Maher v. Smith
Simcocks v. Reed	Bentley v. Burke
Simcocks v. Moody	Piers v. Piers
Radcliffe v. Boyle	O'Brien v. Bernard.
Mendham v. Molloy	

26th April, 1849.

ABSTRACT OF A BILL FURTHER TO FACILITATE THE SALE OF INCUMBERED ESTATES IN IRELAND.*

Note—The words printed in Italics are proposed to be inserted in committee.

SEC. I. Whereas it is expedient that further facilities should be given for the sale of incumbered estates in Ireland, be it enacted, &c., that it shall be lawful for Her Majesty by warrant under the royal sign manual to appoint any number of persons not exceeding *three* to be commissioners under this act during Her Majesty's pleasure and upon every vacancy to appoint some other person to such office to be styled “the commissioners for sale of incumbered estates in Ireland.”

II. That the commissioners shall have a seal, and shall cause to be sealed therewith all orders, conveyances, &c. under this act and such orders, &c., or copies thereof purporting to be sealed with the seal of the commissioners, shall be received in evidence without any further proof thereof.

III. All acts, &c., authorized to be done by the commissioners under this act may be done by any *two* of such commissioners.

IV. The commissioners, with the consent in every case of the commissioners of her Majesty's treasury, may appoint a secretary and such clerks, messen-

* Prepared and brought in by the Solicitor General for England, Lord John Russell, and Sir William Somerville.

gers and officers as they shall deem necessary, and may remove same.

V. That no commissioner, secretary or other officer shall hold office for more than *five* years from the passing of this act, and thenceforth until the end of the then next session of parliament.

VI. That the commissioners of her Majesty's treasury may direct a salary, not exceeding £—, to be paid to the commissioners under this act, and may regulate the salaries of the secretary and other officers under this act, and same, and other expenses of carrying this act into execution, shall be paid out of monies to be provided by parliament.

VII. No commissioner shall, during the continuance of his office, be elected for or sit as a member of the House of Commons.

VIII. Before entering on the execution of his office every commissioner shall take the following oath: "I, A. B., do swear that I will faithfully, impartially, and honestly, according to the best of my skill and judgment, fulfil all the powers and duties of a commissioner under an act, passed in the — year of the reign of Queen Victoria, intituled &c." And the appointment of every such commissioner, with the time when, and the name of the justice or baron before whom he shall have taken said oath, shall be forthwith published in the Dublin Gazette.

IX. The commissioners shall frame and cause to be printed and circulated, as they shall see occasion, forms of applications and directions, indicating the particulars of the information to be furnished to the commissioners on applications to them under this act, with reference to title, incumbrances, and the circumstances of the land, and such other information as, in the judgment of the commissioners, may assist them in forming an opinion on such application, and also such other forms and directions as they may deem requisite.

X. The commissioners shall, from time to time, make such general rules for regulating the course of procedure under this act, and securing the due and prompt distribution of the moneys received upon sales, amongst or for the benefit of the persons entitled thereto, and for the protection of the interests of persons under disability and of future interests, and for giving effect to this act; but no fees or sums shall, under any general rule or otherwise, be payable to any officer or person appointed under this act in respect of any proceeding under this act, save in respect of any copy or extract of any order, &c., such sum not exceeding three half pence for every 90 words, as shall be paid for the making of such copy, &c., and every such general rule shall be laid before her Majesty's Privy Council of Ireland, and by order signed by six of said Privy Council, said Privy Council may confirm or disallow any such rule, or alter, amend, or remit same to the commissioners for further consideration, and (when confirmed) every such general rule shall be enrolled in the Court of Chancery in Ireland, and when so enrolled shall be binding on the commissioners, and shall be of the same force as if enacted by the authority of parliament: provided that same may be amended, rescinded, or altered by other rules, confirmed and enrolled in like manner.

XI. All such general rules made and confirmed as aforesaid shall be laid before both houses of parliament within one month from the confirmation thereof, or if parliament be not then sitting, within one month from the commencement of the next session.

XII. It shall be lawful for the commissioners, by summons under their seal, to require the attendance at a time and place to be mentioned in such summons of all persons they shall think fit to examine in relation to any matter before them, and require such persons to produce all deeds, &c. relating thereto, and examine such persons on oath or affirmation; and every person summoned to attend shall fail to appear, or refuse to be sworn, or shall not answer all lawful questions, or fail or refuse to produce any such deeds, &c. in his custody, possession or power, shall be liable to the same penalties &c. as any person failing to appear or refusing to give evidence in any suit or matter in the Court of Chancery in Ireland, and the commissioners shall have the like powers, &c. for enforcing the attendance of persons summoned, for punishing persons failing to appear or refusing to be sworn, &c. and for enforcing all orders made by them under this act as are vested in the said Court of Chancery in relation to any suit or matter depending therein.

XIII. The commissioners may receive in evidence affidavits, and same may be made before commissioners of the Court of Chancery, or the commissioners under this act may appoint persons to take same, and to examine witnesses.

XIV. Orders made by the commissioners may be enrolled in the Court of Chancery in England, and may be enforced in the same manner as orders under the 41 Geo. 3, c. 90.

XV. The commissioners shall have all the powers and authority of a court of Equity in Ireland for the investigation of title, and for ascertaining and allowing incumbrances, and charges, and the amount due thereon, and settling the priority of same, and the rights of owners and others, and generally for ascertaining, declaring and allowing the rights of all persons in any land or lease, in respect of which any application may be made under this act, or in the money to arise from sales under this act, but their procedure shall be according to such general rules as aforesaid, or, where same shall be inapplicable, at the discretion of the commissioners, and the commissioners may send cases for the opinion of a court of Law, and direct issues of fact to be tried by a jury, and, subject to any such general rule, the commissioners may refer to any one of such commissioners any such inquiries or matters as they may think fit, and such commissioner shall have, in relation thereto, the like powers vested in any two commissioners under this act.

XVI. The owner of any incumbrance upon land in Ireland, or any lease in perpetuity, or any lease for a time whereof not less than *sixty* years shall be unexpired, subject to incumbrance, may, within *three* years from the passing of this act, apply to the commissioners for a sale under this act.

XVII. For the purposes of this act land shall not be deemed subject to an incumbrance unless same shall affect a term of not less than *fifty* years abso-

lute, unexpired, or a greater estate on such land, nor unless such incumbrance shall have been created by the owner of an estate of inheritance, but an incumbrance charged under a power created by an owner of an estate of inheritance shall be deemed to have been created by such owner, and such lease as aforesaid shall not be deemed subject to incumbrance where same shall affect a derivative estate or interest only, or less than the whole estate created by such lease, unless such incumbrance shall have been created by the owner of or persons entitled to the whole estate created by such lease, but any incumbrance charged under a power created by the owner or person entitled to such whole estate, shall be deemed created by such owner or person entitled.

XVIII. When any incumbrances shall be subject to any limitation, or be held on trust, the commissioners may proceed, upon the application or consent of the first person entitled to the income of such incumbrance, or of any trustee thereof, or other person whose estate or interest in the incumbrance appears to the commissioners sufficient to enable him properly to apply or consent in respect of the interests of the parties interested in the incumbrance.

XIX. The commissioners shall direct notice to be given to any person in such manner as they shall think fit, and bear any parties interested in the land or lease who may apply to them, and may investigate the title and incumbrances affecting same, and the state and circumstances of the land or lease, so far only as may be necessary to determine whether, under all the circumstances, it is expedient that a sale of all or any part should be made, and may, at their discretion, make an order for sale of all or any part thereof.

XX. Where a sale shall be made, the commissioners shall ascertain the tenancies of occupying tenants, and any leasees or under-leasees, subject to whose tenancies, leases or under-leases the owner or incumbrancer, applying to the commissioners under this act, may be owner or incumbrancer, and may give such notice and make such inquiries as may be necessary to secure the rights of such tenants, leasees, or under-leasees, and the sale shall be made subject to the tenancies, leases or under-leases so ascertained, and when the commissioners think fit, such sale may be made, subject to any annual charge, or such apportioned part as the commissioners think fit should remain charged thereon.

XXI. Where the commissioners make an order for sale, the land or lease shall be sold under the control of the commissioners by public sale or private contract together or in lots, and at such time and place as the commissioners think fit, and the conveyance, &c. shall be made by the commissioners, and the execution by any other party shall be unnecessary, and such conveyance shall refer to the tenancies, leases or under-leases (if any), and the charges (if any), subject to which the sale is made, and may be in the form in the schedule of this act contained, or to the like effect, with such limitations of uses and other additions, &c. as, with the approval of the commissioners, the purchaser may direct.

XXII. The purchase-money, in every case, shall be paid into the Bank of Ireland to an account in the name of the commissioners, and to the credit of

the estate sold, or, as the commissioners by general rule or special order, shall direct, and on the notification by the bank to the commissioners of the receipt of the money, a certificate, under the seal of the commissioners, of such receipt shall be endorsed on or written at foot of the conveyance, and on such payment into bank the purchaser shall be discharged from all liability as to the application of the purchase-money, and the certificate of the commissioners shall be evidence of payment.

XXIII. Every such conveyance upon the sale of land shall be effectual to pass the fee-simple and inheritance of the land subject to such tenancies, leases, and under-leases referred to therein as aforesaid, but save, as hereafter provided, discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever, of her Majesty, her heirs and successors, and all other persons whomsoever; and every such conveyance upon the sale of a lease shall pass the estate created or agreed to be created thereby, and remaining unexpired, subject to the rent and covenants annexed to the reversion, and to such tenancies, leases, and under-leases as are referred to in such conveyance, but save as aforesaid, and as hereafter provided, discharged from all rights, titles, charges, &c., affecting same; where any land or lease is sold, subject to any annual charge or apportioned part thereof, same shall remain payable out of such land or lease as in the conveyance, &c., shall be expressed.

XXIV. Such conveyance shall not affect any right of common or way, or other easement or rent-charge in lieu of tithes, crown or quit-rent, or charge under the drainage act, 5 & 6 Vic. c. 89, or the act amending same, 10 & 11 Vic. c. 32.

XXV. The commissioners shall have power to order the delivery to the purchaser of all leases, &c., and shall, on the application of the purchaser, issue an order to the sheriff to put such purchaser in possession of all lands not in the occupation of leasees, &c., subject to whose leases the sale shall be made, and who shall have attorned to such purchaser within a time limited by such order, and same shall be executed in like manner as a writ for the delivery of possession.

XXVI. The commissioners shall, out of the purchase money received on the sale of any land or lease under this act, pay the costs of and consequential on the application for the order for the sale, as they shall think fit, and the expenses of and incidental to the sale, and the surplus shall, after payment of such costs, &c., under the order of the commissioners, be applied in or towards payment or satisfaction of the incumbrances or charges which affected such land or lease, or part thereof, according to their priorities, and shall, subject as aforesaid, be paid to the owner, previously to such sale of such land or lease, where such owner was absolutely entitled thereto, or where not so entitled, be laid out in the purchase of land, which shall be limited and settled to the same uses, upon the same trusts, for the same purposes, and in the same manner, as the land or lease, or part sold, or such of them as shall be then subsisting or capable of taking effect; and

until such money can be so laid out, it may, under such order as aforesaid, be transferred or paid over to trustees, to be appointed or approved by the commissioners, for the purpose of being so laid out as aforesaid, with such power for the investment thereof in Government Stock funds or securities in the meantime, and such directions for the payment of the income of such investment in the manner in which the rents of the land to be purchased would be applicable, as the commissioners shall think fit.

XXVII. That any money so paid into bank may by order of the commissioners be invested in their name in the purchase of any stock, &c., and the dividends applied under the order of the commissioners, as the rent of the land or lease from the sale whereof the money invested has arisen, would have been applicable.

XXVIII. Whenever the commissioners direct the appointment of trustees, they may make provision for the appointment of new trustees.

XXIX. Provided that no payment towards the discharge of any incumbrance or charge, not being a payment in full, shall prejudice or affect any right or remedy of the incumbrancer, or the person entitled to the charge in respect of the balance, otherwise than as against the land or lease or part thereof sold, and no payment under this act, of or in respect of any incumbrance or charge, shall impair any right or equity of any person out of whose estate such payment shall be made, to be reimbursed or indemnified by any person, or out of any other land or estate, except so far as the commissioners under any special circumstances shall order.

XXX. That the commissioners may pay to any person entitled to any charge, not being an incumbrancer under this act, who may consent to accept same, a gross sum in discharge, or by way of redemption thereof or of a part thereof; and where part only of the land or lease is sold, may, with the consent of the incumbrancer or person entitled to the charge, charge the part not sold with such incumbrance or charge, or an apportioned part thereof, in exoneration of the money arising from the sale, and may authorize persons to release the money from any incumbrance, or relinquish their claim on such money in respect thereof, without impairing or affecting such incumbrance or charge, as to the remaining part of the land or lease originally charged, and the commissioners may invest money to meet any annual charge, where by reason of same being contingent or otherwise it shall seem proper so to do, and otherwise may make such orders for applying the money as will secure the convenient application thereof for the benefit and according to the rights of the parties interested in the land or lease or part thereof from the sale of which the same shall have arisen.

XXXI. Where any money arising from a sale is not immediately distributable, or the parties entitled thereto cannot be ascertained, or where the commissioners think it expedient, they may order such money or the securities in which same may be invested, to be transferred to the account of the Accountant-General of the Court of Chancery or

Exchequer in Ireland, or the Court of Chancery in England, in the matter of the parties interested, in trust to attend the order of such Court, and may declare the trusts affecting same so far as ascertained by them, or the facts found by them in relation thereto; and the Court of Chancery, Chancellor, and Master of the Rolls in England and Ireland respectively, and the Court of Exchequer in Ireland, may make such order in relation to such money, &c., so transferred, as they may think fit in relation to any funds, &c., paid or deposited under the 10 & 11 Vic. c. 96, being the act for the relief of trustees, or the 11 & 12 Ric. c. 68, for extending said act to Ireland; and such money shall not be liable to usher's poundage.

XXXII. Where any lease subject to incumbrance shall be sold, the commissioners may, at the application of the owner of the reversion, include in this sale the reversion, upon such terms as they shall see fit, and shall apportion the purchase-money and expenses, and the assurance shall include the reversion, if the commissioner's think fit.

XXXIII. If any land or lease to be sold shall be subject to any lease or under-lease for years or lives comprising other land at an entire rent, the commissioners may apportion the rent between the land to be sold and the remainder; and where it is intended to sell part only of any lease, the commissioners may apportion the rent between the land to be sold and the remainder, and the commissioners shall direct notices to be given of any such intended apportionment to such persons as they think fit, and may hear parties in relation thereto; and after such apportionment and sale, the owners of the reversion shall have the like remedies for the apportioned rents against the lands out of which same shall be payable, and the owners and occupiers thereof as were subsisting for the entire rent before such apportionment, and all the covenants, conditions, and agreements of every lease or under-lease, except as to the amount of rent to be paid, shall as regards the apportioned parts remain in force in the same manner as if no apportionment had taken place.

XXXIV. Where any person who, if not under disability, might have applied, consented, or done any act, or been party to any proceeding under this act, shall be a minor, idiot, lunatic, or married woman, the guardian, committee of the estate, and husband respectively of such person may apply, consent, do such act, or be party to such proceedings as such person might have done, and shall otherwise represent such person for the purposes of this act; but a married woman entitled for her separate use, (with or without power of anticipation,) shall for the purposes of this act be deemed a *feme sole*, and where there shall be no guardian or committee of the estate of any idiot or lunatic, or where any person of unsound mind shall not have been found idiot or lunatic under an inquisition, the commissioners may appoint a guardian for the purposes of this act, and may change such guardians, and the commissioners may appoint a next friend of any married woman, and may change such next friend.

XXXV. Proceedings under this act shall not

abate or be suspended by deaths, transmissions, or change of interest. But in such case the commissioners may, where they see fit, require notices to be given to parties becoming interested, or make any order for discontinuing, suspending, or carrying on the proceedings, as may appear just.

XXXVI. In every proceeding under this act, the commissioners shall have full power and discretion as to the giving and withholding costs and expenses, and as to the person by whom, and the funds out of which the same shall, in the first instance or ultimately, be paid, repaid, and borne, and may apportion same amongst such parties, and in respect of interest, rents, or income, and principal or corpus, as they shall see fit.

XXXVII. Application may be made for a sale, and an order made by the commissioners, notwithstanding any pending proceeding in a Court of Equity in England or Ireland, or any decree of such Court already made for a sale; and where it shall be shown to the commissioners that a decree for a sale has been made by a Court of Equity, the Commissioners shall, if they see fit, without further inquiry, order a sale of the land or lease decreed to be sold, and where any sale shall be made of land or lease, in respect of which there shall have been a decree, or any proceedings pending in a Court of Equity, in distributing the money and in their other proceedings, the commissioners shall have regard to the proceedings in such Court in relation to the priorities and rights of incumbrances and others; and where a decree has been pronounced, the commissioners may proceed upon and be guided by the declaration of and the inquiries and proofs made and taken under such decree in relation to such priorities and rights as aforesaid, and the commissioners shall, out of the money arising from any sale under this act, where there shall have been any such decree or pending proceeding, make such provision for payment of costs incurred in Equity as circumstances may require, or they may order all or any part of the purchase-money, after payment of the costs and expenses payable under the orders of the commissioners, to be paid into the Court of Equity in or under any suit or decree then pending or made.

XXXVIII. When the commissioners shall order the sale of any land or lease or part thereof, in respect of which a decree shall have been made by a Court of Equity for a sale, or any proceeding shall have been pending, they shall by certificate under their seal notify to such Court the order, &c., made by them, and all proceedings for or in relation to a sale under the decree of such Court shall be stayed, and upon the completion of the sale under such order of the commissioners, any receiver appointed by such Court shall cease to act, with respect to the land or lease or part sold, and the Court may suspend or stay any other proceedings in such court, in or under any order or decree already made by such Court as the Court shall think fit, and pending any proceedings for a sale under this act, it shall not be lawful for any owner, or any person claiming to be owner within the meaning of this act, or claiming by the act of such owner or person, or by act of law, or any

incumbrancer, to commence any proceedings at law or in Equity for redemption, foreclosure, or sale, or to commence, take, continue, or prosecute any proceeding whatsoever under the act of the last session, "to facilitate the sale of incumbered estates in Ireland," without leave of the commissioners.

XXXIX. The commissioners shall not be subject to be restrained in the execution of their powers under this act, nor shall any person be restrained from making application under this act to the commissioners, or doing any other act, or giving any consent under this act, by order or injunction of a Court of Equity; nor shall proceedings before the commissioners be removeable by *certiorari*.

XL. The commissioners may renew, rescind, or vary any order made by them, but save as aforesaid, and as hereafter provided, every order shall be final, provided that where the commissioners allow appeal, but not otherwise, appeal against any order may be made to the Privy Council of Ireland, within one calendar month from the making of the order appealed against, and such appeal shall be heard and reported on by members of the Privy Council, to be appointed by the Lord Lieutenant or other Chief Governor of Ireland, to be a judicial committee for that purpose, and the order of the Privy Council shall be made according to the report of such judicial committee, and shall be final.

XLI. Any person examined before the commissioners, or the persons authorized by them, who shall give false evidence, shall be guilty of perjury.

XLII. In the construction of this act the word "land" shall extend to manors, advowsons, rectories, messuages, lands, tenements, rents, and hereditaments of any tenure, whether subject to any fee-farm or other perpetual rent, with or without condition of re-entry for securing the same or otherwise, or whether corporeal or incorporeal, and every undivided share thereof. And the word "estate" shall extend to any estate in Equity as well as at Law, and to the benefit of any covenant or contract for, or right of renewal. And the word "lease" shall include an agreement for a lease, and the estate or interest created or agreed to be created by such lease or agreement in the whole or any part of the land therein comprised; and "lease in perpetuity" shall mean any lease or grant for one or more life or lives, with or without a term of years, or for years determinable on one or more life or lives, or for years absolute with a consent or agreement in any of such cases, whether in the same or in any other instrument, for the perpetual renewal of such lease or grant, whether such lease shall be derived out of the inheritance or by way of under-lease out of any lease or other estate. And the word "incumbrance" shall mean any legal or equitable mortgage in fee or for any less estate, and also any money secured by a trust, or by judgment, decree or order of any superior court of Law or Equity duly registered, and any legacy, portion, lien, or other charge whereby a gross sum of money is secured to be paid on an event or at a time certain, and also any annual or periodical charge, which, by the instrument creating same or by any other instrument, is made re-

purchaseable on payment of a gross sum of money, and also any arrear remaining unpaid of any annual or periodical charge for payment of which a sale might be decreed by a court of Equity. And the word "incumbrancer" shall mean any person entitled to such incumbrance, or entitled to require payment or discharge thereof. And the word "possession" shall include the receipt of the rents and profits. And the word "owner," as applied to any land, shall include any person entitled in possession, in fee simple, or in tail, or quasi in tail, and any person entitled in possession for a life or lives, or for a term of years determinable on the dropping of any life or lives, or for a term of years of which not less than 99 years are unexpired, not being a lessee at a rent, and also any person entitled in possession as tenant by the curtesy whether at Law or in Equity, and any person entitled in possession whether in fee, or any lesser estate as aforesaid to the Equity of redemption in any land, or to the land subject to any incumbrance, or a trust for the payment of any incumbrance, and any feoffees or trustees for charitable or other purposes entitled in possession; and the word "owner," as applied to a lease in perpetuity or other lease, shall include any person entitled in possession to the land comprised in such lease for the whole estate created or agreed to be created by such lease, or for any derivative estate (created by settlement on testamentary or other disposition thereof) quasi in tail, for life or lives, or for years, of which not less than 50 years are unexpired, not being an under-lease at a rent derived out of such lease, and any person entitled in possession for such whole estate or such derivative estate as aforesaid to the Equity of redemption in such lease or to such lease subject to any incumbrance on a trust for the payment of any incumbrance; and the words "person" and "owner" shall extend to bodies politic and corporate as well as individuals; and "commissioners" shall mean "The Commissioners for Sale of Incumbered Estates in Ireland;" and "Commissioners of Her Majesty's Treasury" shall mean such commissioners for the time being, or any three of them, or the said Lord High Treasurer for the time being; and every word in the singular number shall extend to several persons and things, and the plural shall apply to one person or thing, and the masculine gender shall extend to a female.

XLIII. This act, save so far as the several provisions require, shall only extend to Ireland.

CHANCERY.

Robert Keating, Esq., Plaintiff,
Richard Gardie, Elizabeth Gardie,
Widow Gustavus Hamilton,
Henry Pigott, and others,
Defendants.

PURSUANT to the Decree made in this cause, bearing date the 2nd day of March, 1840, I hereby require all persons having Charges and Incumbrances affecting the Lands and Premises in the pleadings in this cause mentioned, to come in before me on or before Thursday the 1st day of June next, and prove their demands, otherwise they will be precluded the benefit of said decrees.

Dated this 27th day of April, 1840.

E. LITTON.

LUKE DUFF, Solicitor for Plaintiff, 26, Greenville Street, Dublin.

JAMES O'DRISCOLL,
PROFESSED TROUSERS MAKER
9, ANGLESEA STREET.

CHANCERY.

Samuel Ward and others,

Plaintiffs,
Grace Anne Irwin and others,
Defendants.

PURSUANT to the Decree in this Cause, bearing date the 1st day of December, 1839, I hereby require all persons having Charges and Incumbrances affecting that lot or place of Ground situate on the North side of College Street, and extending back to the South side of Fleet Street, situate in the County of the City of Dublin, with the Buildings erected thereon the property of Henry Ward, late of Shankrock Villa, in the County of Dublin, deceased, being the Tenements and Premises in the Pleading in this cause mentioned, to come in before me at my Chambers on the 1st day of May, in the City of Dublin, on or before the 2nd day of July 1840, and proceed to prove the same, otherwise they will be precluded the benefit of said decrees.

Dated this 16th day of May, 1840.

EDWARD LITTON.

Charles Gausson, & Co., Solicitors for the Plaintiffs,
72, Eccles Street, Dublin.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 4, FLEET STREET, in the Parish of St. Andrew, and published at 13, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, May 22, 1840.

THE Irish Jurist

No. 31.—VOL. I.

JUNE 2, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, JUNE 2, 1849.



We give elsewhere the opinion of the English judges on the errors assigned in the case of *William Smith O'Brien, and others v. the Queen*, and the judgment of the House of Lords in conformity with that opinion.

There was no decision on the substantial question raised by the prisoners, as to whether the 11 & 12 Vic. extended to Ireland in certain cases of treason, the privileges which persons accused of that crime are entitled to in England, and whether the denial of those privileges was the subject-matter of a declinatory plea, the case having been decided, as will be seen on reference to the report, on the ground, that, as the treason, the subject of the sixth count of the indictment, did not come within the provisions of the 11 & 12 Vic.—the Treason Felony Act—which extended to Ireland certain of the provisions of the English Act, 36 Geo. 3, made perpetual by the 57 Geo. 3, it became unnecessary to consider whether the plaintiffs in error were entitled to the benefits derived through those statutes,—namely, a copy of the indictment and a list of the witnesses ten days before the trial. We understand, it was assumed in the argument throughout, that the 6th count of the indictment did fall within the provisions of the acts referred to; and the decision consequently turned upon a point that was unargued—one which the counsel for the prisoners thought too clear for argument, and one on which we are informed the counsel for the crown did not mean to rely.

It will be in the recollection of our readers, that the treason charged in the 6th count of the indictment was a compassing of the Queen's death, and that one of the overt acts alleged in it in support of

such charge, was a conspiracy to put the Queen to death.

It only remains to be considered, whether such treason did or not range within, and was or not a treason for which provision was made by that part of the 36 Geo. 3, which was extended to Ireland by the 11 and 12 Vic. The 36 Geo. 3, enacts, that "if any person shall, during the life of his Majesty the then king, and until the end of the next session of parliament after a demise of the Crown, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of our Sovereign Lord the King, his heirs and successors, and such compassings, imaginations, intentions, and devices shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, every such person, upon conviction, shall be adjudged a traitor."

The 57 Geo. 3 made perpetual the provisions which related to the heirs and successors of his Majesty, and by the 4th section enacted, that any person indicted for any offence made or declared to be high treason by this act, shall be entitled to the benefit of the 7 W. 3 and the 7 of Anne, (whereby the list of the witnesses and copy of the indictment were to be given ten days before the trial.) save and except in cases of high treason in compassing or imagining the death of any heir or successor of his Majesty, where the overt act or overt acts of such treason, which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of his Majesty, or any direct attempt against the life of any heir or successor of his Majesty, or any direct attempt against the person of any heir or successor, whereby the life of such heir or successor may suffer bodily harm.

The 11 & 12 Vic., c. 12, after reciting that doubts were entertained whether the provisions made perpetual by the 57 Geo. 3 extended to Ireland, and that it was expedient to repeal all such of the provisions so made perpetual, and all the provisions of the 57 Geo. 3 in relation thereto, save such of the same as relate to offences against the person of the sovereign, enacts, "that from the passing of this act, the provisions of the said act of the 36 Geo. 3, made perpetual by the act of the 57th of the same reign, and all the provisions of the said last-mentioned act in relation thereto, *save such of the same respectively as relate to the compassing or imagining the death or destruction of the heirs and successors of his said Majesty, King Geo. 3, and the expressing, uttering, or declaring of such compassings or imaginings, shall be and the same are hereby repealed;*" and by the second section the unrepealed provisions are extended to Ireland.

Was, then, the offence charged in the sixth count—a compassing to put the Queen to death—an offence within the provisions of the 36 Geo. 3, and was it an offence either made or *declared* treason by the 57 Geo. 3? If it were not such an offence, of course the benefits given by those statutes could not have been claimed by the prisoners; or again, if it were an offence within the range of those acts, did the saving in the 4th section of the 57 Geo. 3, exclude the prisoners from the benefits given by the former part of the section.

The counsel for the prisoners assumed that it was such an offence, and also assumed that a conspiracy to put her Majesty to death was not either assassination, killing, or any direct attempt against her Majesty's life, so as to come within the saving in the 4th section of the 57 Geo. 3.

The sixth count of the indictment, as we have seen, charged a compassing the Queen's death, and so fell within the 36 Geo. 3, in terms, "shall compass the death of the King, his heirs or successors." The conspiracy to put the Queen to death was charged as an overt act, and so fell within the terms of the same statute, "and such compassing shall express, utter, or declare, by publishing any printing or writing, *or by any overt act or deed.*" According to plain, unambiguous English language, therefore, it would have appeared to us to have been an offence within the statute, and we were anxious to ascertain why it was held not to range within its provisions. The English Judges content themselves by affirming, "It is enough to say, that the charge in the 6th count is not for any treason made or declared by *that statute*"—i. e., the 57 Geo. 3, which, as we have before seen, made perpetual the provisions of the 36 Geo. 3.

In the next sentence, they state that the 4th section of the 57 Geo. 3 "is limited to treasons made or declared by that act, and the treason which is the subject of the sixth count was not one of them, and to which, therefore, it does not apply."

This is the only light that we can extract from the opinion, and it is not satisfactory. What were the treasons made or declared? One was, certainly, "compassing the death of the King, his heirs or successors." Where are the words of exclusion? where the words of restriction?

We confess, were it not for some passages in the judgment of the Irish Chief Justice, we should have been altogether at a loss to divine why the sixth count of the indictment could be supposed to be not within the 36 Geo. 3 or the 57 Geo. 3.

That passage is as follows:—

"I now come to consider the position contended for by the Crown, and, I think, successfully, that even though persons indicted under the 11 & 12 Vic. would be entitled to the benefit of the English statutes, the plaintiffs here could not be so, the indictments not containing any *overt acts of personal violence*. I have already stated that the 36 Geo. 3, c. 7, appears to me to refer to two distinct classes of treason, the one having for its object the protection of the *person* of the Sovereign, and the other the preservation of his authority and government; and I think these two classes are unequivocally recognized and distinguished by the 11 & 12 Vic. c. 12, which, after a full recital of all the treasons made or declared by the 36 Geo. 3, c. 7, sets out in the preamble, that its object was to repeal such of the provisions so recited as did not relate to offences against the *person* of the Sovereign. This is a plain declaration, that some of them do and some of them do not relate to offences against the person of the sovereign. The enactments are in exact conformity with the preamble. I have, therefore, come to the conclusion, that though now, as before the act, the charge of compassing the death of the Sovereign might be sustained under the 25 of Edward 3, by any overt act against her imperial authority, as well as against *her person*; yet, that the 11 & 12 Vic. c. 12, was confined to the latter species of treason, and that as this indictment is framed, it cannot be considered as founded upon its provisions."

Now, with reference to the point, that the indictment does not contain any overt act of personal violence, the answer would be obvious, that the 36 Geo. 3 did not require any particular species of overt act, but uses expressly the words, "*any overt act or deed;*" and further, even if it did require an overt act of *personal violence*, a conspiracy to take away the Queen's life was such an overt act. And on the point, that the statute contemplated two distinct species of treason, the protection of the *person* and the preservation of authority—admitting this to be the fact, it would appear to us that the sixth count of the indictment, as appearing on the record, did embrace a treason against the *person* of her Majesty. To compass the Queen's death, by a conspiracy to put her to death, is surely an attempt against her person, and we see nothing in the act to limit its provisions to open acts of personal violence.

The Irish Chief Justice, though he relied upon, did not rest his judgment on that point merely, and the other judges in the Queen's Bench here did not rely upon it at all.

We have heard it suggested, that the English Judges may have decided the case on another ground; namely, that they may have construed the word "declared" in the 4th section of the 57 Geo. 3 as "newly declared;" and that as the sixth count was not for a treason *newly declared*, that statute, as extended to Ireland, was

inapplicable to the indictment. We can scarcely, however, believe that their decision could have rested on such a construction, when it is apparent from the same section that the Legislature understood old as well as new treasons to have been comprised in the first part of the section, as they expressly provided, as we have seen before, for the case, where the party was indicted for the old and not "newly declared" treason, of compassing the Queen's death, where the overt act was assassination, and enacted that a party indicted for such an offence should not be entitled to the privileges previously conferred.

The design, we apprehend, of the 11 & 12 Vic., was, to retain as treason all attempts against the person and the life of the sovereign, whether direct or indirect, whether by open attack against her life, or by secret designs, as by conspiracy; and to make felony offences which were not directed against the life of her Majesty, but against her authority.

The Irish Judges decided the question on the broad ground, that the privilege conferred by the acts of William and Anne on prisoners tried in England, is not extended to Ireland; and if their decision had been upheld on this ground, we could have no reason, as lawyers, to be dissatisfied—though a grave question of constitutional law has been and is involved in the inquiry why this difference of practice *should* prevail in the administration of the criminal law of the two countries.

The English judges avoided the substantial question, decided on a preliminary point, and assigned no reason for arriving at their conclusion. We cannot, therefore, but feel regret and disappointment at the abrupt termination of a case which involved such important questions, and it is clear it must have been hurriedly decided, or the judges could not have stated, as they did, that the counsel for the prisoners contended for the glaring absurdity, that the 36 Geo. 3 extended *proprio vigore* to Ireland—a position which, we should think, no member of the English or Irish bar ever contended for.

Like the former measures for the relief of the Poor, the Bill now before the House, to amend the acts for the more effectual relief of the destitute poor in Ireland, is conversant chiefly with the details of making, levying, and enforcing the payment of rates. No section, no line, no word, is introduced, indicating the slightest intention on the part of the Government to direct the vast amount of pauper labour now at their disposal to any work of public utility or improvement.

An original policy of the Poor-law—namely, to force proprietors to employ their population in the improvement of their properties, by presenting to them the alternatives of exertion or ruin—having eminently failed among the deeply-incumbered estates of the West and South, another and a more decisive policy has been adopted,—namely, to root out those owners of property who could not, or would not, be roused to exertion, and whose ruin, under the operation of the Poor-law, was too slow for the anxiety of the Government—it may have been, for the necessities of the country.

Under the belief that proprietors themselves would be glad to be rid of properties of which they were the mere nominal owners, the Government, last session, brought in a bill to facilitate the sale of incumbered estates; it might have been more appropriately designated as the "Incumbered Bill for the Sale of Estates." This belief as to this anxiety on the part of proprietors, having proved delusive, and the machinery being found not convenient for creditors, another Bill, with in some respects more extensive and in others more limited powers, has been introduced this session.

By this concurrent measure, the Government has endeavoured to aid the operation of the poor-law; however, lest the forbearance of creditors might render trifling the operations of the Incumbered Estates Bill, there are introduced into the present amendment of the Poor-law, enactments which will confer upon Government the power of initiating proceedings for the sale of estates, and at the same time urge every incumbrancer to press properties into the market.

We allude to the enactments of the 12th and 13th sections of the bill; the 12th section enacts that civil bill decrees for the recovery of poor rate, shall by a short and simple process, become equivalent to judgments recovered in any superior court; and the 13th section enacts, that all judgments obtained for poor rates in a superior court, and all civil bill decrees for poor rates, rendered equivalent to judgments, as provided in the 12th section, shall take priority before all charges and incumbrances whatsoever—crown and quit rents, tithe rent charge, and charges existing under the "act to facilitate the improvement of landed property in Ireland," excepted. By the first of these enactments, the government have secured to themselves the power of initiating proceedings for the sale of any estate where the poor rate may be allowed to fall into arrear; by the second, the fears of creditors will be awakened by the knowledge that the proprietor may materially injure their security, merely by the non-payment of poor rates.

By persons about to purchase or to take land, as well as by the unembarrassed owners of well circumstanced properties, the limitation of the amount to which property is chargeable for poor rate, will be hailed as a boon; but to embarrassed landlords and tottering farmers it will be of little service—the poor rate yet chargeable is too heavy for their ruined resources. However, it is no part of the government plan to save men of this class—they must be cut down as fruitless cumberers of the earth, and their properties, sold at ruinously low prices, will serve to induce capitalists to undertake the profitable employment of the population—a task which the government have considered beyond their power, or out of their province to undertake.

All powerful as may be the effect of thus introducing "new energy and new blood" into the country, we are not satisfied that in a "bill to amend the acts for the more effectual relief of the destitute poor in Ireland," some enactment providing for the useful or profitable employment of the able-bodied paupers, was not introduced. However expeditiously the country may right itself

under a changed system, a considerable time must elapse before the surplus labour of the population can be absorbed into the cultivation of the soil, and in the mean time, the labour test (as it is called) might, in our opinion, be just as well applied by requiring the recipients of out-door relief to work at the earth-works of a railroad, as by requiring them to attend at a quarry and break stones; and the future advancement of the country towards prosperity, which is, or ought to be, the aim of all those bills, would be much more promoted by the former course than by the latter. The government seem deterred from attempting to turn to any useful purpose the labour of the able-bodied paupers, by the recollection of the ill success attending the administration of relief, through employment on public works; they seem to ascribe as inherent to the system itself, the errors committed in carrying it out; and with such nervous apprehension did they contemplate any return to this system, that it was a long time before the able-bodied paupers—though fed at the public expense—were allowed to be employed in rendering the roads—which had been torn up under the Board of Works, and left in an unfinished state—passable. However, after much delay and expostulation, the paupers were so employed, and as no evil result followed, it formed fair subject of hope that the principle “that it was dangerous to employ pauper labour usefully” would have been ere now deserted.

Before, however, the limitation of the amount to which property is liable for poor rate can produce the full relief intended, a new valuation of the ruined unions will be necessary; the valuation at present existing, and according to which rates are now levied, was made before the famine. Two causes have since conspired to depress the value of land, viz. the failure of the potato, and the decrease of the population—both causes tend to destroy that very minute subdivision of land, which, at the same time, produced two apparently opposite extremes, the maximum of poverty and of rents; a valuation made under these circumstances is greatly disproportionate to the present value of property, and cannot be continued as a basis on which to levy so heavy a tax as seven shillings in the pound. However, to the solvent proprietor or purchaser, this limitation will offer strong inducements to exertion, and if the property of the country is transferred into such hands, we have no doubt a re-valuation would be soon insisted upon.

By another provision the interests of this class are still further attended to, and their energies stimulated; improvements are to remain unchargeable with poor rate for seven years. If the bills now before the house will produce the effect they are expected, and seem calculated to produce,—namely, rooting out the present race of encumbered proprietors, and handing over their properties to richer and more industrious men—if these new proprietors, in place of making profit of their purchases, by renting them out to small tenants, will themselves undertake their cultivation, will reside and give employment—we should expect to see a mighty change worked in the appearance and fortunes of the country, within seven years. Comfortable farm-houses, hedge-rows and well cultivated

fields, replacing waste and desolation—employment taking the place of out-door relief—and boards of vice-guardians giving way to men, at once proprietors and cultivators of the soil. If such a destiny awaits this country, men in a few years will smile at the fears which suggested this provision, and will pity the present proprietors, whose indolence or whose poverty required such encouragement to stimulate them to exertion; but at present the provision is a valuable one, and will, we hope, lead to good results.

By the 5th section, rent-charges, by way of annuity and jointure, are made liable to deduction for poor rates; but of mortgages and judgments no notice is taken—these still remain unchargeable—the mortgagees and judgment-creditors are entitled to their full interest, whilst judgments can be obtained against the nominal owners of poverty-stricken and profitless estates for seven shillings in the pound on their valuations. If the legislature have come to the conclusion, that encumbered proprietors are an obstacle to the improvement of the country, they seem to have omitted no means of removing them.

THE uniform practice of the English Courts has in all cases been to refuse the sheriff the costs of obtaining the interpleader rule, under the 1 & 2 W. 4, c. 58, Eng. In *Bryant v. Ikey*, (1 Dov. P. C. 490,) the Counsel for the sheriff contended that the class of cases in which the Court had been accustomed to refuse the sheriff his costs, were those in which there appeared to be a *bona fide* execution on the one side, and a *bona fide* claim upon the other; that the execution creditor, by his non-appearance having admitted himself in error, and abandoned his rights, and having improperly forced the sheriff into Court, was entitled to his costs. But the Court said, that if the sheriff were to be allowed his costs in cases where either the claimant or execution creditor failed to appear, both would appear to save the expense of those costs; that the judges had therefore thought it better to draw one strict line, and in no case to allow costs to the sheriff.

This practice, though adopted in the earlier cases under the similar act 9 & 10 Vic. c. 64, in *Ball v. Bruen*, (Bl. D. & O.) and in a recent case in the Common Pleas, *Alexander v. Handy*, (11 Ir. L. Rep. 390,) has not been unanimously approved of in this country, and has been expressly over-ruled by the Court of Exchequer in the cases of *Scully v. Figges*, (1 Ir. Jur. 36 Ex.;) *Lascombe v. Blake*, (ib.)

The ground upon which the English Courts have founded their practice, is, that the Act confers a large benefit upon the sheriff, by relieving him from a liability he would be otherwise subject to. No question turns upon the construction of these acts, the allowance of costs being in every case entirely in the discretion of the Court.

We think the practice adopted by the Court of Exchequer in this country is certainly more just than that of the English Courts, and is that which is adopted in interpleader suits in Equity. *Pear v. Gilham*, (Coop. 56,) *Aldridge v. Meener*, (6 Ves.

417,) in which the plaintiff is entitled to his costs from the fund in the first instance; and though a sheriff cannot proceed for relief in a Court of Equity, *Kingsley v. Bolton*, (1 V. & B. 335,) it is not easy to understand on what principle he is to be put to expense because the Legislature had lightened a liability incurred in the discharge of his duty—the principle on which Courts of Equity invariably give ordinary persons their costs appearing to be equally applicable to the case of sheriffs.

Court Papers.

Chancery.

May 29.—The following gentlemen took the usual oaths on being called to the bar:—

Andrew William Harnett, Joseph Henry Dunne, William Despard, John Dunbar, Michael Morris, James Murphy, Daniel O'Connell Riordan, Michael Harrison, Arthur Close, Lesley Sidney Montgomery, John Chute Neligan, John Alexander Byrne, George Waters, jun., Walter Robert Atkin, Joshua Finn, James Acheson Lyle.

20th March, 1849.

A BILL FOR CONSOLIDATING AND AMENDING SEVERAL OF THE LAWS RELATING TO ATTORNIES AND SOLICITORS IN IRELAND.*

Note—The words printed in Italics are proposed to be inserted in committee.

Whereas it is expedient to amend several of the laws relating to attorneys and solicitors practising in Ireland: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the 7 Geo. 2 as relates to the better regulating the payment of the fees of attorneys and solicitors; and also the 1 & 2 Geo. 4, be and the same are hereby repealed, save so far as such acts or parts of acts, or any of them, repeal the whole or any part of the same or any other act or acts, and also save and except so far as relates to any matters or things done at any time before the passing of this act, all which matters and things shall be and remain good, valid, and effectual to all intents and purposes whatsoever as if this act had not passed, and also save and except as to the recovery and application of any penalty for any offence which shall have been committed before the passing of this act.

II. That from and after the *passing of this act* no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of *one month* after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house,

office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter, subscribed in like manner, referring to such bill; and upon the application of the party chargeable by such bill within such *month* it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, or Exchequer, or any judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court, and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such *month* as aforesaid, that it shall be lawful for such reference to be made as aforesaid either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of *twelve* months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made; and upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such

* Prepared and brought in by Mr. George A. Hamilton, and Mr. Napier.

reference shall be made may proceed to tax and settle such bill and demand ex parte; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what upon such reference shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand; and of the costs of such reference, if payable: provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation: provided also, that where such reference as aforesaid shall be made when the same is not authorized to be made, except under special circumstances, as herein-before provided, then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: provided also, that it shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery, by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such courts or judges respectively where any such business had been transacted in the court in which such order was made: provided also, that it shall not in any case be necessary, in the first instance, for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance of this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left was not such a bill as constituted a bona fide compliance with this act: provided also, that it shall be lawful for any

judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit Ireland.

III. That where any person not the party chargeable with any such bill within the meaning of the provisions herein-before contained shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: provided always, that in case such application is made when under the provisions herein contained a reference is not authorized to be made, except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he were the party making the application.

IV. That it shall be lawful, in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or been entitled to pay such bill, to refer the same, and such attorney's, or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such direction and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference, to or by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases; and in exercising such discretion as aforesaid the said judge may take into consideration the extent and nature of the interest of the party making the application: provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he shall think fit, to order the same or any part thereof to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making

such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor had.

V. That for the purpose of any such reference, upon the application of the person not being the party chargeable within the meaning of the provisions of this act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: provided always, that no bill which shall have been previously taxed and settled shall be again referred, unless under special circumstances the court or judge to whom such reference is made shall think fit to direct a re-taxation thereof.

VI. That the payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such court or judge, appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within *twelve* calendar months after payment.

VII. That in all cases in which such bill shall have been referred to be taxed and settled the officer to whom such reference is made shall be at liberty to request the proper officer of any other court having such an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers in respect thereof as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same.

VIII. That all applications made under this act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents and papers, shall be made in the matter of such attorney or solicitor; and that upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court,) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law it shall be lawful for such court or any judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall have been disputed previous to the commencement of the taxation, or to make such other order thereon as such court or judge shall deem proper.

IX. That in the construction of this act the word

"month" shall be taken to mean a calendar month; and every word importing the singular number only shall extend and be applied to several persons, matters, or things, as well as one person, matter or thing; and every word importing the plural number shall extend and be applied to one person, matter, or thing, as well as several persons, matters, or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word "person" shall extend to any body politic, corporate or collegiate, municipal, civil, or ecclesiastical, aggregate or sole, as well as an individual, unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.

X. That this act may be amended or repealed by any act to be passed in the present session of parliament.

—♦—
27th April, 1849.

A BILL TO MAKE TEMPORARY PROVISION FOR A GENERAL RATE IN AID OF CERTAIN DISTRESSED UNIONS AND ELECTORAL DIVISIONS IN IRELAND.*

[AS AMENDED BY THE COMMITTEE.]

Whereas, it is expedient, for a limited time, to make further provision for the relief of the destitute poor chargeable on certain unions and electoral divisions in Ireland: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for the Commissioners for administering the laws for the relief of the poor in Ireland, with the approval of the Lord Lieutenant, or other Chief Governor or Governors of Ireland, for the time being, during each of the years ending the thirty-first day of December, one thousand, eight hundred and forty-nine, and the thirty-first day of December, one thousand, eight hundred and fifty, to fix and declare from time to time the amount of such sum as the said Commissioners shall deem it necessary should be raised for the purpose aforesaid, and to assess the same upon the several Unions in Ireland in proportion to the annual value of the property in each union rateable to the relief of the poor, according to the valuation thereof for poor rates in force for the time being; provided that the sum so to be levied in any union, in each of the said two years, shall not exceed sixpence in the pound on such annual value; and the said Commissioners shall transmit to the Guardians of each Union an order under their seal, stating the amount so assessed on such Union, and the amount thereof which shall be leviable on each electoral division of such Union, according to the net annual value of the rateable property in such electoral divisions respectively.

II. And be it enacted, that the guardians of each union shall, in the rate to be made on each electoral

* Prepared and brought in by Mr. Bernal, Sir William Somerville, and Sir George Grey.

division of the union next after the receipt of such order, provide for the sum leviable on such division, according to the order of the commissioner as aforesaid; and from and after the making of the rate on such division next after the receipt of such order the treasurer of the union shall, out of all lodgments made with him of such rate, or any subsequent rate, on account of such division, reserve one moiety of all such lodgments, and place the same to the credit of such division in an account to be entitled "The Union Rate in Aid Account," until the whole sum leviable on such division under the said order shall have been reserved and placed to such account as aforesaid; and the treasurer of such union shall pay over from time to time all sums so reserved as aforesaid on account of the proportion leviable on each electoral division into the bank of Ireland, to be there placed to a separate account in the name of the paymaster of civil services in Ireland, to be entitled "The General Rate in Aid Account."

III. And be it enacted, that the Commissioners of her Majesty's treasury shall be empowered to order the payment of the sum standing in such separate account at the Bank of Ireland as aforesaid, or of any part thereof, to such person or persons, at such time and times, and under such conditions and restrictions as the said Commissioners of her Majesty's treasury shall think fit, for the purpose of affording relief to destitute poor persons in any union or electoral division in Ireland, or of assisting the emigration of such destitute poor persons, or for the purpose of repaying any advance which may have been made as hereinafter provided out of the Consolidated fund of the United Kingdom of Great Britain and Ireland for any of the purposes aforesaid.

IV. And be it enacted, that for the more speedy affording of such relief it shall be lawful for the commissioners of Her Majesty's treasury to direct that any sum or sums not exceeding in the whole £100,000 shall be issued and paid, out of the growing produce of the said consolidated fund, to such person or persons and at such time and times as the said commissioners shall from time to time direct; and such sum or sums shall be charged on and be payable out of the produce of any rate or rates to be levied in any union or unions in Ireland under the provisions and in pursuance of this act.

V. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of parliament.

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IN CHANCERY.

Richard Nagle and others, Plaintiffs, } **PURSUANT** to the Decree made
Richard Nagle and others, Defendants. } in this Cause, bearing date the 15th day of March, 1868, I hereby make it known, that the Creditors of James Richard Nagle, late of Agila, in the County of Waterford, Esquire, deceased, and persons being Charges and Incumbrances affecting the Lands of Agila, Coshin, and Dromore, situate in the County of Waterford, in the placings in the cause mentioned, to come in before me at my Chambers, late 15, in the city of Dublin, and prove the same on or before the 15th day of May next, otherwise they will be precluded the benefit of said decree.

Dated this 1st day of May, 1868.

EDWARD LITTON.

Patrick Scott, Plaintiff's Solicitor, Chambers, 25, College Green, Dublin.

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Lecturer on Chemistry.

Mr. Kelly, College-green.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 80s. Half-yearly, 45s. Quarterly, 25s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, in the FLEET-STREET, in the Parish of St. Andrew, and published by EDWARD JOHNSON, COLLEGE-GREEN, in the same Parish, by EDWARD JOHNSON, MILLIKEN, residing at the same place, all being in the County of Dublin. Saturday, June 2, 1868.

THE Irish Jurist

No. 32.—VOL. I.

JUNE 9, 1849.

Price { Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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		Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W. G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, JUNE 9, 1849.

THE Incumbered Estates bill has passed its third reading in the House of Commons with only twelve dissentient voices. Whatever may be its effect on the destinies of the country—whether it will be the means of driving out poverty and desolation and introducing capital and wealth, or, like its elder brother, remain a dead letter on the statute book—it will soon be the law of the land.

If it does not succeed its failure will not be attributable to any complication of machinery, any difficult or technical processes, obstructing the simplicity of its operation, at least no obstacle of this kind is created by the bill; unlike its predecessor, the present bill indicates or requires no defined course of procedure, it merely hints that the first step shall be by application to the Commissioners according to forms framed and to be circulated by themselves; it leaves all other and further processes entirely at their discretion, subject to a continuing or disallowing power entrusted to the Irish Privy Council, except in cases where no general rule may happen to apply, when the Commissioners are given an unshackled discretionary power. The bill declares the intention of the Legislature, confers powers on the Commissioners to enable them to carry out this intention, but leaves the details of the machinery entirely to themselves.

Professing ourselves favourable, as we have always been, to every useful measure of law reform, we confess we cannot look with entire satisfaction upon the whole of this measure. It creates a new tribunal for a limited period with the largest possible powers, over the most delicate of all subjects of legislation—questions of property. No one can be more sensible than we are of the sad state of the

south and west of Ireland, where vast districts are in the hands of nominal proprietors, whose embarrassments, either self-created, or derived from several generations of improvident forefathers, render them altogether unable to discharge the duties of property, more especially to a people who have always lived on the verge of destitution, and who now, by the visitation of Providence, have passed that verge, and are dying by thousands of famine and plague.

Sensible then of the necessity that property should be transferred, it is not the fact of transfer that we comment on. The bill has certainly many advantages; and, first, the Commissioners are empowered to sell, and give an indefeasible title; the difficulty of making title to estates, both extra-judicially and judicially, was one of the many elements which hitherto prevented their free sale, this difficulty the Legislature now removed by giving the Commissioners a power to confer on the purchaser, on his payment of the purchase-money, a good title against all the world, the inducements held out to them are twofold, sales will be rendered quick and cheap, and the purchaser completely secure in the possession of his purchase.

The cheapness and quickness of sale will be an encouragement as well to incumbancers to sell, as to capitalists to buy; many incumbancers—those whose securities possess a low priority—have been deterred from taking any steps towards the sale of a property, by the fear that the cost, added to the depreciated value of the estate, would exhaust the fund created by the sale before those charges were reached. Those fears, as far as the costs are concerned, the legislature has taken much pains to dispel, as direct provisions are introduced against them, no fees being allowed to any officer under the commission, except a very trifling remuneration for copying orders; and the Commissioners are even precluded from making fees payable by any

general rule. This immunity from the payment of any office fees we regard as a great boon to the owners of incumbered estates, and incumbrancers; and as the salaries of the Commissioners, and other officers, and other expenses of carrying the measure into execution, are to be paid out of moneys to be provided by parliament, the operation of the bill—if it will be distasteful to proprietors, whom it will deprive of the nominal ownership of estates—will effect the transfer with as little injustice to them as possible—applying the whole proceeds of the estate, except the absolutely necessary costs, either to the payment of the debts due by it, or, (in the event of its discharging those) to the use of the owner himself. To the capitalist, the prospect of being put into immediate possession—in place of being kept many years in suspense, pending the suit, with a chance that in the event of the seller not being able to make title, that he may be obliged to institute a suit for the recovery of the instalment he has paid—will operate as a very considerable inducement to purchase.

The privileges created by the bill, are only conferred on incumbrances created by the owners of estates of inheritance, or owners entitled to the whole estate in leases in perpetuity, or leases of which not less than 60 years shall be unexpired and incumbered, or under powers created by owners of such estates. Persons possessed of charges of these descriptions, are empowered by the bill—within three years after its passing—to apply for a sale of the estates affected by these charges; interests in remainder are thus respected, and all derivative interests are jealously protected, and, in fact, strengthened by the transfer, as the 22nd section requires that the conveyance from the Commissioners to the purchaser shall refer to all tenancies, leases, or under-leases, subject to which the sale is made.

The 37th section will probably put an end to many suits. It provides that application may be made for a sale, and an order made by the Commissioners, notwithstanding any pending proceeding in a court of Equity, or any decree of such court made for a sale, and shall, if they see fit, order the sale of the land or lease decreed to be sold without further inquiry. By this provision much useless litigation and expense will be put a stop to—even where the decree for a sale has been obtained—as, under the new tribunal, complicated and expensive searches to make title to the purchaser, will be rendered unnecessary, and, at the same time, the title conferred made more complete and satisfactory.

The 36th section confers a very salutary power on the Commissioners, and will, we hope, have the effect of preventing applications to them merely for malignant or vexatious purposes. By this sec. it is enacted, that they shall have full power and discretion as to giving or withholding costs and expenses, and as to the person by whom and the funds out of which the same shall in the first instance or ultimately be paid. The Commissioners, acting under this section, will doubtless take into account the intent with which, and circumstances under which, any application is made; and will not allow incumbrancers, who have in no event any rational hope of realizing their charges, to gra-

tify themselves by taking the initiative in the ruin of a property, or taking steps merely with a view to embarrass other incumbrancers.

On the whole, we see much to admire in this enactment; but we cannot see the absolute necessity there was for the creation of a new tribunal, to effect all that is contemplated by it. Much as has been said of its confiscating tendency, we can not find fault with an enactment which facilitates the transfer of property, when the circumstances of the country absolutely demand that it should change hands; and though we lament that a great amount of property will be forced into the market at a time when circumstances of an unprecedented character have depreciated its value, yet we must give the framers of the measure credit for endeavouring to obviate, to the utmost of their power, the ill effects of these unhappy circumstances. In the first place, by giving a good title to the purchaser, the price of the estate will probably be much increased; and in the next place, by diminishing the expense of the sale, the balance applicable to the payment of debts, the chance of there being a surplus for the maintenance of the owner, will be also much increased, by the operation of which two causes proprietors and incumbrancers will be placed in a much better position than if left to the old remedy by Bill in Equity. But that the remedy by Bill in Equity could not be moulded to suit the altered circumstances of the country and of the time, and that it would not be, at the least, as safe and satisfactory to entrust powers such as those conferred on the Commissioners by the present Bill, on the Chancellor—as on men who are as yet unknown—we cannot admit.

The narrator of the proceedings of an equity suit must record that the preliminary proceedings were in many instances unnecessarily prolix, tedious and expensive, that the expense of obtaining a decree to account was almost the same whether the suit were amicable or adverse, that the property underwent a wasting process under the dominion of a receiver, and we trust it will be in his power to relate that a measure was devised by which title was made secure, sales completed without delay, property handed over uninjured to the new proprietor, and creditors paid with expedition. It will be difficult to realize these conceptions; the new measure will, however, go some way towards showing that property may be sold at a more accelerated rate than at present. The limited duration of the new tribunal, the lowness of the salaries of the Commissioners, the remuneration being inadequate to secure men of the first ability, the arbitrary powers conferred upon them, the power of appeal resting with themselves, and, when permitted, being to a tribunal not calculated to inspire much legal confidence—the Privy Council, are calculated seriously to impair the general effectiveness of the measure. The country also is burdened with an increased expense, when the existing tribunals are amply sufficient to perform all the legal business of the country. It would have been more inexpensive and as efficacious if the powers conferred by the bill were vested in the Court of Chancery. However, we look forward to this measure as being the pioneer to one of lasting usefulness: by which the Equity courts can here-

after be consolidated, purged of their old excrescences, and form a concentrated system of enlightened jurisprudence.

We could not read without a smile the provision contained in the concluding part of the 38th section of this bill, prohibiting an incumbrancer, from commencing, taking, continuing, or prosecuting any proceeding whatsoever, under the act of last session "to facilitate the sale of incumbered estates in Ireland," without leave of the Commissioners. It reminded us of one of the prohibited degrees, within which it is declared that a man "shall not marry."

THE Legislature, we presume, has felt that the owners of tithe rent charge were unequally and unjustly taxed under the various poor law acts, that they had exempted them from liability to the labour rate act, 9 & 10 Vic. c. 107. However they repented of their leniency, and by the 10 & 11 Vic. c. 107, have introduced words which impose the liability.

The first statute, by the 8th section, provided for the repayment of advances by half yearly instalments; not less than four, nor more than twenty to be presented by the grand juries of the different counties, and levied off the baronies in which the works for which the advances had been made were executed; and by the 9th section, enacted that the moneys to be raised should be charged and levied upon the occupiers, and other persons rated under the poor law acts. The applotment, was to be made, and the money levied by the high constable of the barony, and to be recoverable as grand jury cess. The effect of this section was the adoption of the poor law valuation as the basis of levy, and making the parties liable to payment the occupiers or immediate lessors.

The 12th section allowed the person liable to pay a rent, to deduct for each pound of rent one-half of the amount of the levy, irrespective of the consideration whether the rent were greater or less than the net annual value; and the 13th section empowered any person receiving rent, and also liable to pay a rent, to deduct from the rent paid by him a sum bearing such a proportion to the amount of such assessment deducted from the rent received, as the rent paid bore to the rent received.

It was under this clause that any question could have been raised as to the liability of the tithe owner; in no portion of the act is he expressly mentioned; and it was plain, in our judgment, that the statute was confined to cases either expressly included, or to those in which the relation of landlord and tenant existed, and that there were no words to charge the tithe owner.

The language of the various poor law acts was clear, and the classification of persons liable to poor rate kept perfectly distinct as to occupier, landlord, tithe-owner, or annuitant in fee.

If then any applotment has been made under this act, we think the tithe-owner is not liable; for all assessments made under the 10th and 11th Vic. c. 87, we fear that he is.

This later act remitted one half of the advance, and has made the other repayable by twenty half

yearly instalments, to be raised as poor-rate, and be received by the high constable; and the 7th section contains the following words—"and the several clauses, provisions, powers, authorities in the said first recited act, contained with respect to the moneys to be raised and levied under the same, and with respect to any deduction to be made from any rent, in respect of any assessments under the said act, and also the several provisions and powers of the said acts for the more effectual relief of the destitute poor in Ireland, with respect to any such deduction to be made from rent or tithe, shall be extended and applied to the moneys to be assessed, raised, or levied under the provisions of this act, and the several words or expressions to which an extended meaning is given in the said first recited act shall include the like significations in this act."

The new poor law amendment bill contains no provision for the more equitable adjustment of the poor rate in the tithe-owner. Most certainly, in common justice, the gross inequalities of the pressure upon them should be removed.

It is grossly and glaringly unjust, that they alone in the community should be subjected to a double deduction, for a tax which weighs heavily and oppressively.

23rd February, 1849.

ANALYSIS OF A BILL TO PROTECT JUSTICES OF THE PEACE IN IRELAND FROM VEXATIOUS ACTIONS FOR ACTS DONE BY THEM IN THE EXECUTION OF THEIR OFFICE.*

Note.—The words printed in *italics* are proposed to be inserted in the Committee.

Whereas it is expedient to protect justices of the peace in Ireland in the execution of their duty: be it enacted, That every action to be brought against any justice of the peace in any of the superior courts of law at Dublin, for any act done in the execution of his duty, and within his jurisdiction as such justice, shall be an action on the case; and in the declaration it shall be alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant.

II. That for any act done by a justice of the peace in which he has not jurisdiction, or shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice, without making any allegation that the act complained of was done maliciously, and without reasonable and probable cause: provided that (in any case where a conviction may be quashed either upon appeal or upon application to her Majesty's Court of Queen's Bench) no action shall be brought for any thing done under such conviction, or order until after such conviction or order shall have been quashed; nor shall any action be brought

* Prepared and brought in by Sir W. Somerville and Mr. Attorney General.

for any thing done under any warrant issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order, until after such conviction or order shall have been so quashed; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for any thing done under such warrant.

III. That where a conviction or order shall be made by one or more justice or justices, and a warrant of distress or of commitment shall be granted thereon by some other justice bona fide and without collusion, no action shall be brought against the justice who so granted such warrant by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action shall be brought against the justice or justices who made such conviction or order.

IV. That where any poor rate shall be made, and a warrant of distress shall issue against any person rated, no action shall be brought against the justice or justices who shall have granted such warrant for any irregularity in the said rate, or because such person was not liable to be rated; and in all cases where a discretionary power shall be given to a justice by any act of parliament, no action shall be brought by reason of the manner in which he shall have exercised his discretion in the execution of any such power.

V. And whereas it would render more effective the performances of the duties of justices, and give them protection, if some simple means were devised by which the legality of any act to be done by such justices might be considered by a court of competent jurisdiction, and such justice enabled to perform it without risk of action; be it enacted, that where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office, the party requiring such act to be done may apply to her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule upon such justice or justices, and also the party to be affected by such act to show cause why such act should not be done; and if after service of such rule good cause shall not be shown, the court may make the same absolute, with or without payment of costs, and the said justice or justices upon being served with such rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required.

VI. That in all cases where a warrant of distress or of commitment shall be granted by a justice of the peace upon any conviction or order which shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant for any thing done under

the same by reason of any defect in such conviction or order.

VII. That where by this act it is enacted that no action shall be brought, if any action shall be brought a judge of the court in which it shall be brought, upon application of the defendant, and upon an affidavit of facts, may set aside the proceedings with or without costs.

VIII. That no action shall be brought against any justice of the peace for any thing done by him in the execution of his office, unless within six calendar months after the act complained of shall have been committed.

IX. That no such action shall be commenced until *one calendar month* at least after a notice in writing of such intended action shall have been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney, in which the cause of action, and the court in which the same is intended to be brought, shall be stated; and upon the back shall be endorsed the name and place of abode of the party intending to sue, and the name and place of abode or of business of the attorney if such notice have been served by attorney.

X. That in every action brought in any of the superior Courts of Law, the venue shall be laid in the county where the act was committed; and the defendant shall be allowed to plead the general issue, and to give any special matter of defence, excuse, or justification in evidence, at the trial of such action.

XI. That in every case after notice of action so given, and before action commenced, such Justice to whom such notice shall be given may tender to the party complaining, or to his attorney, such sum as he may think fit as amends for the injury complained of; and after action commenced, and at any time before issue joined, such defendant, if he have not made such tender, or in addition to such tender, may pay into court such sum of money as he may think fit, and which tender and payment of money into court may afterwards be given in evidence by the defendant at the trial, and if the jury shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into court, or beyond the sum so tendered and paid into Court, then they shall find for the defendant, and the plaintiff shall not elect to be non-suit, and the sum of money, if any, so paid into court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of court to him, and the residue to the plaintiff; or if, where money is so paid into court, the plaintiff shall accept the same in satisfaction of his damages, he may obtain from any judge of the court an order that such money shall be paid to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause.

XII. That if at the trial the plaintiff shall not prove that such action was brought within the time herein-before limited, or that notice was given *one calendar month* before action commenced, or if he shall not prove the cause of action stated in such

notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin of the declaration, then such plaintiff shall be nonsuit, or the jury shall find for the defendant.

XIII. That where the plaintiff shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of *two-pence* as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for nonpayment of the sum he was so ordered to pay.

XIV. That if the plaintiff in any such action shall recover a verdict, or the defendant shall allow judgment to pass by default, such plaintiff shall be entitled to costs as if this act had not been passed; or if it be stated in the declaration, that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and in every action against a justice of the peace for any thing done by him in the execution of his office the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client.

XV. That this act shall extend only to Ireland.

XVI. That this act shall commence and take effect on the

XVII. After commencement of this act the following statutes or parts of statutes repealed. 10 Car. I. st. 2. c. 16. (1.) 43 G. 3. c. 143. 43 G. 3. c. 141.

XVIII. That this act shall apply for the protection of all persons for any thing done in the execution of their office, in all cases in which, by the provisions of any act or acts of parliament, the several statutes or parts of statutes herein-before mentioned and by this act repealed would have been applicable if this act had not passed.

XIX. That this act may be amended or repealed by any act to be passed in the present session of parliament.

26th March, 1849.

A BILL^a TO ALTER AND AMEND THE LAW RELATING TO PROCEEDINGS BY ATTACHMENTS IN COURTS OF RECORD IN THE CITY OF DUBLIN, AND OTHER BOROUGHES IN IRELAND.

Note.—The words printed in *Italics* are proposed to be inserted in the committee.

^a Prepared and brought in by Mr. Reynolds and Mr. Richard M. Fox.

Whereas it is expedient and would tend to the more beneficial administration of justice in the Court of Record of the borough of Dublin and in the courts of record of other boroughs in Ireland, and would prevent the improvident and injurious seizure of goods in such boroughs, if the process now in force of proceeding by way of attachment of goods for compelling the appearance of a defendant as well as the process of foreign attachment in the said courts were to cease and determine: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the *passing of this act*, it shall not be lawful for any person to proceed by way of attachment against the goods of any person or by foreign attachment in any court of record of any borough of Ireland.

II. And be it enacted, that from and after the *passing of this act* no person shall have power to attach the goods of any defendant upon any process of attachment issuing out of any court of record of any borough in Ireland to compel such defendant to give special bail, but that in all cases where the cause of action shall amount to the sum of *ten pounds* or upwards the plaintiff shall proceed by way of process issuing out of said court, and returnable to the same on or before a certain day to be named and specified in the said process, and shall serve the defendant or defendants personally with a copy of the said process; and if such defendant or defendants shall not appear at the return of the process, or within four days after such return, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit having been made and filed in the said court of record of any borough in Ireland of the personal service of such process as aforesaid (which affidavit shall be filed gratis), to enter a common appearance or file common bail for defendant or defendants, and to proceed thereon as if such defendant or defendants had actually appeared.

III. And be it enacted, that such affidavit of service of such process shall and may be made before any mayor or recorder of any borough out of the court of record whereof such process shall issue.

IV. And be it enacted, that upon every copy of such process to be served upon any defendant shall be endorsed a notice to such defendant to the intent and meaning of such service to the effect following; that is to say,

"A. B. You are served with this process, to the intent that you may by your attorney appear in the court of record of the borough of _____ at the return thereof, being the _____ day of _____ in order to your defence in this action."

Which said notice shall be signed by the attorney of the plaintiff or plaintiffs with his Christian and surname, and thereunto shall be added his place of residence, and for which notice no fee or reward shall be demanded or taken.

V. Provided always, and be it enacted, that no plaintiff shall enter a common appearance, or file common bail for any defendant unless the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, shall make affidavit in writing that such plaintiff or

attorney (as the case may be) knows the person so swearing to such service, and that such plaintiff or attorney (as the case may be) believes that such process has been personally served on the defendant at such time as such person shall have sworn to, and in which affidavit the addition and place of residence of the person so swearing to such service shall be inserted, which said affidavit shall be filed gratis.

VI. Provided always, and be it enacted, that whenever it appears to the court out of which the process issues that all due diligence has been used to have the process of the court personally served, yet that under the special circumstances of the case appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was not possible by reasonable diligence to effect personal service, that then and in such case it shall and may be lawful for the court out of which the process issues to substitute such other kind of service as to them shall seem fit.

VII. And be it enacted, that so much of an act passed in the third and fourth years of the reign of her present Majesty, for the regulation of municipal corporations in Ireland, as relates to the process of attachment of goods and the process of foreign attachment in the courts of record of boroughs in Ireland, and is inconsistent with the provisions of this act, shall be and the same is hereby repealed.

VIII. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament.

(Continued from p. 224.)

18. That at the Quarter Sessions for which such notice shall be given the court shall proceed to hear and determine the appeal, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable; and they may make such order concerning the costs, both of the adjudication and of the appeal, as they may think reasonable.

19. That in case the mayor or justice to whom the seizure of any sheep, lambs, or cattle supposed to be infected as aforesaid, or of any meat supposed to be unfit for human food, may have been reported, shall upon inquiry order the same to be restored, and in case it appear to such mayor or justice that there was a probable cause of seizure, then and in such case such mayor or justice shall grant a certificate to the party making the seizure that there was such probable cause, and in such case the person or persons who made such seizure, being a person or persons acting under the authority of this act, or of any order made in pursuance hereof, shall not be liable to any action, indictment, or other suit or prosecution on account of such seizure; and in case any action, indictment, or other suit or prosecution shall be commenced and brought to trial against any person or persons, being a person or persons acting under such authority as aforesaid, on account of the seizure of any animals, parts of animals, hay, straw, fodder, or other articles seized as forfeited under this act, or of any order or orders made under the authority of the same, wherein a verdict shall be given against the defendant or defendants, if the court or judge before whom such information or suit shall have been tried shall have certified on the said record that there was a probable cause for such seizure, then the plaintiff, besides the things seized or the value thereof, shall not be entitled

to above 2d. damages, nor to any costs of suit, nor shall the defendant or defendants in such prosecution be liable above 1s.

20. That this act shall continue in force until the 1st of September, 1850, and if parliament be then sitting then further until the end of the then session.

21. Act not to affect the rights, &c. of the city of London.

22. That this act may be amended or repealed by any act to be passed in this session of parliament.

CAP. CVIII.

An act for enabling Her Majesty to establish and maintain diplomatic relations with the sovereign of the Roman states. [4th September, 1846.]

CAP. CIX.

An act to authorize the inclosure of certain lands in pursuance of a special report of the inclosure commissioners for England and Wales. [4th September, 1846.]

CAP. CX.

An act to alter the provisions relating to the charges for the relief of the poor in unions. [4th September, 1846.]

CAP. CXI.

An act to amend an act of the tenth year of her present Majesty, for amending the laws relating to the removal of the poor. [4th September, 1846.]

CAP. CXII.

An act to consolidate, and continue in force for two years and to the end of the then next session of parliament, the metropolitan commissions of sewers. [4th Sept., 1846.]

CAP. CXIII.

An act for the further amendment of the acts relating to the Dublin police. [4th Sep. 1846.]

Sect. 1. *Appointment of Clerks and Officers in Dublin Police Offices vested in the Chief or Under-Secretary of Lord Lieutenant.*

2. *Immediate Lessor rated under 2 & 3 Vict. c. 74, may be described as the "Immediate Lessor" in certain cases.*

3. *Powers for the Recovery of Police Tax. Divisional Justices of Police District in Dublin to have same powers within Dublin Metropolis as Justices have in any County in Ireland.*

4. *Power to Divisional Justices to reduce the Fines upon Licenses in respect of Carriages under Irish Act, 37 G. 3, and to increase the same again.*

5. *Power to Commissioners of Police to alter Hachey Coach Stands.*

6. *Power to Commissioners of Police to license any Stage Carriage or Omnibus to ply in Dublin or the District adjoining.*

7. *Power to Commissioners to grant licenses to Drivers of Hachey Carriages, &c. At the time of granting license, an Abstract of the Laws and a Ticket to be given to Driver, &c.*

8. *A Fee of 2s. 6d. to be paid for Licenses granted under this Act, and 1s. for every Renewal.*

9. *Penalty on Persons Acting as Drivers, &c. without having Licence and Ticket; and on proprietors suffering persons to act as Drivers or Conductors not being licensed. Provision.*

10. *Persons applying for Licenses to sign a declaration accompanied with a certificate, for the same. Penalty on persons making false representation.*

11. *When Drivers or Conductors change their residence, they shall give notice to commissioners.*

12. *Particulars of Licences to be entered in a book at the Office of Commissioners, which shall be evidence.*

13. *Licensed Drivers, &c., to wear their Tickets conspicuously.*

14. *Upon Expiration of Licenses it shall be delivered up to Commissioners. Penalty for Neglect.*

15. *When Tickets are defaced or lost, new ones to be delivered, on payment of 2s. for the same. If Ticket shall be found, to be delivered up to the Commissioners. Penalty for Neglect.*

16. *Forgery of License or Ticket, or knowingly uttering a forged License or Ticket, deemed a Misdemeanour.*
17. *Proprietor to retain the License of Drivers or Conductors employed by him, and produce them in case of Complaint.*
18. *Magistrates to hear and determine disputes.*
19. *Agreements between Drivers, &c., and Proprietors to be in Writing.*
20. *Proceedings with respect to Licences on quitting Service.*
21. *Licences may be revoked or suspended by Justices.*
22. *Penalty on Person acting as Driver, whether licensed or not, without Consent of Proprietor.*
23. *Punishment for furious Driving and wilful Misbehaviour.*
24. *Providing for cases where more Proprietors than one.*
25. *Power to mitigate Penalties.*
26. *Act may be amended.*

Whereas an act was passed in the forty-eight year of the reign of his late Majesty King George the Third, for the more effectual administration of the office of a Justice of the peace, and for the more effectual prevention of felonies within the district of *Dublin* metropolis, and the said act was amended by an act passed in the fifth year of the reign of King George the Fourth: and whereas another act was passed in the session of Parliament holden in the sixth and seventh years of the reign of King William the Fourth, whereby a new and more efficient system of police was established within the limits of the said district: and whereas by several acts passed in the first year, and in the sessions of Parliament holden respectively in the first and second, second and third, and third and fourth years of her present Majesty's reign, the limits of the said district were altered, and divers enactments made in reference to the said district, and for the more effectual maintenance and regulation of the police therein: and whereas by an act of the fifth year of her said Majesty's reign, intitled *an act for improving the Dublin police*, further provisions were made relating to the same: and whereas it is expedient to amend certain of the provisions of the said acts in manner following: and whereas an act was passed in the Parliament of *Ireland* in the thirty-seventh year of the reign of his late Majesty King George the Third, intitled *an act for amending and reducing into one act of parliament the laws relating to hackney and other carriages plying in the city of Dublin, its suburbs and liberties and within seven miles thereof*, which act has been amended by several subsequent acts: and whereas by the said recited acts of the thirty-seventh and forty-eight years of the reign of his late Majesty King George the Third it is, amongst other things, provided, that the superintendent magistrate and divisional justices appointed under the said acts respectively shall retain and employ certain clerks and other officers, under the regulations therein mentioned, and it is expedient to amend the said provisions: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act the power of appointment of all such clerks and officers as aforesaid, and of all other clerks in the police department of the police district of *Dublin* metropolis, or in the department relating to such hackney or other carriages as aforesaid, or to the receipt of rents, fines, penalties, or monies in respect of the same, shall be vested in the Chief Secretary or the Under Secretary for the time being of the Lord Lieutenant or other chief governor or governors of *Ireland*, and not in the divisional justices or any of them.

2. And whereas by the said recited Act of the second and third years of the reign of her present Majesty it is, amongst other things, enacted, that in any case where the value of any house or tenement assessed under the said act shall not amount to five pounds, if the occupier and his immediate lessor, by any writing under their hands, shall require, and if the said justices shall by a minute agree thereto, such immediate lessor shall be

rated instead of such occupier, and such rebate from the rate may be made (not exceeding Ten per Centum) as the said justices shall by such minute allow, and subject to such further regulations as in the said act contained: be it enacted, that in any case where the immediate lessor of any house or tenement may under the said recited act be rated instead of the occupier, if at the time of making any rate the name of such immediate lessor be not accurately known to the persons making the rate it shall be sufficient to describe him therein as the "immediate lessor," with or without any name or further addition; and such rate shall be held to be duly made on him or her by such description, and shall be recoverable from him or her accordingly, notwithstanding any error or defect in his or her name or description, or the entire omission of such name therein.

3. That after the passing of this act the several collectors appointed to receive the police tax or rate under the provisions of the said recited acts or any of them (after such demand made as in the said recited act of the second and third years of her present Majesty's reign mentioned,) in addition to all other modes and powers heretofore provided by any former act or acts, may collect, levy, sue for, and recover the said police tax or rate, or any part of the same from all and every persons and person who now are or is or hereafter shall be liable to pay the same, by all the ways and means, and with the like remedies and powers in case of non-payment, as the grand jury cess, or the money apportioned on the several persons liable to pay the same, may be collected and levied in any county in *Ireland*; and the divisional justices of the police district of *Dublin* metropolis or any one of them shall, for the purposes of raising, levying, or enforcing payment of such police tax or rate, have and exercise the same powers, authorities and jurisdiction within the police district of *Dublin* metropolis as any justice or justices of the peace of any county in *Ireland* has or have or can or shall lawfully have or exercise within his or their respective county with respect to any grand jury cess to be raised within the same.

4. And whereas by the thirty-seventh year of the reign of his late Majesty King George the Third, an act for amending and reducing into one act of Parliament the laws relating to hackney and other carriages plying in the city of *Dublin, its suburbs and liberties, and within seven miles thereof*, it is, amongst other things, enacted, that the superintendent magistrate, from time to time, may alter and increase the fines to be paid or the rents upon the licenses by him granted under the said act now in recital, provided the same be not increased above one fourth part more than the fines and rents thereinbefore mentioned, and to make such rules, orders and regulations for the purpose as to him shall seem meet, and to alter, vary, amend, or annul the same, provided every such alteration, rule, order and regulation respecting the fines or rents so made by the superintendent magistrate shall be approved of by the Lord Chancellor or Lords Commissioners of the Great Seal, and the Chief Judges, or any three of them: and whereas no power is thereby given to reduce the said fines or rents: be it enacted, that the divisional justices of the said police district, in case they shall think fit, with the approval of the Lord Lieutenant or other chief governor or governors of *Ireland*, from time to time may reduce the fines to be paid or the rents to be reserved upon the licenses heretofore granted or hereafter to be granted in respect of any carriages under the said last recited act, or any act amending the same, or afterwards from time to time, with like approval, to increase the same as they may see fit, provided that any such fines or rents shall not be increased so as at any time to exceed the amount now payable for the same.

5. That from and after the passing of this act the commissioners of police of *Dublin*, with the approval of the chief or under secretary of the Lord Lieutenant of *Ireland*, to appoint or to alter, as occasion may require, the stands or stations for hackney or other carriages, and also stations commonly called hazards for the same, within the borough of *Dublin* and the district adjoining the same, as defined in the said last-recited act, or any act amending the same.

6. That, notwithstanding anything in the said last-recited act, or any act or acts, the said Commissioners of Police

may license any metropolitan stage carriage or omnibus to ply or carry passengers between any part of the borough of *Dublin* and any other part of the said borough or of the District adjoining the same as defined under the said recited act of the 37 Geo. 3, or any act amending the same, or between any part of the said district and any other part of the said district, and to fix such rates of fines and rents to be paid in respect of such licence of any such metropolitan stage carriage or omnibus, as the said commissioners shall deem fit, and as shall be approved by the Lord Lieutenant or other chief governor or governors of *Ireland*; provided that such rents and fines shall not exceed the highest rate of rent or fine now or for the being payable in respect of any other hackney carriage in *Dublin*, and no other duty shall be payable for the same; and the provisions of the said last-recited act, and of any act or acts amending the same, shall extend and apply to such carriages, and to such rents and fines, so far as the same are applicable.

7. That the said commissioners may grant a licence to act as driver of hackney, job, and other carriages licensed for the accommodation and conveyance of passengers, or as driver or as conductor of metropolitan stage carriages or omnibuses, (as the case may be,) to any person who shall produce such a certificate as shall satisfy the said commissioners of his good behaviour and fitness for such situation respectively; provided that no person shall be licensed as such driver as aforesaid who is under sixteen years of age; and in every such licence shall be specified the number of such licence, and the proper name and surname, and place of abode, and age, and a description of the person to whom such licence shall be granted; and every such licence shall bear date on the day on which the same shall be granted, and shall continue in force until the thirty-first of *December* next after the date; or if granted in the month of *November* or *December* in any year, then to continue in force until and upon the thirty-first day of *December* in the year next following that in which the same shall be granted, except the same shall be sooner revoked, and except the time (if any) during which any such licence shall be suspended; and on every license of a driver or conductor the said commissioners shall cause proper columns to be prepared, in which every proprietor (if any) employing the driver or conductor named in such licence shall enter his own name and address, and the days on which such driver or conductor shall enter and shall quit his service respectively; and in case any of the particulars entered or endorsed upon any licence in pursuance of this act shall be erased or defaced, every such licence shall be wholly void, and of none effect; and the said commissioners shall, at the time of granting any licence, deliver to the driver or conductor to whom the same shall be granted an abstract of the laws in force relating to such driver or conductor, and of the penalties to which he is liable for any misconduct, and also a metal ticket, on which there shall be marked or engraved his office or employment, and a number corresponding with the number which shall be inserted in such licence.

8. That there shall be charged upon and in respect of every such licence to be granted under the authority of this act a fee of two shillings and sixpence, and upon every renewal of such licence a sum of one shilling, to be paid to the said Commissioners, and to be by them applied, after payment of the expense of such ticket, for the purposes of the said police tax or rate.

9. That from and after the first of *January*, 1849, no person shall act as driver of any hackney or other carriage as aforesaid, or as driver or conductor of any Metropolitan stage carriage or omnibus, whether such person shall or shall not be the proprietor of such carriage, within the limits of the said Police district, unless in each case such person shall have a licence so to do, and a numbered ticket granted to him under the authority of this act, and remaining in force; and after the day last aforesaid every person who shall act as such driver or conductor without such licence and ticket, and also every person to whom a licence and ticket shall have been granted, who shall, except in compliance with the provisions of this act, transfer or lend such licence, or permit any other person to use or wear

such ticket, shall for every such offence forfeit a sum not exceeding forty shillings; and every proprietor who shall knowingly suffer any person not duly licensed under the authority of this act to act as driver of any hackney or other carriage as aforesaid, or as driver or as conductor of any metropolitan stage carriage or omnibus, of which he shall be the proprietor, shall for every such offence forfeit a sum not exceeding forty shillings; provided, that nothing herein-before contained shall subject to any penalty any proprietor who shall employ any unlicensed person to act as such driver or conductor as aforesaid for any time not exceeding twenty-four hours, or any unlicensed person who shall be so employed for the said time, upon proof being adduced by the proprietor, to the satisfaction of the justice before whom such proprietor, driver, or conductor shall be required to attend to answer for such offences respectively, that such employment was occasioned by unavoidable necessity; and that every proprietor who shall so employ such unlicensed driver or conductor, and every such unlicensed driver or conductor, shall be subject to all the powers, provisions, and proceedings of and under this act for any act done by such driver or conductor during such employment, in like manner as if such driver or conductor had been duly licensed.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 8s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 14, FLEET STREET, in the Parish of St. Andrew, and published by E. J. MILLIKEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, June 9, 1849.

THE Irish Jurist

No. 33.—VOL. I.

JUNE 16, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 6d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, JUNE 16, 1849.

THE apathy of Irish members when questions of practical importance are brought or proposed to be brought under the consideration of the House has been frequently the subject of public comment and public condemnation. This feeling of indifference was strongly exemplified on Thursday, the 7th, when no House was made for Mr. Osborne's motion to inquire into the system of Chancery Estate Management.

The honorable member, not dismayed by the supineness of the Irish representatives, managed, with considerable tact, and in a speech delivered with great earnestness and much happiness of expression, incidentally to bring the whole question under the consideration of the House on the succeeding evening during the debate on the Irish Poor Laws, and to carry his point, aided by Mr. Napier, in obtaining a Committee of Inquiry. We augur great public benefit from a thorough investigation into this system of monster evil; we observe, by the statement of Lord John Russell, that it had already occupied the attention of our Chancellor, who has submitted to the Government a plan for its amendment. This much we know, that no half measure will be of efficacy to remove this mighty sore which is all but cancerous. It has spread through the whole island, it has removed, from its natural control, a million and a half of rental, and vested the power of the proprietor in an executive which cannot, and if it could, does not know how to use it. The system goes on still with remorseless energy, and threatens to absorb the whole country within its grasp, nothing too vast, nothing too small for its meshes, properties of £10,000 and £10 a-year come equally within its scope. A very few weeks since we reported an application to the Master of the Rolls that the Re-

ceiver should only be called on to account once in five years, the property over which he had been appointed being only £10 a-year! *Darley v. Hunter*, (ante p. 194.) We should be glad to know how much of that £10 a-year found its way into the hands of the creditor. Assuming Mr. Vereker's estimate in his pamphlet, "Economic Consideration of the Judgment Acts," of the expense to be correct—and we have every reason to confide in its accuracy—the costs of appointing and completing the appointment of a receiver, *where the petition is unopposed*, would amount to £50; adding to this the annual expense of accounting, it is obvious that years would stretch into infinity before this miserable property could pay the debt. The Master of the Rolls refused, and very properly refused to comply with the application, in order that he might shew the utter uselessness of proceeding against so small a property. Whilst we write we are informed that on Wednesday last an application was made to the Master of the Rolls to extend a receiver where the debt was only £5! The expense of extending a receiver is estimated at about £25, his Honour was coerced by the act of Parliament, and was obliged to make the order.

The Court of Exchequer hesitated for some time before they drew up an order for the appointment of a receiver over £20 a-year, but were coerced by the statute, and obliged to make the appointment.

It is not merely that the punishment is severe in the extreme upon the unfortunate debtor, that we denounce the ruinous tendency of the Judgment Acts, and the management of estates by Courts of Equity; the penalty may be, and often is disproportioned to the offence, but if it would deter improvidence and check extravagance, the sanction of the law would be wholesome; it is because that penalty affects not merely the debtor but the creditor, the owner, and the tenant, the individual and the nation, that we have written against it. "The Com-

mittee will do wisely, perhaps, to consider not merely the management of estates by Courts of Equity but the laws which make that management necessary—laws which pour properties with a multitudinous rush within their control.

The statutes which regulate judgments require to be extensively modified; as a security affecting lands judgments should either cease to exist or be rendered specific liens like mortgages, or only attach when execution is sued out upon them. This subject is more calculated, however, for the contemplation of a lawyer than the labours of the committee-room; evidence may be useful to show the prejudicial nature of the great staple security of this country: but what will fall more peculiarly within the province of the Committee will be the examination of a class of witnesses who will give them the groundwork of a measure to improve the management of estates which are placed under the control of a Court of Equity. It may be alleged that the period is inopportune to devise such a measure when the outcry of the day, when the legislation of the hour is directed to supersede the Court of Chancery nearly altogether; it may be urged, you are yourselves inconsistent when you advocate an improved law with reference to judgments with the avowed design of rendering it more difficult if not impossible to reach real property through their medium. By the operation of the Incumbered Estates Bill the property will be sold first, and the inquiry as to the parties entitled to its produce be made afterwards, and by a change in the Judgment Acts you will prodigiously diminish the evil of receiverships.

A little consideration will shew how inadequate to meet the existing evils will be the contemplated laws—how illusory the idea that the Court of Chancery will be superseded. It is estimated, from the vast increase of the last two years, that over a million and a half of rental is under the management of our two Courts of Equity. In ordinary times, the purchase-money of these estates, if all destined for the hammer, would be thirty millions. It is incredible to suppose that this vast amount of property can rapidly change hands, but the fact is, that a portion of it is not destined for sale. It belongs to minors and lunatics, and persons under disability, who are the peculiar objects of Courts of Equity, or the incumbrances affect but a life estate, and it would be impolitic of the creditor to incur the expense of making out title, and selling a limited interest. In all such cases the appointment of a receiver is all that is required; whilst civilization continues, whilst real property is made the subject of family settlement and of business transactions, there must be a controlling power vested in a Court of Chancery, or a court with similar powers under another name. The Incumbered Estates Bill is temporary; its functions will merge into the Court of Chancery.

The step in the right direction has been taken to put an end to jobbing, and to improve a jurisdiction which is susceptible of improvement. We trust it will be carried out with energy, and we were glad to see that Mr. Osborne has nominated his Committee, and is prepared to act with promptitude. His selection of men and numbers was judicious: Mr. Osborne, Sir R. Peel, Sir J. Graham, Sir W.

Somerville, Sir J. Romilly, Mr. Napier, Mr. Maunsell, Mr. Bright, Mr. Henly, Mr. O'Flaherty, Mr. G. A. Hamilton, Mr. McCullagh, Mr. Page Wood, Mr. Turner, Mr. Telford. Some of the latter-named gentlemen will not act, and their places will be filled by Irish members. We look to the evidence to be laid before this Committee and their Report with deep anxiety. The germ is deposited that may be productive of much practical good to Ireland. It has been a source of much gratification to us that we have, on all fitting occasions, reprobated the present system, laid bare its enormities, and given such suggestions as we conceived likely to be practically important; and our acknowledgments are due to Mr. Osborne for his too flattering testimony to our usefulness.

The remedies to be given to the judgment creditor involve questions of much difficulty, so that they may at once be certain, yet not oppressive—defined, yet not offering an insurmountable barrier to the transfer of property. This subject, as we have already glanced at, is a fit one for a jurist thoroughly acquainted with the laws and practice of Ireland. Can none such be found amongst the law officers of the Irish Government, or is all legislative activity—every legislative idea—to be transferred to English officials? If so, it is not to be wondered at that they will acquire, or have acquired, a profound contempt for the legal attainments of Irish lawyers.

To the Editor of the Irish Jurist.

SIR,

The course to be pursued on the occasion of supplying the vacancy in Parliament caused by the judgment against the late Member for the county of Limerick, (William Smith O'Brien,) seems not to have been clearly understood. The effect of final judgment after conviction of high treason is attainder, and, in legal phraseology, a party is then, but not before, said to be attainted of high treason, which was the proper term to have been applied on the occasion of moving for the issuing of a new writ to supply the vacancy, and not that which was made use of—viz., “adjudged guilty of high treason.” The effect of attainder of high treason is, that all the rights of citizenship are forfeited, together with the life of the party; and the awful sentence of the law shews in what detestation and horror such a crime was held by our ancestors. It appears from the records of Parliament, that this crime has been *more frequent* amongst the members of the Upper House, Lord John Russell having adduced only two instances in the Lower House of motions similar to that he was the mover of. Peers, upon being attainted, at once lost all their dignity and other privileges, and even a pardon, which was the prerogative of the Sovereign, did not remove the attainder, but a Bill for this purpose should be passed in Parliament, as in the case of Lord Bolingbroke.

The idea, that though the Sovereign has an undisputed right to pardon any criminal, yet that there is not any right of commutation of the punishment, seems almost too absurd to take notice of. That such a power does exist, is a truth

similar to those first principles which are self-evident, and yet which are difficult of proof. None will deny that a whole contains all its parts; and perhaps it may not a little startle the advocates of the absurd notion already spoken of, to learn that they do in fact deny this self-evident truth, for they affirm, that though the Sovereign may pardon *in toto*, she cannot *in parte*.

Your readers will remember the historical instances of commutation mentioned by Blackstone, under the title "Execution," Lord Coke and Sir Matthew Hale having held that the King could not change the punishment of the law by altering the hanging or burning into beheading, though when beheading was part of the sentence the King might remit the rest.

Even in Lord Coke's time there were instances to the contrary, but he maintained with bull-dog ferocity, "*Judicium est legibus non exemplis*," upon which Foster remarks that the rule is true but the mistake in the application thereof, for inconvenient usage, founded on mercy and never complained of, is undoubtedly sufficient in this as in every other case to determine what is or is not part of the common law.

When Lord Stafford was executed for the Popish plot in the reign of Charles II, the sheriffs of London having received the writ for beheading him, petitioned the House of Lords for an order how the judgment should be executed, for being prosecuted by impeachment they entertained a notion (said to have been countenanced by Lord Russell,) that the King could not pardon any part of the sentence. The Lords resolved that the scruples of the sheriffs were unnecessary, and declared that the King's writ ought to be obeyed. The sheriffs signified to the House of Commons that they were not satisfied as to the power of said writ, and the House, after two days consideration, resolved that the House was content that the sheriff do execute Lord Stafford by severing his head from his body.

When Lord Russell was condemned for high treason upon indictment, the King, while he remitted the ignominious part of the sentence, observed, "That his Lordship would now find he was possessed of that prerogative which, in the case of Lord Stafford, he had denied him."

Our great commentator remarks, "One can hardly determine (at this distance from these turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign." To my judgment it appears abundantly plain, that the sovereign, who is the fountain of mercy, can exercise a dispensing prerogative, and commute a heavier for a lighter punishment, "*onere magis continet in se minus*." The criminal has never yet been the person to raise the point; but it appears that one or two of the state prisoners have called in question the right to alter the sentence.

It is recorded as illustrative of the difference of character of James the Second, and William the Third, that the former, in allusion to an individual of his time, who was obnoxious to the government of the day, said "He is anxious to be a martyr, and I shall gratify him;" and William the Third, on a similar occasion—"He is anxious to be a mar-

tyr, and I shall disappoint him." Posterity has pronounced its approval of the latter sentiment, and I trust our government will adopt it, and disregard that morbid sense of vanity which would sacrifice life to its insane gratification.

N.

(Continued from p. 248.)

10. That before any such licence as aforesaid shall be granted, a requisition for the same, in such form as the said commissioners shall from time to time appoint for that purpose, and accompanied with such certificate as hereinbefore is required, shall be made and signed by the person by whom such licence shall be required, and in every such requisition all such particulars as the said commissioners shall require shall be truly set forth; and every person applying for or attempting to procure any such licence, who shall make or cause to be made any false representation in regard to any of the said particulars, or who shall endeavour to obtain a licence by any forged recommendations, or who shall not truly answer all questions which shall be demanded of him in relation to such application for a licence, and also every person to whom reference shall be made who shall in regard to such application wilfully and knowingly make any misrepresentation, shall forfeit for every such offence a sum not exceeding forty shillings; and it shall be lawful for the said commissioners to proceed for recovering of such penalty before any divisional justice at any time within one calendar month after the commission of the offence, or during the currency of the licence so improperly obtained.

11. That as often as any driver or conductor shall change his place of abode he shall give notice thereof in writing signed by him to the said commissioners, specifying in such notice his new place of abode, and shall at the same time produce his licence to the said commissioners, who shall endorse thereon a memorandum specifying the particulars of such change; and every driver or conductor who shall change his place of abode, and shall neglect for two days to give notice of such change, and to produce his licence in order that such memorandum as aforesaid may be endorsed thereon, shall forfeit for every such offence a sum not exceeding forty shillings; and the said commissioners, or any person employed by them for that purpose, may sue for such penalty at any time during the currency of such licence.

12. That the particulars of every licence which shall be granted as aforesaid shall be entered in books to be kept for that purpose at the office of the said commissioners; and in all courts, and before any divisional justice of the peace, and upon all occasions whatsoever, a copy of any entry made in any such book, and certified by the person having the charge thereof to be a true copy, shall be received as evidence, and be deemed sufficient proof of all things therein registered, without requiring the production of the said book, or of any licence or of any requisition or other document upon which any such entry may be founded; and every person applying at all reasonable times shall be furnished with a certified copy of the particulars respecting any licensed person, without payment of any fee.

13. That every licensed driver or conductor shall at all times during his employment, and when he shall be required to attend before any divisional justice of the peace, wear his ticket conspicuously upon his breast in such manner that the whole of the writing thereon shall be distinctly legible; and every driver or conductor who shall act as such, or who shall attend when required before any justice of the peace, without wearing such ticket in manner aforesaid, or who, when thereto required, shall refuse to produce such ticket for inspection, or to permit any person to note the writing thereon, shall for every such offence forfeit the sum of forty shillings.

14. That upon the expiration of any licence granted under this act the person to whom such licence shall have been granted shall deliver such licence and the ticket relating thereto to the said commissioners; and every such person

who after the expiration of such licence shall wilfully neglect for three days to deliver the same to the said commissioners, and also every person who shall use or wear or detain any ticket, without having a licence in force relating to such ticket, or who shall, for the purpose of deception, use or wear or have any ticket resembling or intended to resemble any ticket granted under the authority of this act, shall for every such offence forfeit a sum not exceeding forty shillings; and it shall be lawful for the commissioners, or for any person employed by them for that purpose, to prosecute any person so neglecting to deliver up his licence or ticket, at any period within twelve calendar months after the expiration of the licence; and any constable or peace officer, or any person employed for that purpose by the commissioners, may seize and take away any such ticket, wheresoever the same may be found, in order to deliver the same to the said commissioners.

15. That whenever the writing on any ticket shall become obliterated or defaced so that the same shall not be distinctly legible, and also whenever any ticket shall be proved to the satisfaction of the said commissioners to have been lost or mislaid, the person to whom the licence relating to any such ticket shall have been granted shall deliver such ticket (if he shall have the same in his possession,) and shall produce such licence to the said commissioners, and such person shall then be entitled to have a new ticket delivered to him, upon payment of a sum of two shillings, to be applied as aforesaid: provided always, that if any ticket which shall have been proved as aforesaid or represented to have been lost or mislaid shall afterwards be found, the same shall forthwith be delivered to the said commissioners; and every person into whose possession any such ticket as last aforesaid shall be or come who shall refuse or neglect for three days to deliver the same to the said commissioners, and also every person licensed under the authority of this act who shall use or wear the ticket granted to him after the writing thereon shall be obliterated, defaced, or obscured so that the same shall not be distinctly legible, shall for every such offence forfeit the sum of forty shillings.

16. That every person who shall forge or counterfeit, or who shall cause or procure to be forged or counterfeited, any licence or ticket by this act directed to be provided for the driver of a hackney or other carriage as aforesaid, or for the driver or the conductor of a metropolitan stage carriage or omnibus, and also every person who shall sell or exchange or expose to sale or utter any such forged or counterfeited licence or ticket, and also every person who shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused,) have or be possessed of such forged or counterfeited licence or ticket, knowing such licence or ticket to be forged or counterfeited, and also every person knowingly and wilfully aiding and abetting any person in committing any such offence as aforesaid, shall be guilty of a misdemeanor, and being thereof convicted shall be liable to be punished by fine or imprisonment, or by both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the court shall think fit; and any person may detain any such licence or ticket, or for any constable or peace officer, or any person employed for that purpose by the said commissioners, to seize and take away any such licence or ticket, in order that the same may be produced in evidence against such offender, or be disposed of as the said commissioners shall think proper.

17. That every proprietor of a hackney or other carriage as aforesaid, and of every metropolitan stage carriage or omnibus, who shall permit and employ any licensed person to act as the driver or conductor thereof, shall require to be delivered to him and shall retain in his possession the licence of such driver or conductor while such driver or conductor shall remain in his service; and in all cases of complaint where the proprietor of a hackney or other carriage as aforesaid, or of a metropolitan stage carriage or omnibus, shall be summoned to produce the driver or conductor of such carriage before a divisional justice of the peace, he shall also produce the licence of such driver or conductor, if at the time of receiving the summons such driver or conductor shall be in his service; and if any

driver or conductor complained of shall be adjudged guilty of the offence alleged against him, the justice of the peace before whom he shall be convicted shall in every case deliver upon the licence of such driver or conductor the nature of the offence and the amount of the penalty inflicted; and every proprietor who shall neglect to require to be delivered to him and to retain in his possession the licence of any driver or conductor during such period as such driver or conductor shall remain in his service, or who shall refuse or neglect to produce such licence as aforesaid, shall for every such offence forfeit a sum not exceeding forty shillings.

18. That it shall be lawful for any such divisional justice to hear and determine all matters of complaint between any proprietor of a hackney or other carriage as aforesaid, or metropolitan stage carriage or omnibus, and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage of loss which shall have arisen through the neglect or default of any driver or conductor to the property of his employer entrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a divisional justice of the peace to pay, and which has been actually paid pursuant to such order, on account of the negligent or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper; and any money ordered to be paid as aforesaid may be recovered in like manner as any penalty under this act.

19. That it shall not be lawful, either in any court of law or before any divisional justice of the peace, to enforce the payment of any sum of money claimed from any driver or conductor by any proprietor on account of the earnings of any hackney carriage or other carriage as aforesaid, or metropolitan stage carriage or omnibus, unless under an agreement in writing which shall have been signed by such driver or conductor in the presence of a competent witness; and no such agreement shall be liable to any stamp duty.

20. That when any licensed driver or conductor shall leave the service of any proprietor, such proprietor shall, upon demand thereof, return to him his licence: provided always, that if the said proprietor shall have any complaint against the said driver or conductor it shall be lawful for such proprietor to retain the licence for any time not exceeding twenty-four hours after the demand thereof, and within that time to apply to the police court of the district in which the said proprietor shall dwell, for a summons against him; and the said proprietor, at the time of applying for the summons, shall deposit the licence with the clerk of such police court or divisional justice; and in case any proprietor who, upon demand thereof, shall have refused or neglected to deliver to any driver or conductor his licence, shall not within twenty-four hours, exclusive of Sunday, or any day on which the police court shall not sit, apply for such summons, and deposit the licence as aforesaid, or shall not appear to prosecute his complaint at the time mentioned in the summons, it shall be lawful for such driver or conductor to apply to the same police court, or to some divisional justice as aforesaid, for a summons against such proprietor; and upon hearing and deciding the case, the justice, if he shall think there is no just cause for detaining the licence, or that there has been needless delay on the part of the proprietor in bringing the matter to a hearing, shall have power to order the said proprietor to pay such compensation to the said driver or conductor as the said justice shall think reasonable; and payment of such compensation shall be enforced in the same manner as any penalty may be enforced under the said revised act of the fifth year of her Majesty's reign; and the justice shall cause the licence to be delivered to the said driver or conductor, unless any misconduct shall be proved against him, by reason whereof the justice shall think that such licence shall be revoked or suspended; and so long as any proprietor shall neglect to apply for such summons and deposit the licence, after demand thereof, any divisional justice

the peace may, in like manner, from time to time, order compensation to be paid by him to the same driver or conductor; and no proprietor shall, under any pretence, or by virtue of any claim whatever, retain beyond the time aforesaid the licence of his driver or conductor.

21. That it shall be lawful for any such divisional justice of the peace before whom any driver or conductor shall be convicted of any offence, whether under this act or any other act, if such justice, in his discretion, shall think fit, to revoke the licence of such driver or conductor, and also any other licence which he shall hold under the provisions of this act, or to suspend the same for such time as the justice shall think proper, and for that purpose to require the proprietor, driver, or conductor in whose possession such licence, and he ticket thereunto belonging, shall then be, to deliver up the same; and every proprietor, driver, or conductor, who, being so required, shall refuse or neglect to deliver up such licence and any such ticket or either of them, shall forfeit, so often as he shall be so required and refuse or neglect as aforesaid, a sum not exceeding forty shillings; and the justice shall forthwith send such licence and ticket to the commissioners, who shall cancel such licence, if it has been revoked by the justice, or if it has been suspended shall at the end of the time for which it shall have been suspended re-deliver such licence, with the ticket, to the person to whom it was granted.

22. That every driver or conductor authorized by any proprietor to act as driver of any hackney or other carriage as aforesaid, or as driver or conductor of any metropolitan stage carriage or omnibus, who shall suffer any other person to act as driver of such hackney or other carriage, or as driver or conductor of such metropolitan stage carriage or omnibus, without the consent of the proprietor thereof, and also every person, whether duly licensed or not, who shall act as driver or as conductor of any such carriage, without the consent of the proprietor thereof, shall forfeit the sum of forty shillings; and every driver or conductor charged with such offence, who, when required by a divisional justice of the peace so to do, shall not truly make known the name and place of abode of the person so suffered by him to act as driver or conductor without consent of the proprietor, and also the number of the ticket of such person (if licensed), shall be liable to a further penalty of forty shillings; and it shall be lawful for any police constable, without any warrant for that purpose, to take into custody any person unlawfully acting as a driver or as a conductor, and to convey him before any divisional justice of the peace, to be dealt with according to law, and also, if necessary, to take charge of the carriage and every horse in charge of such person, and to deposit the same in some place of safe custody until the same can be applied for by the proprietor.

23. That every driver of a hackney carriage or other carriage as aforesaid, or driver or conductor of a metropolitan stage carriage or omnibus, who shall be guilty of wanton or furious driving, or who by carelessness or wilful misbehaviour shall cause any hurt or damage to any person or property, being in any street or highway, and also every driver or conductor who, during his employment, shall be drunk, or shall make use of any insulting or abusive language, or shall be guilty of any insulting gesture or any misbehaviour, shall, for every such offence, forfeit a sum not exceeding forty shillings; or it shall be lawful for the justice before whom such complaint shall be brought, if in his discretion he shall think proper, instead of inflicting such penalty, forthwith to commit the offender to prison for any period not exceeding two calendar months, with or without hard labour, as the justice shall direct; and in every case where any such hurt or damage shall have been caused, the justice, upon the hearing of the complaint, may adjudge as and for compensation to any party aggrieved as aforesaid a sum not exceeding five pounds, and may order the proprietor of the hackney carriage or metropolitan stage carriage, the driver or conductor of which shall have caused such hurt or damage, forthwith to pay such sum, and also such costs as shall have been incurred, and payment thereof may be enforced against such proprietor as any penalty or sum of money may be recovered under and by virtue of this act; and any sum so paid by the proprietor shall be recovered in a summary way before a justice of the

peace from the driver or conductor through whose default such sum shall have been paid upon proof of the payment thereof, or the justice may, in the first instance, adjudge the amount of such compensation to be paid by the driver or conductor to the party aggrieved.

24. That where there shall be more than one proprietor of any hackney or other carriage or metropolitan stage carriage or omnibus it shall be sufficient in any information, summons, order, conviction, warrant, or any proceeding under this act, or the 37 Geo. 3, to name such proprietors, and to describe and proceed against him as if he were sole proprietor.

25. That all complaints under this act may be heard and all penalties recovered by one or more justices as in the 5th Vic., and any divisional justice may, under this act, or the 37th Geo. 3, or any act amending same, or any rules or by-laws amending the same, lessen the penalty or time of imprisonment.

26. That this act may be amended or repealed by any act to be passed in this session of parliament.

CAP. CXIV.

An Act to prevent District Auditors from taking Proceedings in certain Cases. [4th September, 1848.]

CAP. CXV.

An Act to vest in Her Majesty the Property of the Irish Reproductive Loan Fund Institution, and to dissolve the said Institution. [4th September, 1848.]

Sec. 1. *Funds of the corporation to vest in her Majesty.*

2. *Such funds to be applied to charitable purposes in certain counties in Ireland.*

3. *Within three months after act passed corporation may apply certain sums in payment of debts, &c. and compensations to officers.*

4. *Act not to release trustees from liabilities.*

5. *County trustees or local committees, &c. acting under them, to have the powers of recovery of monies as under charitable loan society acts.*

6. *In such cases, certificate of three trustees to be evidence, in lieu of certificate under corporate seal.*

7. *Issuing of certificate to be signified at a meeting of the trustees.*

8. *List of loans and securities to be deposited with clerk of the peace within three months.*

9. *County trustees, on receiving back loans advanced to local committees, to notify the same to the clerk of the peace.*

10. *Penalty on persons giving false certificate under this act.*

11. *Penalty for using certificate for recovery of sums beyond the amount advanced by county trustees.*

12. *Treasurer may make allowances to officers of the trustees.*

13. *Dissolution of Irish Reproductive Loan Fund Institution.*

14. *Accounts to be made up annually, and laid before both houses of Parliament.*

15. *Public act.*

16. *Act may be amended. &c.*

Whereas great distress prevailed in Ireland in the year 1832, and a committee of relief raised a sum of three hundred and eleven thousand and eighty-one pounds, five shillings, and seven pence, by subscription, for the suffering poor; and the said charitable association was subsequently carried on or superintended by such committee, or the board of directors under the name or style of "The Irish Reproductive Loan Fund Institution;" and whereas by an act passed in the sixth and seventh years of the reign of her Majesty, intitled, *An Act to consolidate and amend the Laws for the Regulation of the Charitable Loan Societies in Ireland*, certain things were enacted; and whereas the business of the said corporation cannot be continued with advantage to the public, and the said corporation have therefore agreed to surrender their charter, and that their funds and property and the debts owing to them should be vested in her Majesty, to be applied as hereinafter mentioned. be it enacted, that all

the funds and property of the said corporation, and all funds and property vested in, and all debts due to any members, agents, or trustees of the said corporation, on behalf of the said corporation, subject as hereinafter mentioned, and also all funds and property of the said corporation vested in or under the control of any of the said local trustees or local committees or associations acting under them, or of any societies in connexion with the said corporation, and also all debts and sums of money due to the said corporation from any persons or person whomsoever, shall immediately after the passing of this act be vested in her Majesty, and shall and may be sued for and recovered in the name of her Majesty, her heirs or successors, or by and in the name of any person or persons appointed for that purpose by the Commissioners of her Majesty's treasury, or any three or more of them, by any such proceedings as may by law be adopted or used for recovering debts or demands due to any Loan Society in Ireland, freed however from the limitation as to amount recoverable in the said recited acts contained, or by such other proceedings at law or in equity as might have been adopted or used by the said corporation for recovering such debts, funds, property, and sums of money respectively in case this act had not been passed.

2. That any such funds or monies belonging to the said corporation which have been or may be paid over to her Majesty's treasury, and all such other monies as which under this act shall be recovered or received from any party or parties in Ireland, shall be applied and disposed of for such charitable purposes or objects applied and disposed of for such charitable purposes or objects of public utility not otherwise provided for in whole or in part by local rate or assessment, including the instruction in and the promotion of agricultural science, in the several counties of *Leitrim, Sligo, Roscommon, Mayo, Galway, Clare, Limerick, Tipperary, Cork, and Kerry, in Ireland*, as the Lord Lieutenant or other Chief Governor of Ireland, with the consent of her Majesty's treasury, or any three of them, shall direct and appoint, but so that the sums already recovered, and hereafter to be recovered from each such county of the monies originally appropriated thereto, as shewn in the Schedule (D.) to this act annexed, and profits which have accumulated or may hereafter accumulate thereon, shall be applied to such purposes within such respective county; provided that the sum of five thousand pounds, which as appears by accounts laid before parliament was specifically appropriated for the establishment of an agricultural school of industry in the province of *Munster*, shall be received out of the said fund to be applied in aid of local funds for the establishing an agricultural school or schools in that province, in such manner as the Lord Lieutenant of Ireland, with the approval of the Lords of the Treasury, shall direct, such sum to be applied, so far as possible, in aid of contributions locally collected for the same purpose.

3. That the said corporation, within three calendar months after the passing of this act, may apply so much of the said sums, mentioned in the said schedule (A.) as now constituting the fund appropriated for defraying expenses as aforesaid, as shall be necessary, in paying the debts, liabilities, and expenses of the said corporation, and such compensations to persons now or heretofore employed by or under the said corporation, or the said association before the incorporation thereof, as the said corporation shall think reasonable, which said compensations may be made either by payment of sums of money, or by the purchase of annuities, or otherwise; and the said corporation shall within the said three calendar months deliver to the commissioners of Her Majesty's treasury the bond mentioned in the said schedule, or such amount of principal and interest as shall have been paid thereon, and transfer and pay over to the said commissioners the balance of the several sums of stock and money mentioned in the schedule (A.) or of other the sums of stock and money which at the time of the passing of this act shall form the property of the said corporation, exclusively of so much of the said balances or sums of money, and of the money owing on the said bond, which shall not have been realized by the said corporation, together with all vouchers, books, accounts, and papers now under their control and custody, and relating in any way to the

said charity or any portion of the funds under the control and management of the said corporation, except such vouchers, accounts, and papers as the commissioners of Her Majesty's treasury, or any three or more of them, shall think fit to leave in the possession of the trustees and local committees as being necessary to enable such trustees and local associations to collect the funds intrusted to them respectively; and upon such transfer, payment, and delivery to the said corporation, and all the present and former governors and members thereof, and all the several persons who at any time members of the committee of relief or charitable association in London previously to the date of the said aforesaid, or of the board of directors of the said charitable association in London, and their respective estates, shall be fully released and discharged from all claims and debts and all liability whatsoever by or to Her Majesty's treasury, or any persons or person whatever, for or in respect of any matter or thing whatsoever connected with or relating to the said corporation, or the said committee of relief or charitable association, or the funds or property of the said corporation, or any funds or property whatever at any time vested in or received by the said committee of relief or charitable association, or any members or member, agent or servants thereof, or for or in respect of any matter or thing whatsoever connected with the premises.

4. That nothing herein contained shall release the trustees in the said several counties in Ireland from any liability in respect of the moneys intrusted to them respectively out of the funds vested in the governors of the said corporation, and any obligation to collect and enforce payment thereof, and of the accumulations thereof, as such trustees respectively would have been subject to, in case this act had not been passed; and the commissioners of her Majesty's treasury, or any three or more of them, may from time to time appoint any person or persons to collect and receive from such trustees, or from the party or parties liable to pay the same, such of the monies hereby vested in her Majesty as may be payable by such trustees or other parties respectively; and the said local committees, associations, or other borrowers shall continue liable to the said trustees in the same manner and to the same extent as if this act had not been passed, and the bye laws and regulations made, established, or continued under the authority of the said charter, so far as the same are consistent with this act, shall continue to be obligatory on the said trustees and the said local committees or associations respectively, in the same manner and to the same extent as if this act had not been passed, but no further, but so nevertheless that no moneys recovered or received by the said trustees or the said local committees or associations shall be re-issued or again advanced on loan, except such amounts or portions of the sums repaid as may be sanctioned by the governors of the said corporation within three months from the passing of this act, or may be hereafter sanctioned by the Commissioners of her Majesty's treasury, or by such persons or persons as the commissioners of her Majesty's treasury may appoint to receive the monies hereby vested in her Majesty.

5. That notwithstanding the dissolution of the said corporation, any of the said county trustees in Ireland, or any local committees, associations, or parties acting under any of the said trustees in Ireland having had notice before the passing of this act, by virtue or in respect of connexion with the said *Irish Reproductive Loan Fund Institution*, or by virtue or in respect of connexion with any of the said county trustees thereof, or having had monies after the passing of this act, with the sanction of the governors of the said corporation, within such three months as aforesaid, or with the sanction of the commissioners of her Majesty's treasury, or of such persons or persons as they may appoint to receive the monies hereby vested in her Majesty, may use and exercise the powers, authorities, rights, and remedies contained and provided in any act or acts for the regulation of charitable Loan Societies in Ireland for the recovery of monies, and subject to like provisions or any means or remedies provided by law for the recovery of debts, unless the proceedings for the recovery of such monies shall at any time be directed

by the said Commissioners of her Majesty's treasury to be superseded.

6. And whereas by the 6 & 7 Vic. and 7 & 8 Vic. such certificate as in the said acts mentioned is made evidence of the facts therein certified: be it enacted, that from and after the passing of this act a certificate given in the form prescribed in the schedule marked (B) to this act annexed, signed by any three persons professing to be trustees of the funds heretofore belonging to the said corporation in and for the county in which any such local committee, association, or party acting under the said trustees shall have lent such monies or taken any securities, shall be evidence in like manner and be of like force as a certificate under the corporate seal of the said corporation would have been under the said recited acts or either of them, and it shall not be necessary to prove that any person signing such certificate as a trustee shall be a trustee as aforesaid.

7. That all trustees of the funds heretofore belonging to the said corporation who shall give any certificate under the provision herein-before contained shall forthwith after giving every such certificate convene a meeting of the trustees according to the bye-laws regulating such meetings, and shall notify to such meeting the issuing of such certificate, and shall transmit to the commissioners of her Majesty's treasury a duplicate or copy of such certificate, signed by the trustees who shall have issued the same, and by the chairman of such meeting; and the commissioners of her Majesty's treasury may from time to time cause a list, description, or specification of the trustees of the funds heretofore vested in the said corporation, and of the associations or loan societies or institutions heretofore established in *Ireland* by or in connexion with the said corporation, who shall remain in possession of any money heretofore belonging or accruing from the monies belonging to the corporation, and vested in her Majesty by this act, to be sent to the secretary to the loan fund board in *Dublin*; and such list, description, or specification so sent shall have the same force and effect as the list, description, or specification which by the said act of the sixth and seventh years of the reign of Her present Majesty was required to be sent by the said Irish reproductive loan fund institution to the said secretary of the loan fund board in *Dublin*.

8. That within three months after the passing of this act all such trustees as aforesaid in and for any county, and all such local committees, associations, or other parties acting under any such trustees, holding securities for any such funds or moneys lent as aforesaid, except such as shall have been lent by the trustees to associations or to parties to re-lend, shall and are hereby required to deposit with the clerk of the peace for such respective county duplicate lists of all such loans and securities, and the amount then due thereon respectively, according to the form marked (C.) in the schedule annexed to this act; and the said trustees, local associations, or other parties acting under such trustees as aforesaid, making loans after the passing of this act, with the sanction of the governors, or of the said commissioners of Her Majesty's treasury, or with the sanction of the parties who may be appointed as aforesaid by the said commissioners, shall and are hereby required to transmit to the clerk of the peace, within seven days from the granting of such loans, according to the same form, so far as the same is applicable; and all such duplicate lists as aforesaid shall be duly certified by the inspector to such trustees; and in every case such clerk of the peace is hereby required to take charge of and retain one of such lists, and to transmit the other of such lists, within two days after the receipt thereof, to the commissioners of Her Majesty's treasury: provided always, that all loans and moneys to be recovered in manner herein-before provided shall be included in such lists as aforesaid respectively.

9. That when any such county trustees as aforesaid shall have advanced any such funds or moneys as aforesaid to any local committee, association, or party acting under them, for the purpose of re-lending the same, and shall have received back from such local committee, association, or party the moneys so advanced, the said trustees shall, within forty-eight hours after the receipt thereof, notify in writing to the clerk of the peace of such county such receipt, and

the discharge of such debt or advance as mentioned in any such certificate marked (B.) in the said schedule annexed to this act; and such clerk of the peace, on receipt of such notification, shall forthwith notify the same in writing to the commissioners of Her Majesty's treasury, and also to the justices of the peace at the petty sessions for the district or districts next adjoining the place where such local committee, association, or party has been acting as aforesaid.

10. That any person not being a trustee, who shall as a trustee sign any such certificate as aforesaid, and any such trustee or trustees as aforesaid giving any false certificate under this act, or not giving notice as aforesaid to the respective clerk of the peace of the payment and discharge of any such loan or advance made to any such local committee, association, or party acting under such trustees, shall be liable to forfeit four times the amount of the sum specified in such certificate, one half to the informer, and the other half to her Majesty, and to be recovered by action of debt, bill, plaint, or information, or by proceedings in a summary way before any justice or justices of the peace, in like manner and subject to like provisions as any penalty or forfeiture may be recovered under the 6 & 7 Vic.

11. That if any trustee or trustees, or any member or members of any local committee or association or party acting under any such trustees as aforesaid, shall proceed to recover any moneys lent out by them respectively beyond the amount of the aggregate sum advanced to them by any such county trustees as aforesaid, and the accumulations by the profits derived from the interest, fines, and charges paid thereon by borrowers thereof, and for such purpose shall use any certificate or other evidence of connexion with the said corporation, or any such certificate of a trustee or trustees as in this act provided, every such trustee or trustees or member of a local committee or association or party so offending, shall forfeit the amount of such demand so sought to be recovered, and shall likewise be subject to the further penalty of four times the amount of such demand, one half thereof to be paid to the informer, and one half to Her Majesty, and such penalty to be recovered in the manner herein-before provided as to penalties above mentioned; provided that such penalty hereby inflicted shall not exonerate such party or parties from any penalties he or they may incur to be paid to the loan fund board in *Ireland*.

12. That it shall be lawful for the said commissioners of Her Majesty's treasury, out of the moneys vested in Her Majesty by this act, to allow any secretaries or other persons heretofore employed by the said trustees such allowance in respect of length of service or other meritorious cause, and also to pay to such persons as may be from time to time employed by or with the sanction of the said commissioners, in collecting, managing, and applying, or otherwise in relation to the funds hereby vested in Her Majesty, such salaries or allowances as the said commissioners shall think fit.

13. That after the expiration of three calendar months from and after the passing of this act the said corporation of the *Irish* reproductive loan fund institution shall be dissolved to all intents and purposes whatsoever.

14. That an annual account showing the receipts and disbursements under this act shall be made up to and for the 31st of *December* in every year, and shall be laid before both houses of Parliament within ten days of their next sitting by the lords commissioners of the treasury.

15. That this act shall be deemed a public act, and shall be taken notice of as such in all courts whatsoever.

16. That this act may be amended or repealed by any act to be passed in this session of parliament.

SCHEDULES to which the foregoing act refers.

SCHEDULE (A.)

Funds and Property of the *Irish* Reproductive Loan Fund Institution, exclusively of balances due from the several County Trustees in *Ireland*.

PART I.

Sums now constituting the fund appropriated for defraying expenses of management.

£3,058 5s. 6d. cash.

£7,457 9s. 8d. £3 5s. per cent. annuities.

PART II.—Other Funds.

£22,003 10s. 5d. £3 per cent. annuities.

£8,642 6s. 7d. £3 5s. per cent. annuities.

£500 7s. 6d., with accruing interest, secured by bond of Sir Matthew Barrington, Baronet.

SCHEDULE (B.)

We, the undersigned Trustees for the Funds heretofore belonging to the Irish Reproductive Loan Fund Institution in County _____ and now vested in the Commissioners of her Majesty's Treasury by an Act [insert the title of this act.] certify that A. B. of _____ in County _____

C. D. of _____ in County _____
and E. F. of _____ in County _____

are an association at _____ in County _____ heretofore lending monies advanced by us, and now hold the amount of £ _____ from us.

(Signed) _____ } Trustees as above described.

Signed in the presence of me,
Inspector to the above Trustees in County _____

SCHEDULE (C.)

Statements of Amounts due on the _____ day of 184 _____, by borrowers from the local association at under the Trustees to the late Irish Reproductive Loan Fund Institution in County _____

Whereof the Members are } of _____ in the County of _____
of _____ in the County of _____
of _____ in the County of _____
of _____ in the County of _____

Date when Loan made.	Borrower's Name.	Borrower's Residence.	Surety's Name.	Surety's Residence.	Amount lent.	Amount of principal repaid on date of this return.	Amount of principal due on date of this return.	Amount due for interest & fines on date of this return.	Amount due from borrower on date of this return, including legal fees incurred by association on date of this return.
1	2	3	4	5	6	7	8	9	10
					£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.

Dated this _____ day of _____ 184 _____

Manager.

Clerk.

I certify to have examined the foregoing Statement with the books and papers belonging to the above-mentioned Association, and to have found the same to be true extracts therefrom.

(Signed)

Inspector to the above-mentioned Trustees.
Dated this _____ day of _____ 184 _____

SCHEDULE (D.)

Statement of Funds appropriated by the Relief Committee of 1822 to the Trustees for the several Counties of Ireland, with the sums since repaid by them to the Irish Reproductive Loan Fund Institution.

	Sums originally appropriated.			Repaid.		
	£	s.	d.	£	s.	d.
To the County of Clare	5,697	8	0	933	7	6
" Cork	8,028	0	0	1,050	0	0
" Galway	7,065	0	0	—	—	—
" Kerry	5,777	6	8	5,572	0	2
" Leitrim	2,000	0	0	1,200	0	0
" Limerick	6,370	11	9	—	—	—
" Mayo	9,377	0	9	5,620	18	4
" Roscommon	4,500	0	0	1,788	16	7
" Sligo	3,870	0	0	3,893	6	3
" Tipperary	2,500	0	0	1,841	9	0

CAP. CXVL

An act for carrying into effect the treaty between her Majesty and the Republic of the Equator, for the abolition of the traffic in slaves. [4th September, 1848.]

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET STREET, in the Parish of St. Andrew, and published at 1A, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, June 10, 1848.

THE Irish Jurist

No. 34.—VOL. I.

JUNE 23, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, JUNE 23, 1849.

A CASE of much practical importance to solicitors was recently the subject of adjudication in the Court of Exchequer, in the case of *Levinge v. De Montmorency*, (not yet reported.) A petition was presented on behalf of the receiver in the cause, that the solicitor should deposit certain deeds in his possession in Court, for the purposes of the suit, and to enable the receiver to bring ejectments; and was resisted on the part of the solicitor, on the ground that if the deeds left his possession his lien was gone, and could not be transferred to any fund that would be realized in the cause; that even assuming the right to resist production could not be maintained against the party moving for it, every other party in the cause would incidentally gain thereby, to the prejudice of the solicitor, as the character of an incumbrance, the result of a contract, does not belong to the lien of a solicitor; and for this position the cases of *Blunden v. Desart*, (2 Dru. & Warren, 405,) *Taylor v. Gorman*, (6 I. E. R. 333,) and *Baxon v. Bolland*, (4 M. & Cr. 354,) were cited.

In *Baxon v. Bolland*, the solicitor had been discharged by his client, the plaintiff in the cause. During the progress of the cause, costs had become due to him, as well in that as in other matters in which he had been also employed. The solicitor produced the deed, through which he sought to establish his lien, as evidence in the cause; he subsequently became bankrupt; and his assignee presented a petition claiming a lien on the fund in the cause, for the benefit of which the deed was in Court, for the entire of the costs incurred in the cause and otherwise, and contended, that as the title to the fund was established by the production

of that deed, he was therefore entitled to the same lien upon the fund he was entitled to upon the deed. The Lord Chancellor Cottenham decided that the assignees of the solicitor were entitled to payment out of the funds in the cause alone.

In *Blunden v. Desart*, (Flan. & Kel. 572,) before Sir M. O'Loughlen, the lien of the solicitor was upheld, under the following facts:—Mr. Maxwell was the solicitor of Sir J. Blunden; from the year 1800 till 1805, different title-deeds relating to Sir John's estates came into his possession. In 1812, costs became due to the solicitor. In 1815, a judgment was recovered against Sir John Blunden, and further costs were incurred from that period to the death of Sir John, in 1818. An order having been made in the cause of *Blunden v. Desart*, that the solicitor of the late Sir John should furnish his costs, the Master reported under that order, that £1544 17s. 10d. was due to the solicitor. On the 27th of June, an order was made—Maxwell, the solicitor, "not objecting thereto"—that he should lodge in the Master's office all the title-deeds, relating to the lands decreed to be sold, in his power or possession, and without prejudice to such lien as he might establish against the funds in the cause. The Master, in allocating the funds, reported the solicitor's demand to be in priority to creditors whose claims were subsequent to 1812. The assignee of the judgment of 1815 objected to this report, and Sir M. O'Loughlen upheld the report of the Master. This case came by way of appeal before Sir E. Sugden, C. (2, D. & W. Judgment, 422,) who reversed the order of the Master of the Rolls as far as regarded the costs incurred subsequently to the judgment of 1815.

The next case relied upon as unfavourable to the lien of a solicitor who has parted with the possession of his client's papers, is that of *Taylor v. Gorman*, (6 Ir. Eq. Rep. 330,) before Mr. Black-

burne, M. R., the present Lord Chief Justice. In that case, the solicitor of the defendant, in 1819, obtained possession of several deeds relating to the estates of the defendants, and on which he obtained a lien. These deeds he brought into Court, under an order in the cause, the lodgment to be without prejudice to such lien as he had thereon. There was a mortgage of 1777 on the lands which these papers related to, and claims on behalf of younger children, prior to 1819. Subject to these prior demands the Master found that the solicitor had a lien on the papers in Court, and that he was entitled to be paid in priority the portion of the several costs incurred by him prior to the rendition of certain judgments affecting the estate of the defendant.

The suit was instituted to carry into effect the trusts of a deed by which the defendant conveyed certain estates to trustees for the payment of his debts, to which deed the solicitor was a party. In his judgment, (p. 333,) the Master of the Rolls says—"The solicitor having parted with the deed, it is argued that his right is transferred to the fund, and that, the estate being sold and the prior mortgage paid, he is, in place of the lien he has lost, to be paid out of the surplus of the funds realized by the sale." He then goes on—"This claim is at variance with the nature of the right which the lien on the deed confers, and is repudiated by Lord Cottenham in *Boson v. Bolland*. "The solicitor's claim on the fund," he observes, "has been called transferring the lien from the document to the fund recovered by its production; but there is no transfer, for the lien on the deed remains as before, although perhaps of no value; and whereas the lien on the deed could never have been actually enforced, the lien on the fund, if established, would give a title to payment out of it." The solicitor, to get rid of the difficulties those arguments create, has endeavoured to found his right on the *decree or order*, as amounting to a recognition of a right to be paid out of the fund, but they have no effect save that of preserving his right, if right he had, to get back the deed, and cannot be argued to have altered the nature and character of that right, substituting for it actual payment of his demand." This decision was confirmed on appeal by Sir E. Sugden, C. (7 Ir. Eq. Rep. 259.)

These cases have been generally considered by the profession as authorities for the position—that by parting with the possession of the deeds, even under the order of the court, the solicitor in every case virtually lost his lien upon the deeds in his possession, inasmuch as, according to the view taken by the Master of the Rolls in *Taylor v. Gorman*, that lien was not transferred to the fund; and the possession being parted with, the lien which it was admitted by the court still attached to the papers, became valueless, though being one which, if the analogy between this and other instances of lien be correct, would revive upon re-possession. *Hartley v. Hitchcock*, (8 Taunt. 149.)

The doctrine upon which the lien of a solicitor on the papers of his client, which have properly come to his possession rests, is founded upon the plainest principles of justice, and, in the abstract,

is one upon which no difficulty can arise. The rule is settled beyond question, that if a client discharges his solicitor, the court will not take the papers from the latter, unless upon payment of his bill. To travel through the infinity of decisions on this subject, or reconcile them, would not be, perhaps, possible, and the attempt would be beyond the limits of our present enquiry; but it will be found on examination to be generally true, that in every case where the court has denied the solicitor's claim upon the fund, it was either on the ground that no lien existed, or there were circumstances amounting to a waiver of it.

The solicitor having obtained possession of the deeds, has a right to retain them, and it would certainly appear to be contrary to the principles of justice, which first gave that right, that the court, by ordering the production of the deeds, should deprive him of it, if it be unaffected by any infirmity. And, as we heard Mr. Baron Richards observe, in the case which led us to these observations, it would be monstrous to say, that if a solicitor have a lien against a subsequent creditor, that a prior creditor should be deprived of the means of getting at the deeds for the purposes of his suit; and that if the court had not the power of getting possession of the deeds, and of preserving the rights of the solicitors in their integrity, that the whole cause should be paralyzed.

The solicitor for the defendant, Montmorency, resisted the application for the production of the deeds; his counsel citing the cases referred to, to shew the prejudicial effect the production would have upon his rights, and relied upon his right to retain possession till paid.

The court held there was a marked distinction between those cases where the solicitor voluntarily produces the deed, and where the court makes the order *in invitum*. Mr. Baron Pennefather, observing on the case of *Taylor v. Gorman*, said, that though the observations of the Master of the Rolls went to the length of the proposition they were cited to maintain, that the Lord Chancellor had upheld that decision on a different ground—holding that the solicitor, by executing the deed of 1824, had waived his lien; but that he could not be understood as deciding that, if the order was *in invitum*, the court could not protect the interest of the solicitor.

The court directed the deeds to be brought in without prejudice to the attorney's lien, if any he have, or against the puisne creditors making a special reservation as to the rights of the attorney—Mr. Baron Pennefather concluding by saying that he by no means thought such a reservation necessary, as in his opinion the ordinary order to bring in the deeds without prejudice would be sufficient.

The case of *Boson v. Bolland* which was relied upon by the Master of the Rolls in his judgment in *Taylor v. Gorman*, was also, it was observed by the court, within this principle, the solicitor having voluntarily produced the deed. Lord Cottenham, in that case, held that the solicitor having produced the deed voluntarily, was entitled to be paid the costs in that suit alone in which it was produced, and that by the production he disentitled himself

to that lien for his general balance which he previously had.

Worrall v. Johnson, (2 Jac. & W. 214), before Sir Thomas Plumer, M. R., was observed upon by Lord Cottenham in *Baron v. Bolland*, and he appeared to doubt its authority as to the question whether the solicitor was entitled to be paid his general balance, or merely those arising in the suit in which the fund was realised. But there appears to be this plain distinction between the two cases—in the latter the voluntary production having destroyed the general lien, the particular one on the funds in the cause only remained. The Chancellor, p. 357, says, "It appears to me, that in these observations, (referring to those of Sir T. Plumer in *Worrall v. Johnson*), the distinction between the solicitor's lien upon the fund realised in the cause, and his lien upon, or rather right to retain his client's papers in his hands, as solicitor, is not sufficiently kept in view. The lien upon the fund realised in the suit is confined to the costs of that suit, *Lease v. Church*, (4 Madd. 391,) although that seemed to be doubted in *Worrall v. Johnson*." These observations of the Lord Chancellor appear to have been made without attentively considering the report of *Worrall v. Johnson*, which appears to us to confirm, rather than clash with the opinion of Lord Cottenham—the lien being upon the papers, which, it is clear from the judgment of the court, the solicitor had never lost possession of. At p. 218, Sir T. Plumer adverts to the distinction which Lord Cottenham thought to be not sufficiently attended to. "There are two kinds of lien that a solicitor has for a bill of costs—one on the fund recovered, and the other on the papers in his hands;" and at p. 219—"It is of no consequence there is a compromise here—the fund cannot be transferred without an application to the court; and the other parties would then object, unless the deed be given back to them; and it cannot be got at, except from the solicitor. The plaintiff's assignee can therefore never succeed, without applying for the possession of it;"—evidently shewing the demand of the solicitor was on account of the general lien on the papers, which, being in his possession, in the language of Lord Cottenham in *Baron v. Bolland*, "he had a right to withhold, and, if essential to the client, might, by those means, compel payment of his general professional demand." This proposition must, however, be taken with this qualification, that no person has a title to the papers superior to that of the client. In *Molesworth v. Robins*, (2 Jon. & Mat. 358), Sir E. Sugden in his judgment, p. 370, after saying "that a solicitor to enforce his lien, can only withhold the deed, so as to prevent the party entitled having the benefit of them," goes on "but no man can give a lien to a solicitor of a higher nature than the interest he himself has in the deed. The client had no right to charge the deed which did not belong to him alone, but to himself in common with others, and which he could not withhold from the class of persons entitled to them."

These authorities go far to support the view of the Court of Exchequer in *Levings v. De Montmorency*. They shew the very high nature of the

rights accorded to the solicitor for his protection—the injustice of depriving him of that right we have already adverted to. The proper course for every solicitor whose lien is sought to be interfered with, will be, to dissent to the production of the deed—to act on his strict right of retainer—and in this manner compel the parties requiring the benefit of the papers, either to purchase that benefit by the settlement of the whole costs due, or by driving them to the necessity of an application to the court to compel their production, obtain, as in this case, a full protection—a course recommended by Sir E. Sugden in *Taylor v. Gorman*, who, after adverting to the hardship inflicted upon the solicitor in the case before him, adds, "that he should be cautious never to enter into such an arrangement as existed there—that his course should be to call upon the court to decide the question of lien."

To the Editor of the Irish Jurist.

MR. EDITOR—Whoever has read the recent debates in the House of Commons, on the subject of the sale of incumbered estates in Ireland, cannot but be struck with the feeling of discontent exhibited, that so little has been done to diminish the delay and expense of the procedure in the Court of Chancery. To describe the Court of Chancery as an unwieldy engine, costly in its working, and tardy in its movements, seemed to be the ambition of every member who addressed the house, while the annals of bygone litigation have been ransacked for the purpose of amusing the house with the story of some unhappy purchaser under that court, who afterwards finds himself embarked in a sea of litigation, and shipwrecked in the end. In this state of feeling, the project for taking the sale of incumbered estates from the Court of Chancery, and entrusting it to government commissioners, was introduced into the house, and passed almost without opposition. Now, while I freely admit that greater facilities should be given for the transfer of land, and that although a good deal has of late been effected, yet that many improvements might still be made in our judicial proceedings, I would altogether deprecate the system of modern legislation, which, in the rage for novelty, endeavours to discover some new machinery for the working of each specific case, rather than improve the old, which is so well adapted for all.

The Court of Chancery has been in existence for centuries; the excellencies of its system, and the impediments to its working, are now well understood. Some of the greatest men that ever lived have left upon it the impress of their characters; and surely it would be much wiser to remove whatever has been found to clog the working of this wondrous machine, than to substitute for it the weak inventions of modern theorists, whose patch-work devices, if found to work at all, would require much time to be understood, and a long series of judicial decisions to consolidate, before they could be reduced into a system of practice.

Now, to apply these observations to the object

which appears to be so desired, of selling the estates of incumbered proprietors in Ireland, it would not be difficult to shew, that by giving increased powers to the Court of Chancery in a few particulars, estates could be sold by this court with as much expedition, more economy, and with far greater safety to the parties interested, than by the proposed new machinery, or almost any other that could be invented. To make this intelligible to some readers, let me observe, that the delay in the sale of estates through the court of Chancery, arises from two causes. The first is, that by the present practice the sale is not made until the end of the suit, after the rights of all the parties has been adjudicated upon, and the sum due to each ascertained. The second is, that after the sale is made, it is now necessary to trace the title of the party whose estate is decreed to be sold. But let these two impediments be removed, and any estate might be sold through the Court of Chancery, within three months after the application to it for that purpose is made. For instance, there exists in Ireland more statistical information respecting land, than, we believe, in any other country in the world. First, there is the ordnance survey, which gives the value, or the approximate value of every estate in the country. Second, there is the registry office, where an abstract of every deed creating any limitation or charge, can be had. Thirdly, there is the new office for the registry of judgments, established by Sir Edward Sugden, where, at a glance, any one that pleases, can see every judgment that has been entered up against any individual in the community. Suppose, then, that an incumbrancer desires to have an estate sold; let him file a short bill or present a short petition, succinctly stating the nature of his own incumbrance, the value of the estate, as appearing from the Ordinance Survey, and the amount of the other charges or incumbrances that appear to affect it, (which, for greater conciseness, could be done by referring to a schedule, to be affixed to the bill or petition, giving merely the dates, sums, and parties' names connected with each charge;) and then, after serving all parties with notice, let him be at liberty to set down the cause or matter to be heard before the Lord Chancellor, who upon receiving proof by a witness, *vis a voce*, at the hearing, of the plaintiff's or petitioner's incumbrance, and being satisfied of the genuineness of the other charges, and that the plaintiff or petitioner has in fact the right to sell the estate, should be at liberty to pronounce a decree for a sale at once; and at the same time direct that the purchaser is to have a parliamentary title, and to be put into possession of the estates immediately upon lodging his purchase-money in Court; and thenceforward be freed from all the future litigation in the suit connected with the claims of the various incumbrancers or parties interested, whose demands are to be transferred from the estate sold to the purchase-money in Court, which represents it. After the fund is brought into Court, the usual allocation order could be made, referring it to the Master in the cause, to report the rights and priorities of the several incumbrancers, and to allocate the fund amongst

them accordingly. By what new machinery could a sale be effected so cheaply or expeditiously? What more perfect system could be invented? And yet, all this is to be superseded, and new Judges, together with their hosts of secretaries, clerks, and other officials, are to be sent over from England, to make new rules and orders, and to sell the estates of incumbered proprietors in Ireland, where there is for that purpose so great an establishment, and so perfect a system already in existence.

Fearing on this occasion to trespass too much on your space, I will, with your permission, again refer to this important subject.

B. C. L. L.

Court Papers.

ROLLS COURT—LONG LIST.—June 12, 1849.

Alexander v. Robinson	Black v. Dobbin
Allen v. Colthurst	Blackley v. Elwin
Anderson v. Bolingbroke	Blackley v. Sell
Archdall v. Irvine	Blackmore v. Rose
Armstrong v. Walker	Blackstock v. Burke
Ashton v. Smith	Blackwood v. Gort
Balfe v. Balfe	Blair v. Nugent
Bannatyne v. Alton	Blake v. French
Barlow v. Fitzgerald	Same v. same
Barry v. Cronin	Bloomfield v. Egan
Same v. same	Bond v. Thompson
Barton v. M'Dermott	Bond v. Tatlow
Bate v. Maxwell	Borough v. Williams
Bateman v. M'Elligott	Borough v. Butler
Betty v. Smith	Boyd v. Burke
Same v. same	Boyle v. Sleator
Same v. same	Brennan v. Moran
Same v. same	Brereton v. Westropp
Berne v. Fagan	Bachanan v. Colborn
Best v. M'Loughlin	Burke v. Darcy
Betham v. Homan	Burton v. Helehan
Bevan v. White	Butler v. Glengall
Same v. same	Campbell v. Browne
Bigge v. Smith	Same v. same
Same v. same	Campbell v. Skerret
	<i>First Fifty.</i>
Cane v. Fitzgerald	Curran v. Glover
Carberry v. Bonayne	Same v. same
Carpenter v. Carew	Curtis v. Swiney
Carson v. Allingham	Daly v. Curtis
Cashin v. Hayes	Darby v. Reed
Cassidy v. Guinness	Davis v. Parker
Caulfield v. Giles	Same v. same
Chamley v. O'Shaughnessy	Davis v. Irwin
Cheney v. Reed	Dawson v. Miller
Christy v. Marston	Disney v. Eyre
Clarke v. Jessor	Dobbins v. Adams
Clanmorris v. St. George	Doherty v. Ware
Collins v. Deasy	Donations (C. of) v. Magrath
Conry v. Conry	Donovan v. Bissett
Same v. same	Donovan v. Swiney
Cooney v. O'Reilly	Dowell v. Burke
Corbet v. Mahon	Dowse v. Keogh
Cormick v. Wall	Drought v. Phillips
Same v. same	Duignan v. Snogg
Cormick v. O'Donnell	Eccles v. Eccles
Cosby v. Cosby	Edgeworth v. Edgeworth
Courtney v. Shaw	Same v. same
Cripps v. Villiers	Elliott v. Maguire
Cullen v. Dn. & Ch. of Killaloe	Exshaw v. Popham
Cunningham v. Bernie	Eyre v. Eyre
	<i>Second Fifty.</i>

Fahy v. Daly
 Fahy v. Blake
 Fair v. Bowen
 Fairlough v. Ackland
 Faries v. Cullen
 Farrer v. Whaley
 Fawcett v. Biggs
 Fenton v. Fenton
 Same v. same
 Same v. same
 Ferguson v. St. George
 Same v. same
 Ferguson v. Thompson
 Ferrall v. Butler
 Ferall v. Lowe
 Fitzgerald v. St. Leger
 Fitzpatrick v. Power
 Forrest v. Bernard
 Friel v. Trant
 French v. Mannsell
 French v. French
 Frith v. Irvine
 Fulton v. Jennings
 Gt. S. & W.R. Co. v. Percival
 Gahain v. Pottinger

Third Fifty.

Harris v. Farren
 Harte v. Littledale
 Harvey v. Wallis
 Harvey v. King
 Hedges v. Oldworth
 Same v. same
 Hedges v. Hollier
 Henderson v. O'Grady
 Henry v. Madden
 Hickson v. Calla
 Hickson v. Day
 Hill v. Wise
 Hilton v. Charleville
 Hobhouse v. Hamilton
 Same v. same
 Same v. same
 Hoy v. Browne
 Hogg v. Mitchell
 Hollier v. Hedges
 Holmes v. Boyle
 Holmes v. Low
 Hone v. Langford
 Hoops v. Kingston
 Jages v. Power
 Jant v. Westropp

Fourth Fifty.

Inox v. Molloy
 Jabbett v. Boyd
 Jowler v. Briscoe
 Jow v. Bagnell
 Jabez v. Abbot
 Joss v. Kennmare
 Same v. same
 Jodie v. Tatlow
 Livingston v. Livingston
 Lewis v. Nesbitt
 Lewis v. Lewis
 Lindsay v. Buckman
 Litchfield v. Penrose
 Long v. Hamilton
 Morton v. Kingston
 Nych v. Bodkin
 Same v. same
 Nych v. Lynch
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CAP. CXVII.

An act for rendering certain newspapers published in the Channel Islands and the Isle of Man liable to postage.
[4th September, 1848.]

CAP. CXVIII.

An act to explain and amend the law as to the licence required for the letting of post horses to hire in Ireland, and the law respecting proceedings for duties and penalties under the post horse, stage, and hackney carriage acts in the united Kingdom.
[4th September, 1848.]

CAP. CXIX.

An act to simplify the forms of certificates under the act authorizing the advance of money for the improvement of land by drainage in Great Britain.
[4th September, 1848.]

CAP. CXX.

An act to facilitate the transfer of landed property in Ireland.
[4th September, 1848.]

- Sec. 1. Registrar of Deeds, &c., previous to giving out any Negative Search, to cause a Copy to be recorded in Registry Office.
2. Books containing Copies of Negative Searches to be numbered, and Number and Page of Book to be endorsed on original Search.
3. Indexes to be provided for the Books containing Copies of Negative Searches. Power to search Books on payment of fee.
4. Attested Copies of recorded Searches to be given by Registrar, &c., upon payment of fee.
5. Such Copy to be equivalent to a new Search to the same extent.
6. Fees to be accounted for as under Act for regulating Registry Office.
7. Power to Treasury to alter the forms of Indexes of Names and Lands directed by 2 & 3 W. 4. c. 87.
8. Power to Treasury to direct Expenses consequent upon this Act to be defrayed out of Balances in Registrar's hands.
- Power to demand Fees as specified in the Schedule to this act.
10. Registrar of Judgments, upon production of certificate of satisfaction of judgment, to enter memorandum thereof upon entry of Registry.
11. Court, &c., by whom Decree has been pronounced shall direct Officer to give certificate thereof, and record same. In case Decree has been registered under 3 & 4 Vic. c. 105., or under 7 & 8 Vic. c. 91., a Memorandum to be annexed to the entry of Registry.
12. No Judgment, &c., to be registered until certificate of the existence of such judgment, &c., has been lodged with Registrar.
13. Crown Bonds and Recognizances more than twenty years old not to affect Purchasers or Mortgagees, unless re-docketed in the office of Registrar of Judgments.
14. Power to Treasury to consolidate Offices.
15. Act may be amended, &c.

Whereas it is expedient to afford further facilities for the transfer of landed property in Ireland, by diminishing the expense of registry searches, and otherwise: be it enacted, that the registrar of deeds and the registrar of judgments in Ireland for the time being shall and they are hereby required, previous to giving out of said office any negative search, to cause a copy of such negative search to be entered on parchment in books to be provided for the purpose and to be kept in their offices respectively among the records thereof.

2. That every book wherein any such copy of a negative search and certificate shall be entered shall be numbered in some appropriate and convenient manner, and the pages of each such book shall be numbered, and the number or other distinctive mark of every such book and the number or numbers of the page or pages therein wherein any such negative search and certificate shall be copied, shall be specified at foot of the certificate, signed by the registrar or assistant registrar in manner following (that is to say,) "Copied in Book, No. Page Number"

3. That the said registrars shall respectively cause sufficient index or sufficient indexes to be prepared, in such form as the commissioners of Her Majesty's treasury shall direct, to the books containing the copies of searches made pursuant to this act; and in such indexes shall be entered, in some convenient manner for reference, the name or names of some one or more of the persons whose acts such negative search shall relate to; and that the said registrar of deeds shall also cause to be prepared another sufficient index or other sufficient indexes to the said books, containing the said copies of the said negative searches, in such form as the said commissioners of Her Majesty's treasury for the time being, or any three of them, shall from time to time direct, wherein shall be entered, in some convenient form for reference, the name or names of some one or more of the denominations of land mentioned in the requisition for such negative search; and all persons shall be at liberty to search the said books on payment of the fee mentioned in the schedule hereunto annexed.

4. That every person shall be entitled to an attested copy of any search so recorded, or any portion thereof, upon payment of the fees mentioned in the schedule hereunto annexed; and the registrar or assistant-registrar of deeds and registrar of judgments in Ireland for the time being, upon being furnished with a specific requisition, shall cause to be delivered to the person making such requisition an attested copy of every such recorded negative search, or the portion thereof in such requisition mentioned; and all the penalties and liabilities to which such registrars and assistant registrars are liable in respect of fraud, collusion, or neglect in making the original searches and certificates shall extend to the attested copies to be given under this act.

5. That every such attested copy of every such recorded negative search and certificate, so signed as aforesaid, shall have the same force and effect, and shall be accepted and received in the same manner and for the said purposes, as an original negative search or certificate to the same extent and in the same terms.

6. That the fees payable to the said registrar of deeds and registrar of judgments under this act shall be deemed and taken to be part of the fees payable to them under the acts for the regulation of their respective offices, and shall be applied and accounted for according to the provisions of said acts.

7. And whereas by the 2 & 3 W. 4. c. 87, it was provided that alphabetical indexes of the names of the persons and of the lands affected by the memorials registered in said office should be made and kept in the manner and according to the form particularly specified in said act: and whereas the making of searches in said office may be facilitated by alterations in the form of such indexes: be it enacted, that the commissioners of her Majesty's treasury may make any alterations in the forms of the indexes of names and lands directed by said recited act to be made, and to order that a sufficient index or indexes shall be prepared to the several books in the office of the said registrar of judgments; and from the time of making any such order, or from any time to be specified therein, the said indexes shall be made and kept in such manner and form as the said commissioners of her Majesty's treasury, or any three of them, shall in such order, specify and direct; and the said commissioners in like manner may vary or rescind any such order as aforesaid.

8. That the said commissioners may order and direct that

any expenses which may appear to them to be requisite for or to be necessarily and properly incurred in carrying the purposes of this act into effect shall be defrayed out of the balances on the accounts of the said registrars in respect of the said register of offices, or in such other manner as the said commissioners shall think fit to direct.

9. That for and in respect of the entries, endorsements, certificates, and other matters or acts hereby directed or required to be performed, the officers discharging said duties shall respectively be entitled to demand and receive the several fees specified in the schedule to this act annexed, which schedule, and all directions therein contained, shall be deemed and taken to be part of this act; and the said commissioners, by order under their hands, from time to time may alter and vary the fees specified in the said schedule, and to substitute other fees therefor.

10. 'And whereas by the 7 & 8 Vic. c. 90, provision was made for the registry in the office created by such act, and called "the Judgment office," of all judgments of the superior courts of common law, and of crown bonds and recognizances, and of all decrees, rules and orders which, under the 3 & 4 Vic. c. 105, had the force and effect of judgments of the superior courts of common law, in order to make same binding as against purchasers, mortgagees, and creditors, but no sufficient provision was made by said recited act for the registry in said office of the satisfaction of judgments, crown bonds or recognizances, decrees, rules, or orders registered therein: be it enacted that the registrar of judgments shall, upon the lodgment with him of a certificate of the entry of satisfaction upon the roll of any judgment of any of the superior courts of common law which may have been registered under said recited act, or which may appear upon the books of revivals and redocketings which, under the provisions of said recited act, were transferred to said registrar, signed by the proper officer of such superior court of common law, or upon the lodgment with him of the certificate of the cancelling or vacate of any bond or recognizance to the Crown, signed by the proper officer in that behalf, and which certificate such officers are hereby authorized and required respectively to give, cause a memorandum of such satisfaction, cancelling, or vacate to be subscribed to the entry of the registry of such judgment, or of the revival or re-docketing thereof, or of such crown bond or recognizance, specifying the date at which such satisfaction, cancelling or vacate appears by such certificate to have been entered on record, and shall sign such memorandum, and shall, if required, endorse upon a duplicate of such certificate a minute, stating that such memorandum has been entered as aforesaid; and upon every search made in the said judgment office subsequently to the entry of such memorandum as aforesaid, whereon such judgment, crown bond or recognizance shall appear, the entry of such memorandum shall be stated.

11. That from and after the passing of this act every court judge, commissioner, or other person by whom any decree, rule or order has been or shall be pronounced or made, which, under the 3 & 4 Vic. c. 105, has the force and effect of a judgment, upon its being made to appear to them or him that such decree, rule or order has been fully performed, complied with, or satisfied, shall direct the proper officer to give a certificate thereof, and record the same in his office; and in case said decree, rule or order shall have been or shall be registered under the provisions of the said act of the 3 & 4 Vic. c. 105, or under the 7 & 8 Vic. c. 90, the registrar of judgments shall, upon the lodgment with him of such certificate, cause a memorandum thereof to be annexed or subscribed to the entry of the registry of such decree, rule, or order, specifying therein the date of such certificate, and shall sign such memorandum, and shall, if required, cause a minute of the entry of such memorandum to be endorsed upon a duplicate of such certificate; and in every search made in said judgment office after the entry of such memorandum, whereon such decree, rule, or order shall appear, the entry of such memorandum of satisfaction shall also be stated.

12. That from and after the passing of this act no judgment, crown bond or recognizance, rule, decree, order, or lis pendens, shall be registered by the said registrar of judgments, pursuant to the 7 & 8 Vic. c. 90, unless and until there shall be subscribed to the memorandum or minute by said act required to be left with said registrar a certificate of the existence of the judgment, crown bond or recognizance, rule, decree, order, or lis pendens, described in said memorandum or minute, such certificate to be signed by the proper officer of the court in which such judgment, crown bond or recognizance, rule, decree, order, or lis pendens shall have been entered or obtained; and that the said registrar of judgments, upon the lodgment with him of any such memorandum or minute, shall, if required, endorse upon a duplicate thereof a certificate of the lodgment and entry thereof, for which certificate no fee shall be paid to him beyond the fee authorized by the said act for such entry.

13. 'And whereas by the 7 & 8 Vic. c. 90, no bonds or recognizances to the Crown to be thereafter entered into or passed shall affect lands, tenements, or hereditaments as to purchasers or mortgagees or creditors until duly registered according to the directions of the said act, but no similar provision is made with respect to obligations to the Crown previously existing: and whereas bonds and recognizances to the Crown passed or entered into at remote periods, and filed as of record in her Majesty's courts in Ireland, remain in full force, and operate as incumbrances on land, notwithstanding that the conditions upon which they were passed or entered into may have been long since satisfied and performed, and no claim may exist on foot thereof on the part of the Crown, and it is expedient to extend the principle of the aforesaid provision to such cases, and thereby further facilitate the transfer of landed property: be it enacted, that from and after the 1st of Jan. 1849, no bond or recognizance to the Crown so filed as of record in Ireland, which shall be more than twenty years old from the date thereof shall affect any lands, tenements, or hereditaments as to purchasers or mortgagees or creditors, unless and until a memorandum or minute, duly authenticated, containing the name and usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected, the sum for which such bonds or recognizance was passed or entered into, and the date of the same, shall be left with the registrar of judgments, who shall forthwith enter the same particulars in a book to be entitled "Re-docketed Crown Bonds and Recognizances," to be kept in alphabetical order by the name of the person whose estate is intended to be affected by such bonds or recognizances; and for every such entry the said registrar shall be entitled to the same fee as is authorized by the said act for each entry in the book intitled "The Index of Debtors and Accountants to the Crown," and all persons shall be at liberty to search the said book, as well as the books directed by the said act to be kept by the said registrar, on payment of the fee by the said act authorized.

14. 'And whereas by the operation of this act the duties of certain offices may be diminished, and it will therefore be expedient, having regard to economy, to discontinue them as separate offices, and to provide for the discharge of such duties as may remain to be performed; be it enacted that in such cases the commissioners of her Majesty's treasury, or any three of them for the time being, shall have power, if they shall think fit, by their warrant, after the passing of this act, to order that a consolidation of any office so affected shall take place with some existing office of the court to which it belongs; and any order made as aforesaid for the regulation of the business of such office shall be of as much force as if it had been specially enacted herein, and the officer to whom the duties as aforesaid shall be so transferred shall have as full power and jurisdiction for all official purposes as were enjoyed or belonged to the officer whose duties shall be so transferred.

15. That this act may be amended or repealed by any act to be passed in the present session of Parliament.

SCHEDULE of FEES to which the foregoing act refers.

For every attested Copy of a Search recorded pursuant to this Act in the Office of Registrar of Deeds on the Certificate or Attestation thereof, when such Copy shall not exceed Three Folios of 72 words,	s. d.
When such Copy shall exceed Three Folios, for every Folio,	1 0
For every attested Copy of a Search recorded pursuant to this Act in the Office of Registrar of Judgments on the Certificate or Attestation thereof, when such Copy shall not exceed Three Folios of 72 words,	0 4
When such Copy shall exceed Three Folios, for every Folio,	1 0
For every other Certificate directed or required by this Act, including a Duplicate thereof,	0 4
For every Memorandum of Satisfaction of a Judgment, Crown Bond, or Recognizance, Decree, Rule, or Order, to be subscribed or annexed to the original Entry of Registry in the Office of Registrar of Judgments, pursuant to this Act, including the Endorsement thereof directed by this Act,	1 0
For Liberty to search the Book or Books in the Office of Registrar of Deeds containing the recorded Copies of Negative Searches,	2 6
For Liberty to search the Book or Books in the Office of Registrar of Judgments containing the recorded Copies of Negative Searches,	1 0
	1 0

CAP. CXXI.

An act to alter the laws and regulations of excise respecting the survey of dealers in and retailers of spirits, and respecting the sale and removal of spirits by permit from the stock of such traders; and respecting the distribution of penalties and forfeitures recovered under the laws of excise. [4th September, 1848.]

CAP. CXXII.

An act to amend the laws respecting the warehousing of *British* spirits in *England*, *Scotland*, and *Ireland* respectively, and to permit spirits made from malt only, and spirits made from malt and other grain, and rectified spirits, to be exported on drawback from any part of the United Kingdom; and respecting certain spirit mixtures, and the removal of goods subject to excise regulations from customs warehouse. [4th September, 1848.]

CAP. CXXIII.

An act to renew and amend an act of the tenth year of Her present Majesty, for the more speedy removal of certain nuisances, and the prevention of contagious and epidemic diseases. [4th September, 1848.]

CAP. CXXIV.

An act to amend an act of the last session, for varying the priorities of the charges made on "the *London Bridge* approaches fund," and to facilitate the completion of certain improvements in the city of *Westminster*. [4th September, 1848.]

CAP. CXXV.

An act for raising the sum of two millions by Exchequer bills, or by the creation of annuities, for the service of the year 1848. [5th September, 1848.]

CAP. CXXVI.

An act to apply a sum out of the consolidated fund, and certain other sums, to the service of the year 1848; and to appropriate the supplies granted in this session of parliament. [5th September, 1848.]

CAP. CXXVII.

An act to reduce the duties on copper and lead. [5th September, 1848.]

CAP. CXXVIII.

An act for carrying into effect the agreement between His Majesty and the Imam of *Muscat* for the more effectual suppression of the slave trade. [5th September, 1848.]

CAP. CXXIX.

An act for amending an act passed in the ninth and tenth years of Her present Majesty for making preliminary inquiries in certain cases of applications for local acts. [5th September, 1848.]

CAP. CXXX.

An act for guaranteeing the interest on such loan, not exceeding five hundred thousand pounds, as may be raised by the *British* Colonies on the Continent of *North America*, in the *West Indies*, and the *Martin*, for certain purposes. [5th September, 1848.]

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TERMS OF SUBSCRIPTION.—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 4, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, June 23, 1848.

THE Irish Jurist

No. 35.—VOL. I.

JUNE 30, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, JUNE 30, 1849.

A BILL "to amend the law of judgments in Ireland," which will be found elsewhere in our present columns, has been brought into the House of Commons during the past week, the provisions of which, if enacted in their present shape, will rank among the most important statutes of the session, repealing the 9 Geo. 2, c. 5, and the 5 Geo. 2, c. 14—the acts giving power of assigning judgments, the 5 & 6 W. 4, c. 55, s. 31, and 3 & 4 Vic. c. 105, s. 21, which gave creditors the power of appointing receivers by petition over the lands of their debtor—the statute of Westminster, 13 Ed. 2, c. 18, and 3 & 4 Vic. s. 19—so far as they relate to the time at which the sheriff is to find the seizure or possession of lands by the defendant, (which, after the 31st of December, 1849, is to be the period when the writ of *Elegit* is delivered to the sheriff for execution, instead of, as heretofore, the entry of the judgment,) and repealing the 3 & 4 Vic. c. 105, s. 22, by which judgments were made a charge upon land.

Whether benefit will be derived from those portions of the contemplated Act which deprive a creditor of the power of assigning his judgment, and make it to be no longer a charge upon the lands of his debtor, we apprehend, will create much difference of opinion. The difficulties thrown in the way of the transfer of land, in consequence of the number of judgments affecting property in Ireland, operated most injuriously both upon debtor and creditor, the expense of clearing the title from these charges being great.

It had been also a matter of doubt, whether the release of a judgment over part of the lands of the debtor did not extinguish it as against the residue; but this has been set at rest by the 98th section of

the 11 & 12 Vic. c. 48, (the Incumbered Estates Bill of last session;) and a judgment may now be released as to part, and be preserved as to the rest of the land which it bound.

Much of the evil connected with this species of security arose from the want of a single and proper registry; this has been removed by Sir Edward Sugden's last act, 7 & 8 Vic. c. 90, an act for the protection of purchasers, which, for the purpose of binding purchasers, rendered it necessary that every judgment should appear on the same registry; and no purchaser is affected, even though he have otherwise notice of the existence and validity of the judgment. Another evil arose from the universality of the judgment binding every existing interest in lands, and every future interest. And a still greater practical evil, was the facility of placing a debtor's lands under the controul of a Court of Equity for a trifling debt of £5 or £10; and this was much enhanced by the defective and ruinous system of managing estates by absentee receivers; and by a court which was powerless for improvement, and unfitted to assume the duties of a landlord over an impoverished or rack-rented tenantry.

These evils were curable by limiting the amount of debt for which a judgment creditor could obtain a receiver, and by improving the system of managing estates under the control of the Court. But despite even them, judgments were a favourite security in Ireland; they were the common assurance of the country; any change in the laws affecting them required caution, practical knowledge, great care, and deliberation.

That part of the bill which deprives the creditor of the power of appointing a receiver for judgments to be obtained after the 31st of December, 1849, appears, we think, very objectionable.

We believe, the policy of the legislature in proposing this measure was, to render the mode of

proceeding upon judgments for the recovery of debts less facile, and the security less valuable, and thus drive capitalists to lend their money upon mortgage security. Even admitting the policy of the measure to be well founded, there appears to be considerable doubt as to its well-working. The remedy by *elegit* is still left open to the creditor. This is objectionable. That proceeding is more expensive to the debtor, and less satisfactory to the creditor. The sheriff having found by inquisition the metes and bounds, cannot deliver actual possession, but only such seizure as will enable the creditor to maintain his ejectment. The costs of these proceedings the debtor must bear, and perhaps those of litigated accounts, as to how much of the profits of the debtor's estate the creditor should or should not have received without default. He is at the uncontrolled mercy of his creditor. His estate lets for less than the value, as the creditor can give no certain tenure, and is precluded from abating rents, making allowances or improvements, as all would be charged against him in the account, as so much that might have been received by him towards the liquidation of his demand.

The policy of the measure being, as we have said, to prevent the borrowing of money upon judgment security, and supposing it fully effectuated by the proposed measure, there still must be a very large number of judgments in debt and damages, in actions in the superior courts; decrees, orders, and rules of the Courts of Equity, Law, and Bankruptcy, which have, and under this bill are proposed to be invested with, the effect of judgments entered after the 31st day of December, 1849—which cannot be said to come within the evils to be remedied, they not being strictly money advances. On all these, if execution against the body or goods be unavailing, the creditor must resort to his *elegit*. This could, we think, be better and less expensively done through the means of an improved system of receivers; for which purpose a committee of the House of Commons is, at this moment, collecting evidence as the foundation of a measure for the improvement of the receiver system. What we would propose is, that all persons obtaining a judgment in an action prosecuted in a superior court of law, and all persons having a money demand under such decrees, rules, or orders, as would have the force of judgments, and which judgment or demand, exclusive of the costs of obtaining such judgment or decree, &c., should not exceed £100, should still have the power of appointing a receiver; and it might be provided that all persons whose judgments, under a certain amount, should be founded on a warrant of attorney, should not have this power. This, with an improved system of receivership, and a reduction in the expenses of the petition, would work beneficially for creditor and country.

Whilst on the subject of receivers, though perhaps not within the scope of our present subject, we would suggest, that, whilst the amount of the judgment over which a receiver could be appointed should be limited in the one direction, to preserve the policy of the measure under consideration, and for the benefit of debtors a receiver should not be

appointed, when the amount of the judgment obtained by confession was less than £100, or the income of his property available for the purpose of payment less than £50. In such case a summary power of sale, on petition to the Master of the Rolls, or Lord Chancellor—who should be enabled to give a parliamentary title—would be most desirable. A measure of this nature, instead of interfering with, would work in the direction of the present bill, by facilitating the transfer of land.

If the intention of the legislature was to abolish the system of receivers in toto, we would not advocate their retention for this purpose alone; but independently of their existence in causes, receivers will be still appointed under the mortgage acts, and for at least twenty years under the 5 & 6 W. 4, and 3 & 4 Vic.

Independently of the policy of the bill before us, we have never seen one which, on a cursory glance, discloses a greater number of legal doubts. The first section repeals all those portions of the 5 & 6 W. 4, and the 3 & 4 Vic. 105, relating to receivers under the judgment acts, save so far as they relate to judgments or decrees, &c., entered into before the 31st of December, 1849. Suppose a judgment entered in March, 1849, revived within twenty years, could a receiver be appointed on the judgment of revivor? This, we apprehend, will raise a serious question, which, we believe, has not been satisfactorily settled, and will be found discussed in the cases of *Farrell v. Gleeson*, (11 Cl. & Fin. 702); and *Ottiswell v. Farran*, (10 Cl. & Fin. 319.)

In the next place, under the provision in this bill there is no method whatever in proceeding upon a recognizance, except by bill. The 31 sec. of the 5 and 6 W. 4, c. 55, enacts that no grant in *curtadium* shall be made after the passing of that act, except in trust for the crown; a receiver cannot be appointed upon any recognizance entered after the 31st of December, 1849. So that there will be no summary made of proceeding on a recognizance entered into after that date.

The 2nd section enacts that the sheriff shall deliver execution unto the party, in that behalf suing, of such lands, &c. as the debtor, at the time when such writ of *elegit* is delivered to the sheriff, had any disposing power. The 3 and 4 Vic. c. 105, extended the statute, West. 13, Ed. 1, c. 18, by conceding to the creditor the power of extending the whole of the debtor's lands, but did not repeal it, nor does this act. So that a question may arise whether the creditor may not still have his execution for the moiety, the enquiry being as to what lands the debtor was seized or possessed of, as to the moiety, at the time of the entry of the judgment instead of the delivery of the writ to the sheriff under this act.

The 3rd section leaves the equitable rights of judgment creditors as they existed before the passing of the 5 and 6 W. 4, c. 55.

The 4th section preserves the rights of judgment creditors after the 31st of December, 1849, with respect to the administration of assets, as they are at present.

The 5th section is a valuable enactment, giving

judgments a preference to such conveyance, as under the statute of Frauds, 10 Car., 1 Stat., 2 c., 3 Ir., would be deemed void against purchasers for money, or other good consideration.

The 6th section gives decrees and orders of the Court of Chancery, and of the Equity Exchequer; and rules of the courts of common law; and all orders of the Lord Chancellor, or Master of the Rolls; or of the Court of Commissioners of Bankruptcy; or of the Lord Chancellor in matters of Lunacy, to be made after the 31st of December, 1849, the same efficacy as judgments entered after that date will have by virtue of this act.

The 7th section gives the same force to judgments of the inferior courts removed to the superior, as the last section gives decrees and orders, &c.

The 8th section gives the power of framing new writs.

Looking at the general frame and policy of this bill, with the exceptions stated, we think this is one of a class of measures which have been introduced without due consideration. That portion of it which takes away the power of appointing a receiver and re-introducing the exploded system of *elegits*, and the taking possession of the debtor's lands subject to an account in a court of law, we consider mischievous in the extreme. It is a recurrence to a bad system, fraught with the most extensive national evils. We hope the Irish Members will make a stand against the Bill. They will deserve the greatest censure, if it does not meet with a reasoning, well-considered, but most determined opposition.

The measure before us is sweeping, and will be received with great alarm by every professional man and every judgment creditor in Ireland.

THE 21st general order of the Court of Chancery, 1843,* directs, "That when the plaintiff shall make a party to the suit, any person against whom no account, judgment, conveyance, or other direct relief is sought; or any person having a demand founded upon a recognizance or judgment, who shall not be in possession of the land or property, the subject of the suit, or some part thereof, and shall require such party to appear and answer the bill, the costs so incurred shall be paid by the plaintiff, &c."

If a suit be instituted in a court of Equity, and the land, the subject of the suit, be liable to more than one judgment debt, and the owner of one—prior to the filing of the bill—have appointed a receiver by petition under the 5 & 6 W. 4, c. 55, and the 3 & 4 Vic. c. 105, over the whole or a portion of the land, and though the receiver be in the actual receipt of the rents and profits, and the subsequent creditors have extended that receiver to their own judgments, a question may arise as to whether the subsequent creditors, not having re-

ceived any of the proceeds of the estate, in discharge of their demands, can be considered within the meaning of the rule in question, as "creditors by judgment or recognizance in possession of the land or property the subject of the suit."

In practice, we believe, it is usual to make such persons parties to the suit, and, perhaps, in the absence of judicial authority, it is the safer course—the inconvenience accruing from payment of their costs, if they should be held to be unnecessary parties, being less than that arising from their absence, if necessary. Following the analogy of the law and practice of *Elegits*, for which the receiver, under the statutes mentioned, is substituted, the better opinion would appear to be that until the creditor receives a payment on foot of his demand, he is not in possession within the meaning of the order, except he is either the creditor appointing the receiver and having a priority, who, in that case, must be taken to be in possession from the completion of the appointment of the receiver, or having originally extended the receiver, is the next in order to be paid, the demand of the prior creditor being satisfied, and the creditor accounted with by the receiver. In these cases the receiver being in perception of the rents for the benefit of the creditor it must be taken to be his possession though no money be actually paid him.

Before the passing of the 5 & 6 W. 4, c. 55, generally known as the Sheriff's act, if a judgment creditor issued an *elegit*, and went into possession, and another creditor of the same nature issued a second *elegit*, he could not get possession of the moiety already extended; if his judgment were of the same term as the first, the sheriff would give him the other moiety; if not, a moiety of that moiety (Cro. El. 481), that is, a fourth of the whole. And if the whole of the lands of the debtor, by two *elegits* of the same term, or by successive ones of different terms, were to come into the possession of creditors, no other creditor could go into possession, as the sheriff would return to any subsequent *elegit*, "no lands," (Imp. office of Sheriff, tit. Ex. *Elegit*.) And since the passing of the 3 & 4 Vic. c. 105, sec. 21, which enables the creditor to extend the entire of the debtor's bonds, no subsequent creditor could get possession till the first were paid off.

The 5 & 6 W. 4, c. 55, sec. 31, enacts, that any person entitled to sue out, or who has already sued out a writ of *elegit*, upon any judgment in any of the superior courts of law, &c., may apply by petition to the Court of Chancery, or to the Court of Equity Exchequer, for an order that a receiver may be appointed of the rents and profits of all lands, tenements, and hereditaments which he would be entitled to have extended or appraised under a writ of *elegit*. This enactment plainly substitutes the receiver for the *elegit*. The creditor must not only be in a position, with respect to his legal proceedings, to issue an *elegit*, but he can have his receiver over such property alone, as he could have extended under an *elegit*; and on examination of the multifarious cases on the appointment of receivers under this act, the courts will be found to have acted strictly in accordance with the decisions in *elegit* matters. The

* The analogous rule is the 9th of the Equity Exchequer orders, 1844.

subsequent act, 3 & 4 Vic. c. 105, s. 19, extended the jurisdiction of the court enabling them to appoint receivers over property which, neither under the former act, nor by *elegit* could the creditor reach. With this exception neither the 5 & 6 W. 5, nor the 3 & 4 Vic. alter in any way the nature of the receiver's position as the mere representative of an *elegit* creditor in possession, and when extended by a second creditor, who could not get possession in consequence of the possession of a prior creditor, he was in the same position as if the second creditor, having kept his *elegit* alive by continued returns, until the first being paid off, the sheriff was enabled to give him possession. So, under the provisions of these acts, a continuing statutory right to go into possession by each creditor who might extend him to his demand according to his priority, is vested in the receiver; and the inclination of the authorities appears to be in this direction. In *Morrogh v. Hoare*, (5 I. E. R. 195.)

it was decided that where there was a fund in court, or in the hands of a receiver appointed at the instance of a judgment creditor, it should be treated as if it had been realized by the judgment creditor himself when in possession under an *elegit*, and that it consequently should be paid to him, notwithstanding a claim by a prior specific incumbrancer. As in *Hanley v. Langford*, (5 L. Rec. 28. 203.) the court—where it appeared on the face of the bill that the judgment creditor had proceeded by petitioning a receiver, but was disappointed in recovering his demand, in consequence of objections raised, that the whole demand was still due—expressed an opinion that it need not be averred that he had issued an *elegit*; such proceeding being equivalent to the issuing execution at law—Mr. Baron Fry observing, that “the creditor was in the same situation as if he had issued execution, and there was a return of *nulla bona*. The court had, in fact, told him there were *nulla bona*.”

CIRCUITS OF THE JUDGES.

SUMMER ASSIZES. 1849.	HOMER.	NORTH WEST.	MUNSTER.	LEINSTER.	CONNAUGHT.	NORTH-EM.
	LCJ Blackburne L. C. J. Doherty	Justice Torrens. „ Crampton.	Justice Ball. „ Jackson.	B. Pennefather. Baron Richards.	Baron Lefroy. Justice Moore.	L. C. B. Fitz. Justice Parke.
Tuesday, July 3	Trim,	Longford,	... ..	... ..	... ..	... ..
Wednesday, 4	... ..	... ..	Ennis,	... ..	... ..	... ..
Thursday, 5	Mullingar,	... ..	... ..	... ..	... ..	... ..
Friday, 6	... ..	Cavan,	... ..	... ..	... ..	... ..
Monday, 9	Tullamore,	... ..	... ..	Wicklow,	... ..	... ..
Tuesday, 10	... ..	... ..	... ..	... ..	Roscommon,	Drogheda
Wednesday, 11	... ..	Enniskillen,	Limerick & City,	... ..	... ..	Dundalk.
Thursday, 12	Maryborough,	... ..	... ..	Wexford,	... ..	... ..
Friday, 13	... ..	... ..	... ..	... ..	Carrick-on-Shan-	... ..
Saturday, 14	... ..	Omagh,	... ..	Waterford,	... [noe]	Monaghan.
Monday, 16	Carlow,	... ..	... ..	... ..	Sligo,	... ..
Wednesday, 18	Athy,	... ..	... ..	... ..	... ..	Armagh.
Thursday, 19	... ..	Lifford,	... ..	... ..	Castlebar,	... ..
Friday, 20	... ..	... ..	... ..	Clonmel,	... ..	... ..
Saturday, 21	... ..	Londonderry and	... ..	... ..	... ..	... ..
Monday, 23	... ..	[City,	Tralee,	... ..	Galway & Town,	Downpatrick
Tuesday, 24	... ..	... ..	... ..	... ..	... ..	... ..
Thursday, 26	... ..	... ..	... ..	Kilkenny & City,	... ..	... ..
Friday, 27	... ..	... ..	... ..	... ..	... ..	Carrickfergus &
Saturday, 28	... ..	... ..	Cork and City,	... ..	... ..	[Town]
Monday, 30	... ..	... ..	... ..	Neenagh,	... ..	... ..

21st June, 1849.

A BILL TO AMEND THE LAW CONCERNING JUDGMENTS IN IRELAND.*

Notes.—The words printed in Italics are proposed to be inserted in the committee.

Whereas an act of the Parliament of Ireland was passed in the ninth year of King George the Second, intituled 'an act for the more effectual assigning of judgments, and for the more speedy recovery of rents by distress:' and an act of the Parliament of Ireland was passed in the twenty-fifth year of King George the Second, intituled 'an act to explain and amend an act passed in the ninth year of the reign of his present Majesty, intituled "an act for the more effectual assignment of judgments, and for the more speedy recovery of rents by distress," so far as the said act relates to the assignment of judgments and statutes, and to prevent great inconveniences that frequently happen to the suitors of the Court of Chancery by the death or removal of a six clerk or six clerks of the said court, and to enable grand juries to make presentments for the clerks of the crown and peace:' and whereas by an act passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled 'an act for facilitating the appointment of sheriffs in Ireland, and the more effectual audit and passing of their accounts; and for the more speedy return and recovery of fines, fees, forfeitures, recognizances, penalties, and deodands; to and abolish certain offices in the Court of Exchequer in Ireland; and to amend the laws relating to grants in *custodiam* and recovery of debts in Ireland; and to amend an act of the second and third years of His present Majesty, for transferring the powers and duties of the commissioners of public accounts in Ireland to the commissioners for auditing the public accounts of Great Britain,' it was enacted, that it should be lawful for any person entitled to sue out or who had already sued out a writ of *elegit* upon any judgment recovered in any of His Majesty's courts at Dublin, or to issue or who had issued execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery, or to the Court of Exchequer at the Equity side thereof, for an order that a receiver might be appointed of the rents and profits of the entire, and not of a moiety only, of all lands, tenements, or hereditaments which he would be entitled to have extended or appraised under a writ of *elegit*, or extended, seized, or taken under a writ of *levari facias*, or other proceeding on such recognizance, or to have a receiver thereof appointed by that court extended to that matter, and it should be lawful for the court to appoint or extend a receiver accordingly over the whole thereof, or over so much thereof as should appear to it sufficient for the purposes of paying the sum due on such judgment or recognizance: and whereas by an act passed in the fourth year of Her Majesty's Reign, intituled "An act for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the

"remedies of creditors against the property of debtors, and for the further amendment of the law, and the better advancement of justice in Ireland," it was enacted that it should be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, should be directed at the suit of any person upon any judgment which, at the time appointed for the commencement of that act should have been recovered, or should be thereafter recovered in any action in any of Her Majesty's superior courts at Dublin, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments including lands and hereditaments, which might be of copyhold tenure, as the person against whom execution was so sued, or any person in trust for him should have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person should, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer might then make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* was sued out, which lands, tenements, rectories, tithes, rents, and hereditaments by force and virtue of such execution should accordingly be held and enjoyed by the party to whom such execution should be so made and delivered, subject to such account in the court out of which such execution should have been sued out as a tenant by *elegit* was then subject to in a court of equity; and it was enacted, that it should be lawful for any person entitled to sue out or who had already sued out a writ of *elegit* upon any judgment recovered in any of Her Majesty's courts at Dublin, or to issue, or who had issued execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery, or to the Court of Exchequer at the equity side thereof, for an order that a receiver might be appointed over any lands, tenements, rectories, tithes, annuities, rents, or hereditaments by that act made liable to be seized, extended, appraised, or taken in execution on any such judgment, or to order that any receiver appointed before the passing of that act over the property of any judgment debtor might be extended to the matter of such new petition, and that in proceeding under the said act of the sixth year of King William the Fourth and the act now in recital the said court of Chancery and court of Exchequer at the equity side thereof should have power to appoint or extend a receiver in a summary way, on a petition at the instance of such person, over any property of such judgment debtor which such creditor would or could make available for the payment of his judgment debt by filing (after a writ of execution had been issued and returned at law upon such judgment) a bill in a court of equity, or by any writ of execution at law, or (subject to the proviso therein-after contained) by petition under the provisions of the act now in recital, and it should be lawful for the said courts respectively to appoint or extend a receiver

* Prepared and brought in by Mr. Solicitor General, Lord John Russell, and Sir William Somerville.

accordingly over the whole thereof, or over so much thereof as should appear to be sufficient for the purposes of paying the sum due on such judgment or recognizance: and it was enacted, that a judgment already entered up, or to be thereafter entered up, against any person in any of her Majesty's superior courts at Dublin, should operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, including lands and hereditaments of copyhold tenure, of or to which such person should at the time of entering up such judgment, or at any time afterwards, be seized possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person should at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and should be binding as against the person against whom judgment should be so entered up, and against all persons claiming under him after such judgment, and should also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and that every judgment creditor should have such and the same remedies in a court of equity against the hereditaments so charged by virtue of that act, or any part thereof, as he would be entitled to in case the person against whom such judgment should have been so entered up, had power to charge the same hereditaments and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon, subject to the provisions in such act contained; and by the lastly-recited act the effect of judgments in the superior courts of common law was given to certain decrees, orders, and rules for payment of monies, costs, charges, and expenses: and whereas, it is expedient to amend the law concerning judgments in Ireland: be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the 31st day of *December*, 1849, all the provisions of the said acts of the 9th and 25th years of King George the Second, relating to judgments, statutes staple, and statutes merchant, and the recited provisions of the said acts of the sixth year of King William the Fourth, and the 4th year of Her Majesty, shall be repealed, save so far as respects judgments entered up, recognizances entered into, and decrees, orders, and rules made on or before the said 31st day of *December*, 1849.

II. And be it enacted, that the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, is directed at the suit of any person upon any judgment entered up after the 31st day of *December*, 1849, in any action in any of Her Majesty's superior courts at Dublin, shall make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes,

rents and hereditaments, only (including lands and hereditaments which may be of copyhold tenure) as the person against whom execution is so sued, or any person in trust for him, is seized or possessed of, at the time when such writ of *elegit* is delivered to the sheriff or other officer to be executed, or over which the person against whom execution is so sued has, at the time when such writ of *elegit* is delivered as aforesaid, any disposing power which he might, without the assent of any other person, exercise for his own benefit, which lands, tenements, rectories, tithes, rents and hereditaments by force and virtue of such execution shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out, as a party to whom execution is made and delivered under the provision hereby repealed of the said act of the fourth year of Her Majesty, is made subject to under such provision.

III. And be it enacted, that any creditor under a judgment entered up as aforesaid after the said 31st day of *December*, 1849, on which a writ of *elegit* has been sued out, shall have the same rights and remedies in equity, upon and in respect of such lands, tenements, and hereditaments as might under this act be delivered in execution under such *elegit*, as such creditor might have had in respect of the lands, tenements, and hereditaments, or moiety of lands, tenements, and hereditaments, which might have been delivered in execution under a writ of *elegit* in case the provisions hereby repealed of the said acts of the sixth year of King William IV, and of the fourth year of her Majesty had not been enacted.

IV. And be it enacted, that in the administration in courts of Equity of the assets of any person against whom any judgment may be entered up as aforesaid, who shall die seized of or entitled to any estate or interest in lands, tenements, or hereditaments, the judgment creditor shall under such judgment have the same rights upon and in respect of such lands, tenements, and hereditaments as if this act had not been passed.

V. Provided always, and be it enacted, that every conveyance and other act whatsoever of and concerning lands, tenements, or hereditaments which under an act of the Parliament of Ireland passed in the tenth year of King Charles I, intituled "An act against covenous and fraudulent conveyances," would be deemed void against purchasers for money or other good consideration, shall be void as against any judgment creditor whose judgment shall have been entered up before such conveyance or other act, and the like execution and other remedies may be had under such judgment in respect of such lands, tenements, and hereditaments as if such conveyance or other act had not been made or done: provided also, that nothing herein contained shall in anywise affect the provisions of the same act concerning conveyances and other acts had or made to the intent to delay, hinder, or defraud creditors.

VI. And be it enacted, that all decrees and orders of the Court of Chancery, and of the Court of Exchequer at the Equity side thereof, and all rules of

any of the superior courts of Common Law, and all orders of the Lord Chancellor or Master of the Rolls or of the Court of Commissioners of Bankruptcy, and all orders of the Lord Chancellor in matters of Lunacy, to which the effect of judgments in the superior courts of common law was given by the said act of the fourth year of her Majesty, shall, where such decrees, orders and rules respectively shall be made after the said 31st day of December, 1849, have the effect of judgments in the superior courts of common law entered up after the said 31st day of December, 1849, and the persons to whom any monies, costs, charges, and expenses are by such decrees, orders and rules respectively directed to be paid, shall have the remedies to which judgment creditors under judgments so entered up will have and be entitled to.

VII. And be it enacted, that any judgment, rule, or order of any inferior court of record, which, after the 31st day of December 1849, shall, under the provisions of the said act of the fourth year of Her Majesty, be removed into any of Her Majesty's superior courts of record at Dublin, shall have no further force or effect than a judgment recovered in or a rule or order made by, such superior court after the said 31st day of December, 1849; but, save as aforesaid, any judgment, rule, or order so removed shall be subject to the provisions of such last-mentioned act in relation to judgments, rules, or orders removed into any of such superior courts.

VIII. And be it enacted, that such new or altered writs shall be sued out of the courts of law and equity, and court of commissioners of bankrupt, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions herein-before contained, and in such forms as the judges of such courts respectively, shall, from time to time think fit to order, and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the case will admit, and that any existing writ, the form of which shall be in any manner altered in pursuance of this act shall, nevertheless, be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

IX. And be it enacted, That this act may be amended or repealed in this present session of Parliament.

(Continued from p. 264.)

CAP. CXXXI.

An act to amend, and continue until the 1st of November, 1849, and to the end of the then next session of parliament, an act to make provision for the treatment of poor persons afflicted with fever in Ireland.

[5th September, 1848.]

CAP. CXXXII.

An act for the appointment of additional taxing masters for the High Court of Chancery in Ireland, and to regulate the appointment of the principal assistants to the masters in the superior courts of law in Ireland.

[5th September, 1848.]

CAP. CXXXIII.

An act to amend the laws relating to Savings Banks in Ireland.

[5th September, 1848.]

Sec. 1. So much of 7 & 8 Vic. c. 83, as relates to limiting Responsibility of Trustees of Savings Banks in Ireland repealed.

2. Power to Trustees and Managers to limit their Responsibility.

3. Appointment of Auditors.

4. Depositor's Book to contain Copy of Rules. Duplicate Copy of certified Rules, &c., to be exhibited in Office.

5. Rules to provide for Production and Inspection of Books.

6. No Fee to Barrister in certain Cases.

7. Commissioners may close Account with Savings Banks in certain Cases, and re-open them if they think fit.

8. Term of Act.

9. Act may be amended, &c.

'Whereas it is expedient to amend the laws relating to savings banks in Ireland, and to make other and additional provisions respecting such savings banks: be it enacted, that so much of an act passed in the 7 & 8 Vic. c. 83, as relates to limiting the responsibility of trustees and managers of savings banks in Ireland, except as to any liability incurred or to be incurred before the 20th of November, 1849.

2. That from and after the 20th of November, 1848, any trustee or manager of a savings bank in Ireland who has declared or shall declare, in writing under his hand deposited with the commissioners for the reduction of the national debt, that he is willing to be answerable for a specific amount only, such amount being in no case less than one hundred pounds, shall not be liable to make good any deficiency which may thereafter arise in the funds of such savings bank beyond the amount specified in such writing: provided that the trustee and manager of every savings bank in Ireland shall be personally liable for all monies actually received by him on account of or to and for the use of such institution, and not paid over and disposed of in the manner directed by the rules of the institution; and an extract of this provision shall be enrolled as one of the rules of every such savings bank, and printed and affixed in every office or place where deposits are received, with the names and places of residence of the trustees and managers for the time being, and the amount, if any, to which they have collectively or individually limited their responsibility.

3. That the trustees of each savings bank in Ireland shall, as soon as conveniently may be after the passing of this act, and from time to time in case of a vacancy, appoint an auditor or auditors to audit the accounts of the said institution, as well as to examine and inspect the books of the several depositors; and the said trustees shall, immediately after such appointment, transmit the signature, name, and address of the said auditor or auditors to the commissioners for the reduction of the national debt; and the trustees of every savings bank shall cause the annual and other statements required to be transmitted under the acts relating to savings banks to be certified and verified by the auditor or auditors appointed by the said trustees, in addition to the attestation by trustees and managers now required by the said acts; and shall also cause a certificate from the said auditor or auditors as to the result of his or their examination of such of the depositors books as may have been produced to him or them for examination to be transmitted with the said annual statement to the said commissioners: provided that the trustees of any such savings bank may agree with the trustees of any other savings bank or banks as to the appointment of a common auditor or auditors; and the auditor or auditors so

appointed for all the said banks shall be deemed and taken, as soon as the signature, name, and address shall have been transmitted by each such bank to the said commissioners, to be the auditor or auditors of each such bank.

4. That every depositor in every savings bank in *Ireland* on his first deposit shall be furnished with a deposit book, in which shall be printed at length a copy of the certified rules of the savings bank in which he shall make such deposit, and that a duplicate copy of the certified rules, and of every alteration and amendment thereof, and a duplicate copy of every annual statement or account required by and furnished to the said commissioners, signed by two trustees or managers of any such savings bank, shall be from time to time exhibited in the office of such savings bank, and shall be open to the inspection of every depositor or person intending to be such.

5. That the rules of every savings bank in *Ireland* shall specify a number of days, not less than two in every year ending on the 20th of *November*, on which the book of each depositor shall be produced at the office of the said savings bank for the purpose of being inspected, examined, and verified with the books of the institution by the auditor or auditors; and in case the said book shall not be produced on or before the last of the days mentioned in any one year ending as aforesaid, the said account shall be closed, and all interest shall cease to accrue on the sums deposited from the last day of the year in which the said book should have been so produced, in the case of every depositor who shall have received notice to produce his said book, and of every depositor in a savings bank the rules of which provide for the production of deposit book once in each year: provided nevertheless, that the trustees or managers shall have the power to re-open the said account, but only to allow interest thereon from the time when the same shall have been re-opened, unless the trustees shall be satisfied that such depositor has been prevented by some sufficient cause from producing the deposit book at the time so specified; and an extract of this provision shall be enrolled as one of the rules of every savings bank.

6. That no fee shall be payable to the barrister for certifying the rules of savings banks in any case where his certificate is required only in consequence of the insertion of this provision in the rules of any savings bank.

7. That if it shall appear to the satisfaction of the said commissioners that the clauses of the said recited act and this act, or the orders, directions, and regulations of the said commissioners, signified by the comptroller general to the trustees of any savings bank in *Ireland*, have not been complied with by the trustees or managers of any savings bank in *Ireland*, the said commissioners, may close the account of the said savings bank, and discontinue the keeping any further account with the trustees thereof, and to direct that no further sum shall be received at the bank of *Ireland* from the trustees of such savings bank to the account of the commissioners until such time as such commissioners shall think proper: provided that the said commissioners may re-open and allow the growing interest of such accounts during the time of such discontinuance, and authorize the receipt of money at the bank of *Ireland*, whenever the said commissioners shall think fit, upon such trustees complying with the directions of such commissioners; and the said commissioners shall forthwith publish a notification of such account being closed, or of the same being re-opened, in the *Dublin Gazette*, and also in some newspaper published in the county in which the said savings bank shall be established.

8. That this act shall continue and be in force until the 1st of *January*, 1850, and until the end of the then next session of parliament.

9. That this act may be amended or repealed by any act to be passed in this session of Parliament.

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All communications for the *IRISH JURIST* are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, June 30, 1849.

THE Irish Jurist

No. 36.—VOL. I.

JULY 7, 1849.

Price { Per Annum, £1 10s.
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DUBLIN, JULY 7, 1849.

THE very extensive alteration proposed in the law with regard to judgments, and the importance of the subject, induce us again to recur to it.

The opinions of some of the ablest members of the profession and of the judicial bench, are divided on the question of the Judgment Acts. On the one hand, it is contended, that the assurance by judgment has been found so mischievous where the entry of the judgment operates as a charge upon land, that the entire repeal of the statutes which make it such a charge, and which confer upon the creditor the power of appointing a receiver, would be most desirable.

The arguments on this side of the question are based on the mischiefs which have flowed, from the facilities given to incumber, from the universality of the effect of judgments—attaching not only on the debtor's then existing, but on all his after acquired property—from the impediments thrown in the way of the transfer of land, and from the fearfully accumulating mass of property placed under the control of Courts of Equity, whereby the relation of landlord and tenant is at once severed, and properties and people alike wasted and ruined.

Actuated by this reasoning, the Government have introduced a measure prospectively doing away with the power of assigning judgments, making them no longer a charge upon lands until execution has been sued out, and then only a charge upon that property of the debtor which at the time of the delivery of the writ to the sheriff, the debtor was seized of, or had a disposing power over; and taking away altogether the jurisdiction of Courts of Equity to appoint receivers. The statute of Westminster is so far altered, that the entirety and not a moiety of the debtor's lands is to be delivered

by the sheriff; but, with this exception, the law of *elegit* is proposed to be restored to the same position as before the passing of Sir Michael O'Loghlen's Act. The opponents of the proposed measure rest their opposition to it on various grounds; amongst others, that after great deliberation the law was advisedly changed in 1840, by making judgments a charge upon lands; that frequent mutation in legislation, more especially when the movement is a retrograde one, is unwise, its effect being to create a disturbance in the law and a shock to public credit, and to establish a different code for the same mode of assurance, the security being different as respects judgments prior to 1850, and those subsequent to that date; that the security by judgment has for more than a century been a favourite one in this country, and, under certain restrictions, a very convenient one; that judgments need not necessarily prove an impediment to the transfer of land; and that, conceding to the fullest extent the mischiefs created by the "fatal facility" in appointing receivers, it would be much better to improve the system of managing estates under our Courts of Equity, than, by taking away the jurisdiction alluded to, to allow a recurrence to an incomparably worse mode of management, by which the creditor takes possession of the estate, subject to an account in a Court of Law!

It was in fact the evils of *elegits* and *custodiams*, the inapplicability of Courts of law, from their constitution and want of machinery, to take accounts, protect the unfortunate tenant, and prevent the collusion of the inheritor, that induced the Legislature to pass the Sheriff's Act. It requires a strong argument to shew why the steps of the Legislature should be retraced, and none whatever has been shewn, the Solicitor-General having stated no reasons for the change, when he introduced the bill.

For our own part, we subscribe to the reasons of the opposition; the evils incident to the security by judgment can be very well combatted in detail; at least, the public mind is not prepared for so great a change as that contemplated. It is too late to recede from the principle of the 3rd & 4th Vic; of this opinion, at least, is Sir Edward Sugden, who proposes a modification and not a repeal.

He would have no receiver appointed for a debt under a certain limit—say, £100, nor until the judgment was a year old. That portion of the statute which gives the judgment creditor who appoints the receiver priority for his costs, should be repealed, and the costs should follow, as in causes, the priority of the demand, and the amount realized should be distributed likewise according to priority. These changes, apparently unimportant, would have a most beneficial effect in limiting the number of applications for receivers with which our Courts now swarm. We look for the mitigation, if not the removal, of the national evil inflicted by such appointments, to an improved administration of property by our Courts of Equity.

There is a vast amount now under its control; there always will be a certain number of cases in which a sale would not be desirable.

By vesting in a concentrated body power to manage, to improve, the debtor's estate, the benefit, so far as public good is concerned, is incalculably greater than that to be derived from doing away with the office of receiver, and permitting the creditor to take possession, without any other object than that of wresting his money from the lands.

Look to the abuses of the old system,—its expense—its tendency to produce litigation—to foster fraud—and its various imperfections, and no man practically acquainted with them but will deplore its revival.

Can it be intended that the creditor must issue his writ of *elegit*—that the sheriff is to impanel no jury, though supposed to hold an inquisition as to the value of the lands—that a fictitious finding of is to be binding as to that value—that after that expense and circuity are performed, there remains behind an action of ejectment, its delays, its expense—and that all this antiquated, obsolete process is to be adopted for the recovery of a debt of record? Can it be intended to open a fresh door to fraud, in accounting before a tribunal unfit to take the account?

Whether we contemplate the general scope of the proposed measure or its particular provisions, we view it as fraught with danger, and we sincerely trust that it will not be pressed forward or made the law of the land.

That portion of the statute which repeals the 9 Geo. 2, c. 5, and the 25 Geo. 2, c. 14, and makes judgments no longer assignable at law, we think objectionable.

In England, judgments are assignable only in Equity, the assignment being effected indirectly and expensively which here is made directly and comparatively inexpensively. If the power of assignment be permissible in any form, we hold that to be the best which gives the assignee all the powers of the assignor. How does it affect the estate or the debtor more injuriously, that proceed-

ings are taken in the name of A. B., the assignee, rather than that of C. D., the assignor? If the assignment be recognized at Law, the ~~former~~ will be the case; if only in Equity, the latter; but the proceedings are taken no less, we admit, with greater embarrassment to the creditor—an object not desirable.

The grounds of opposition to the security by judgment are, however, more tenable, when it is compared with the security by mortgage—the great defect of the former being its want of specification; it is a sort of voracious monster, that seizes on every present and future interest.

We should be rejoiced to have the charging effect of a judgment assimilated to that of a mortgage—the lands that are intended to be bound being specified in the judgment; in fine, to have a sort of statutable mortgage. If this object were attainable—the management of property under our courts of Equity improved—a limit placed as to the amount for which a judgment by confession could be obtained—and a time fixed after its entry, prior to which a receiver could not be procured—the costs of that receiver's appointment made to rank with the demand, and be entitled to no priority—we believe such a change in the law would be acceptable to the great body of the profession and to the country generally. It would at least be a more easy preparation for a change than the present violent and sudden measure.

It would not be discordant with the present law, and it certainly is advantageous, to preserve uniformity of principle and practice, with reference to the same security.

By the 2nd section of the new bill, the judgment will not operate against lands, until the writ be delivered to the sheriff, so that all conveyances and mortgages for good consideration made immediately between even the execution and the delivery of the writ will defeat and delay the judgment creditor.

Will this provision, or will it not, open a door to fraud? Will the action of ejectment, founded on the sheriff's return, be a mere form, or very often a seriously contested one? Will litigation be thereby checked or promoted?

Is the English Solicitor-General, to whom all legislative activity for this country is confided, aware of what the old practice was, with reference to the inquisition by the sheriff, and the supposed jury—that it was all a fiction—that the sheriff for his fee gave what appraised value, and what return the creditor pleased?

Has he ever been informed of the difficulties of procuring a proper account in a court of law? of the bills to account that have sprung from that difficulty?

Has he taken into consideration, with regard to purchasers, the inexpediency of having the sheriff's court the court of record for judgments which bind land, when *elegit* after *elegit* will be poured in, and no power to put the creditor in privy with the fund?

It would be well that at least some few of the salient defects of the system should be pointed out before he involves the country in mischiefs which it will not be very easy to remove.

THE tenure of lands under leases for lives containing covenants for perpetual renewal has been a source of much litigation and great practical inconvenience. For the second time an act of Parliament has been introduced abolishing prospectively estates of this character, and providing for the conversion of those at present existing into estates of inheritance in fee simple, subject to perpetual yearly fee-farm rents.

This conversion is intended to be carried out by petition to the Court of Chancery or Equity Exchequer by the owner of any lease or underlease, that grants may be made to and accepted by all lessees in perpetuity at the same time that he applies to have his own leasehold interest converted into a tenure in fee, and thus, no matter how many derivative interests in perpetuity may exist between the owner in fee and the last lessee in perpetuity, this lessee may have at once all the superior interests converted into estates of inheritance in fee simple, subject to a fee-farm rent.

The amount of these fee-farm rents is the subject of a simple calculation: in cases where the fines payable on the fall of a life are only nominal, the fee-farm rent is to remain the same as the rent reserved in the lease about to be converted. In cases where the fines are not nominal the fee-farm rent is to be the aggregate amount of the reserved rent and the value of the renewal fine and fees (if any), such value to be estimated with regard to the probable duration of the subsisting term, the average duration of life, and the respective periods of renewal, but without regard to, and exclusively of any penal rent or sums made payable on neglect, delay or refusal to apply or take renewal, and in the event of the parties differing as to the value of the annual value of the renewal fines and fees, a power is given to apply to the Court of Chancery or the Court of Exchequer in a summary way by petition to have the amount determined.

In addition to the fee-farm rent the party whom this act requires to make the grant in fee simple is entitled to the benefit of all covenants and conditions for payment of rent and otherwise, and all reservations contained in the lease about to be converted, (except the covenant to grant, or to accept, or to take a renewal,) as well as all covenants that by law run with the land; and power is given, on the agreement of the parties, to commute any of these covenants, conditions or reservations for an increase in the fee-farm rent, excepting covenants, which interfere with the proper cultivation of the soil, which covenants the lessees are empowered to require should be done away with, the fee-farm rent to be increased so as to compensate for the value of such covenants, such value (in case of difference between the parties) to be determined by the Court of Chancery or Equity Exchequer on application made for that purpose; and a further power is given, on consent of both parties, by which the lessee may allocate a portion of the land comprised in his lease, in fee simple in lieu of the fee-farm rent which would be otherwise payable under the grant, or such fee-farm rent or any part thereof may be made payable out of any sufficient part of the lands—the residue of the lands being discharged therefrom.

Here we have a machinery by which all the lands held under leases of lives with a covenant of perpetual renewal may, at the option of the lessees, be converted into estates of inheritance in fee simple, subject to a fee-farm rent and certain conditions and reservations contained in the leases—these conditions and reservations may, by the agreement of the parties, be commuted into an increase of rent, and the rent itself may also, by the arrangement of the parties, be exchanged for a portion of the very land thus leased in perpetuity; so that it is possible for the lessee to get rid both of the conditions, reservations, and rent itself, by the allocation of a part of his land, and hold the remainder in fee simple discharged from any duty whatsoever.

But while power is thus given to be discharged, of the rent, by agreement between the parties, great facilities are conferred for its recovery; in case it be made payable in the grant, it is made recoverable by distress, *ejectment* for non-payment of rent, action of debt, covenant, and all other ways, means, remedies, actions, suits, or otherwise, by which rent service reserved on any common lease or demise, for a life or lives, is, or may be, by law recoverable. In actions of replevin, debt, or covenant, or other proceeding founded on the grant, proof that the plaintiff or other person, or any person or persons through whom he claims, has or have been in the possession or receipt of such fee-farm rent for three years, shall be sufficient evidence of the title of the plaintiff or other person thereto. However, to counterbalance these powers, the time for redemption in case of *ejectment* for non-payment of rent, is much extended. Any person having an interest in the lands out of which such fee-farm rent is payable, having it in his power, on the person who has made default in the payment, failing to redeem within six months after execution executed, to do such acts, and take such proceedings for the redemption of the lands from the said judgment and execution, within nine months after execution executed, as mortgagees of a lease might do or take, for the redemption of the lease, and making any money advanced for such redemption a lien and charge, not only upon the estate and interests of the person who has made default in payment of the rent, but upon all the inheritance upon which such estate or interest is subsisting, in priority to all other interests and charges whatsoever upon such inheritance, save charges created under the acts relating to the drainage of lands, and improvement of lands in Ireland.

There is nothing to regret in the abolition of a species of tenure, under which great parts of the land in this kingdom were held. By the proposed enactment, the rights of all parties concerned are protected; the lessors are secured in the payment of their reserved rents, the value of their renewal fines, their covenants, reservations, and conditions, or the value of them, if they agree to commute them for an increase of rent; the lessees are protected from litigation, are given a secure and quiet tenure, as long as they continue to perform the stipulated services, and the possibility of freeing themselves, in favourable circumstances, from all conditions, covenants, reservations, or rent. If security of tenure will have any influence in raising the condition, and increasing the industry and

wealth of the occupier of land in this country, this act will be found of great public utility.

By it, likewise, a distinct species of property, hitherto exempt, will be rendered liable to taxation for the support of the poor, as it is expressly enacted, that where any fee-farm rent made payable by any grant under this act is greater in amount than the rent reserved in the lease or under-lease in perpetuity to the owner of which such grant is made, the party paying such rent shall be entitled to deduct from the party receiving the same, the proper poundage in respect of the poor's rate, from the portion of such rent which by virtue of this act is added to the amount of rent previously payable. Now, the addition to be made to the amount of rent previously payable will be the value of the renewal fines, fees, and commuted conditions, covenants, and reservations: so that thus renewal fines, fees, and the value of conditions, covenants, &c., will be thus rendered liable to poor rate. Holding, as we do, that no individual should be permitted to plead exemption from contributing to the support of the poor, by reason of his enjoying some peculiar species of property, we are glad to see the Legislature thus seizing on opportunities, as they offer, for extending the area over which this tax shall be spread.

The rapidity with which this enactment will succeed in converting leases with covenants for perpetual renewal into estates of inheritance in fee simple, subject to fee-farm rents, will depend entirely on the estimate which the owners of such leases will form of the advantages to be derived from these conversions; but however rapid or tardy this conversion may be, the Legislature have provided that no leases with covenants for perpetual renewal shall henceforward be created; "every lease with a covenant for perpetual renewal made after the passing of this act, shall, notwithstanding anything herein contained to the contrary, operate as a conveyance of the lands specified therein to the intended lessee, his heirs and assigns, for ever, at a fee-farm rent equal to the rent expressed to be reserved in such lease; and all reservations of fines or fees, and covenants for their payment, shall be altogether void."

The power of ejectment where there is no reversion, is wisely bestowed; we anticipate its extension to all cases of rents reserved by leases, irrespective of the consideration, whether the term be co-extensive with that of the lessor or not. It is a mistake to suppose that the laws regulating the relation of landlord and tenant form a landlord code, the fact being, that in many instances the rights of the landlord are utterly disregarded. Among the most mischievous of recent measures was that which took away the right of distress upon growing crops.

As there is little doubt that the Act for the Sale of Incumbered Estates will be made law this session, and as extensive alterations have been made in the bill by the Select Committee of the House of Lords, we purpose to abstract the new clauses, and point out the alterations made since the bill was first introduced and given in our pages, ante 227.

With the exception that the blank for the salaries of the Commissioners has been filled up—the first Commissioner to have £3000 per annum, and the other two £2000 a-year each—the first fifteen sections have undergone no material alteration.

The 16th, 17th, and 18th sections of the amended bill are as follows:—

16. And be it enacted, that where land in Ireland, or a lease in perpetuity, or any lease for a term whereof not less than sixty years shall be unexpired at the time of such application as herein after mentioned, or any church or college lease, of land in Ireland, shall be subject to any incumbrance, it shall be lawful for the owner of such land or lease, within three years from the passing of this act, to apply to the commissioners for a sale of such land or lease under the provisions of this act.

17. And be it enacted, that where any land in Ireland, or any such lease as aforesaid of land in Ireland, shall be subject to any incumbrance, it shall be lawful for any incumbrancer on such land or lease, within three years from the passing of this act, to apply to the Commissioners for a sale under the provisions of this act of the whole or part (as in the judgment of the Commissioners may appear necessary) of such land or lease, for the purpose of discharging the incumbrances thereon.

18. And be it enacted, that where an application for a sale of any land or lease had been dismissed with costs by a competent tribunal, no application by the same party for a sale of such land or lease, or any part thereof, shall be entertained by the Commissioners, unless it is shown that such costs have been paid.

The 19th, 20th, and 21st sections correspond with the 17th, 18th, and 19th of the old bill.

The 22nd is new—

22. Provided always, and be it enacted, that the Commissioners shall not make an order for sale of any land or lease, or any part thereof, upon application by an incumbrancer on such land or lease, in case it be shown to the satisfaction of the Commissioners, by the owner of such land or lease, that the amount of the yearly interest on the incumbrances and other yearly payments (if any) in respect of charges payable out of the income of such land or lease, and the other lands or leases (if any) subject to the incumbrance of such incumbrances, do not exceed one half of the gross yearly income of such land or lease, or of all the lands or leases so subject.

The 23rd corresponds in number with the 20th, but is more full.

23. And be it enacted, that where a sale shall be made under this act the Commissioners shall, where and so far as they may deem necessary for the purposes of such sale, ascertain the tenancies of the occupying tenants, and of any lessees or under-lessees whose tenancies, leases or under-leases affect the land or lease, or part thereof, to be sold, and may give such notices and make or cause to be made such inquiries as they shall think necessary for ascertaining and securing the rights of such tenants, lessees, or under-lessees as aforesaid; and all occupying tenants, and all persons being or claiming to be lessees or under-lessees as aforesaid, shall, at such times and places as the commissioners may by

all notices require, produce all leases, under-leases and agreements in writing under which such tenants or persons occupy or claim to hold, if such leases, under-leases, or agreements, or counterparts thereof are in their possession or power, and where they occupy or claim to hold under leases, under-leases, or agreements in writing not in their possession or power, or under parol agreements or lettings, they shall deliver, at such times and places as aforesaid, particulars of the terms and conditions upon and subject to which they occupy or claim to hold; and the sale shall be made subject to the tenancies, leases, or under-leases ascertained as aforesaid, and subject to which the owner or incumbrancer applies; for a sale under this act shall be owner or incumbrancer, and such other of the tenancies, leases, and under-leases, ascertained as aforesaid, as shall appear to the Commissioners to have been granted in full by the owner or person in possession or receipt of the rents and profits, and subject to which it shall appear to the Commissioners the sale shall be made, save such (if any) of such respective tenancies, leases, and under-leases as with consent as hereinafter mentioned, shall be included in the sale; or the sale may, where the Commissioners think fit, be made subject to any leases, under-leases, or tenancies, according to any general description or subject to any condition concerning any leases, under-leases, or tenancies the nature of which shall not have been ascertained or shall be disputed; and, when the Commissioners shall think fit, such sale may be made subject to any annual charge affecting the land or lease, or part thereof, sold, or to any such apportioned part of the annual charge as the Commissioners may think fit should remain charged thereon; and where such land or lease, or part thereof, is subject to any incumbrance under the terms of which the incumbrancer cannot be required to pay payment of the principal money before the expiration of a term of years unexpired, such sale may, if the Commissioners think fit, be made subject to such incumbrance.

The 24th and 25th correspond with the 21st and 22nd. They relate to the sale under the direction of the Commissioners, and the payment of the purchase money.

The 26th is new:—

26. Provided always, and be it enacted, that it shall be lawful for any incumbrancer on or person otherwise interested in any land or lease, or part thereof, (other than the incumbrancer or owner on whose application the sale has been ordered,) to bid at any public sale, and to become the purchaser at any public sale or by private contract, in the same manner as any person not interested therein might bid and become the purchaser; and, by leave of the commissioners, it shall be lawful for the incumbrancer or owner on whose application the sale has been ordered to bid and become the purchaser; and where an incumbrancer on any land or lease, or part thereof, shall be the purchaser of such land or lease, or part thereof, the commissioners may, where they think fit, authorise such purchaser to retain out of the purchase money the amount which might have been ordered to be paid thereout in respect of such incumbrance

in case the whole purchase money had been paid into the bank of Ireland under this Act, or such sum on account of such amount as the Commissioners may think fit, and to pay the residue only of the purchase money into the said bank; and where at the time of authorizing such retainer as aforesaid the Commissioners shall not finally have ascertained and determined the priority and rights of such purchaser in respect of his incumbrance, and the amount which he would be entitled to be paid in respect thereof out of the purchase money, such retainer shall be without prejudice to the power of the Commissioners to require such purchaser to pay into the said bank the whole or any part of the amount so retained, which ought to be so paid by him; and the Commissioners shall withhold their certificate of payment herein-before mentioned until they shall be satisfied that the full purchase money, less the amount which such purchaser would be entitled to be paid in respect of his incumbrance has been paid into the said bank.

The 27th corresponds with the 23rd, and relates to the effect of the assurance.

The 28th, 29th, 30th, 31st, 32nd, and 33rd nearly coincide with the 24th, 25th, 26th, 27th, 28th, and 29th.

The 34th is more extensive than the 30th.

34. And be it enacted, that it shall be lawful for the Commissioners to sell any land or lease, or part thereof, discharged from any crown rent or quit rent which they may be enabled and may, with the consent of the owner think fit to purchase, or from any charge made by virtue of the said acts of the sixth year and 10th year of her Majesty, or either of them, which they may, with such consent, think fit to pay off or redeem; and in any such case the Commissioners shall, out of the money arising from the sale, and in preference to all other payments thereout, pay the consideration for the purchase of such crown rent or quit rent, or such sum as may be necessary for paying off or redeeming such charge; and it shall be lawful for the Commissioners, where they think fit, to pay to any person entitled to any annual or other charge, not being an incumbrance according to the definition of this act, who may consent to accept the same, a gross sum in discharge, or by way of redemption thereof, or a part thereof; and where a part only of any land or lease, subject to any incumbrance or charge, is sold, to charge the part not sold with such incumbrance or charge, or an apportioned part thereof, in exoneration of the money arising from the sale, and to enable or authorise persons to release the money arising from the part so sold from any incumbrance or charge, or to relinquish their claim on such money in respect thereof, without impairing or affecting such incumbrance or charge as to the remaining part of the land or lease originally charged; and the Commissioners, where they think fit, may invest or provide for the investment of money, to meet any annual or periodical charge, or any other charge, incumbrance, or interest, where, by reason of such charge, incumbrance, or interest being contingent or otherwise, it shall appear to the Commissioners proper or expedient so to do, and otherwise may make such orders and directions for applying the money arising from any sale in such manner as will

secure the convenient application thereof for the benefit and according to the rights of the parties interested in the land or lease, or part thereof, from the sale of which the same shall have arisen.

The 35th corresponds with the 31st. The 36th is new.

36. And be it enacted, that where there shall be separate applications to the Commissioners for sales under this act, of any land, and of any lease in the same land, or of two or more leases in the same land, or there shall be such applications for sales of different undivided shares of any land or lease, it shall be lawful for the Commissioners, where they shall see fit so to do, to include, with the consent of the persons by whom such respective applications may be made or prosecuted, and of any other persons whose consent the Commissioners may, under the circumstances, think fit to require, in the same sale, upon such terms as they think fit, such land and lease, or such leases, or such several undivided shares as aforesaid; and where there shall be separate applications for sales under this act, of any land, and of any lease in other land, or of different lands or leases in different lands, it shall be lawful for the Commissioners, where, from the lands being intermixed, or from other circumstances, it shall appear to them convenient so to do, to include, with such consent as aforesaid, such land and lease, or lands or leases, in the same sale, upon such terms as they may think fit; and where any land or lease, or part thereof, subject to any incumbrance is proposed or ordered to be sold under this act, it shall be lawful for the Commissioners, upon the application of the owner of any lease or under-lease, or estate in reversion, or other estate or interest whatsoever in the same land, (and although such lease, under-lease, estate in reversion, or other estate or interest be not subject to any incumbrance, or would not, if subject to any incumbrance, be subject to be sold under an order of the Commissioners under the provisions herein-before contained,) or upon the application of any incumbrancer on any such lease, under-lease, estate, or interest, to include the same, upon such terms as they may see fit, in the sale of the land or lease, or part thereof, so proposed or ordered to be sold as aforesaid; and all the provisions of this act applicable to any land or lease subject to any incumbrance, and ordered to be sold under this act, and to any incumbrance or charge upon such land or lease, and to the purchase money arising from the sale thereof, and to the conveyance or assignment thereof shall, so far as circumstances admit, extend and be applicable to every such lease, under-lease, estate in reversion, or other estate or interest to be so included in the sale; and in every such case as aforesaid, the Commissioners shall apportion the purchase money and expenses as they see fit.

The 37th, 38th, 39th, 40th, 41st, and 42nd sections correspond with the 33rd, 34th, 35th, 36th, 37th, and 38th.

The 43rd, 44th, 45th, 46th, 47th, 48th, 49th are new.

43. And be it enacted, that where an application shall be made for a sale under this act of an undivided share of any land or lease, or where any such undivided share shall have been sold under this

act, and either before or after the conveyance or assignment thereof under this act, the Commissioners, on the application of any party interested in such undivided share, or of the purchaser (as the case may be), and after causing to be given such notices to the owner or owners of the other undivided share or shares of the same land or lease as they may think fit, and hearing such parties interested in the respective shares as may apply to them and making or causing to be made such inquiries as may enable them to make a just partition, if they think fit, make an order under their seal for the partition of such land or lease; and in such order, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each of the undivided shares in such land or lease; and the commissioners shall have the like authorities, jurisdiction, and powers in relation to such partition as a court of equity would have in the case of a partition under the direction of such court; and the part so allotted in severalty in respect of each such undivided share by such order of partition as aforesaid shall, without any conveyance or other assurance in relation thereto, go and come to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made; and the like order for a sale of the part allotted in respect of the undivided share to which the application for the sale shall relate may be made (where the order for partition is made before sale) and the like proceedings had in relation to such sale, and the like conveyance or assignment may be made of the part allotted in respect of the share sold (where the order for partition is made after sale, and before conveyance or assignment,) and with the like consequences in the several cases aforesaid, as if the application for a sale, or the sale, (as the case may be), had been in respect of the part so allotted as aforesaid; and where any land or lease, or part thereof, to be sold under this act, is subject to any lease, under-lease, or tenancy under which the lessees, under-lessees, or tenants hold jointly or as tenants in common, it shall be lawful for the commissioners, on the application of any such lease, under-lessee, or tenant, and after causing to be given such notices as they may think fit, and hearing such parties as may apply to them, and making such inquiries as they may think necessary, to make an order under their seal for the partition, as between such lessees, under-lessees, or tenants, of the land included in their lease, under-lease, or tenancy, and for the apportionment of the rent reserved or payable under such lease, under-lease, or tenancy; and after such order of partition the owner of the reversion in the respective parts of the land shall have the like remedies for the apportioned rents against the respective parts out of which the same shall be payable, and the lessees, under-lessees, or tenants holding such respective parts under such lease, under-lease, or tenancy, and such order of partition, as were subsisting for the entire rent before such partition and apportionment; and all the covenants, conditions, and agreements of every such lease, under-lease, or tenancy, except as to the

amount of rent to be paid, shall, as regards the respective parts allotted on such partition, and the apportioned parts of the rent, remain in force as against the respective leasees, under-leasees, or tenants to whom under such partition such respective parts shall be allotted.

44. And be it enacted, that where an application shall be made for a sale under this act of any land or lease, or part thereof, or where the same shall have been sold under this act, and either before or after the conveyance or assignment thereof under this act, if application be made to the commissioners by any party interested in such land or lease, or by the purchaser, (as the case may be,) for the exchange of all or any part of such land, or of all or any part of the land comprised in such lease, for other land which the owner thereof may be willing to give in exchange, the commissioners may make or cause to be made such inquiries as they may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands, and cause such notices to be given to parties interested in the respective lands as they may think fit; and if, after making such inquiries, and hearing such parties interested in the respective lands as may apply to them, the commissioners shall be of opinion that such exchange would be beneficial, and that the terms thereof as proposed, or as modified by them, with the consent of such owner as aforesaid, are just and reasonable, they may make an order under their seal for such exchange accordingly, and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such order; and the land taken upon such exchange under such order shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given on such exchange would have stood limited or been subject to in case such order had not been made; and the like order for a sale may be made in respect of the land taken in exchange for any land, or any land comprised in any lease to which the application for a sale shall relate, (where the order for exchange is made before sale,) and the like proceedings had in relation to such sale, and the like conveyance or assignment may be made in respect of the land taken in exchange for the land or lease, or part thereof sold, (where the order for exchange is made after sale, and before conveyance or assignment,) and with the like consequences, in the several cases aforesaid, as if the application for a sale, or the sale, (as the case may be,) had been in respect of the land so taken in exchange.

45. And be it enacted, that it shall be lawful for the commissioners, upon the application of the owners of the several undivided shares (not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending,) of any land in Ireland who shall desire to effect a partition of such land, to make or cause to be made such inquiries as the commissioners may think fit for ascertaining whether such partition would be beneficial to the persons interested in such respective shares; and in case the commissioners shall be of opinion that the proposed partition would be

beneficial, and that the terms thereof are just and reasonable, they shall make an order under their seal for such partition accordingly; and in such order, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each such undivided share; and the part so allotted in severalty in respect of each such undivided share by such order of partition shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses, and be subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made.

46. And be it enacted, that it shall be lawful for the commissioners, upon the application of the owners of lands in Ireland not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending, who shall desire to effect an exchange of such lands, to make or cause to be made such inquiries as the commissioners may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands; and in case the commissioners shall be of opinion that the proposed exchange would be beneficial, and that the terms thereof are just and reasonable, they shall make an order under their seal for such exchange accordingly; and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such order; and the land taken upon such exchange under such order shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given upon such exchange would have stood limited or been subject to in case such order had not been made.

47. And be it enacted, That it shall be lawful for the commissioners, upon the application of any number of persons who shall be separately owners of parcels of land not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending, so intermixed, or divided into parcels of inconvenient form or quantity, that the same cannot be cultivated or occupied to the best advantage, but forming together a tract which may be divided into convenient parcels, and who shall desire to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels, to make or cause to be made such inquiries as the commissioners may think fit for ascertaining whether such proposed division and allotment would be beneficial to the persons interested in such lands; and in case the commissioners shall be of opinion that the proposed division and allotment would be beneficial, they shall make an order for the division and allotment thereof accordingly, with a map or plan thereunto annexed, in which shall be specified as well the parcels in which the several persons on whose application such order shall have been made were respectively interested before such division and allotment as the several parcels allotted to them respectively by such order; and the parcels of land taken under such division and allotment shall go and enure to and upon the same uses and trusts, and be

subject to the same conditions, charges, and incumbrances, as the several lands which the persons taking the same shall have relinquished or lost on such division would have stood limited or been subject to in case such order had not been made.

48. Provided always, and be it enacted, That in the case of land in respect of which no proceedings for a sale under this act shall be pending, no such order of partition or of exchange, or of division and allotment, as aforesaid, shall be made by the commissioners until such notices by advertisement in such public newspaper or newspapers as the commissioners shall direct shall have been given of such proposed partition, exchange, or division and allotment, and three calendar months shall have elapsed from the publication of the last of such advertisements; and in case before the expiration of such three calendar months any person entitled to any estate in or to any charge upon any land included in such proposed partition, exchange, or division and allotment, shall give notice in writing to the Commissioners of his dissent from such proposed partition, exchange, or division, and allotment, (as the case may be,) the Commissioners shall not make an order for such partition, exchange, or division and allotment, unless such dissent shall be withdrawn, or it shall be shown to the Commissioners that the estate or charge of the party so dissenting shall have ceased, or that such estate or charge is not an estate or charge in respect of which he would be entitled in equity to prevent such partition, exchange, or division and allotment; but no such order as aforesaid shall be in anywise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made.

49. And be it enacted, that every conveyance and assignment respectively executed as required by this act, and every order for partition or for exchange, or for division and allotment, made by the commissioners under their seal, shall for all purposes be conclusive evidence that every application, proceeding, consent, and act whatsoever which ought to have been made, given and done previously to the execution of such conveyance or assignment, or the making of such order respectively, has been made, given, and done by the persons authorized to make, give and do the same; and no such conveyance, assignment, or order shall be impeached by reason of any informality therein.

The 50th and 51st, corresponds with the 39th and 40th.

The 52nd defines who are to form the judicial committee.

52. And be it enacted, that the judicial committee herein-before referred to, shall consist of the Lord High Chancellor of Ireland for the time being, and such of the members of the said Privy Council as shall from time to time hold any of the following offices in Ireland; that is to say, the office of Lord Keeper or first Lord Commissioner of the Great Seal of Ireland, Lord Chief Justice or Judge of the Court of Queen's Bench, Master of the Rolls, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, and Judge or Commissary of

her Majesty's Court of Prerogative for Causes Ecclesiastical and Court of Faculties in and throughout Ireland, and of all persons members of the said Privy Council who shall have held the office of Lord Chancellor of Ireland, or any of the other offices herein-before mentioned, and of such other persons not exceeding four in number, being Privy Counsellors in Ireland, as the Lord Lieutenant or other Chief Governor or Governors, for the time being, of Ireland, shall appoint to be members of such committee; and no such appeal as aforesaid, shall be heard or reported on by the said judicial committee, unless in the presence of at least four members of the said committee; and no report on such appeal shall be made, unless a majority of the members of such committee present at the hearing concur in such report.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 14, FLEET-STREET, in the Parish of St. Andrew, and published at COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, July 7, 1849.

THE Irish Jurist

No. 37.—VOL. I.

JULY 14, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, JULY 14, 1849.

It has long been an unquestioned principle of our Courts of Equity, that there can be no revivor of a suit for the recovery of costs alone. *Kemp v. Mackrell*, (2 Ves. 580, S.C. 3 Atk. 811.) This rule, however, applies only to the costs untaxed at the time of the abatement, *White v. Hayward*, (2 Ves. 461, S.C. 1 Dick, 173,) and not to abatements by death, *Sayer v. Sayer*, (Dick. 42,) the different judges presiding in the Courts of Equity being astute to discover some means of escape from a rule which Lord Hardwicke had pronounced to be a "hard one." See *Barry v. Stawell*, (Fl. & Kel. 1, S.C.; 3 I. E. R. 18.)

In the case of *Robertson v. Southgate*, (13 Jur. 33,) June 9th, 1849, a question of much practical importance has been raised, on the effect of the 3th, 18th, and 19th sections of the 1 & 2 Vic. c. 10, giving decrees of the Court of Chancery the effect of judgments at law. These sections are similar to the 27th and 28th of the analogous Irish Act, the 3 & 4 Vic. c. 105. By the decree in that cause, the bill was dismissed, as against all the defendants, with costs; and it was ordered that such costs, when taxed, should be paid by the plaintiffs. Before the costs were taxed, one of the defendants died, and on this fact being brought under the attention of the Taxing Master, he refused to proceed in the taxation of the costs of the deceased defendant. A motion was made before Pigram, V. C., by the executrix of that defendant, without having revived the suit, that the Taxing Master should be ordered to proceed with the taxation of the costs of the deceased defendant. The counsel in support of the motion, admitting that the suit could not be revived for the costs alone, contended that the 1 & 2 Vic. c. 110, made the

decree for costs, when registered, a charge upon the plaintiff's lands; that before registration the costs should be ascertained by taxation; that the decree gave a present right, which the taxation subsequently made effectual; and, therefore, in order to carry into effect the spirit of the Act, the Court would assist the creditor by directing taxation, so as to entitle his representative to register the decree. For the other side it was argued, that as the suit was abated, the application could not be entertained, that there could be no revivor for costs, and though the statutes gave decrees the effect of judgments, it could not alter the rules of Equity. The Vice-Chancellor, without giving any opinion upon the effect of the statute, was of opinion the applicant must revive the suit, if she desired to rely on the effect of the statute.

The 27th section of the 3 & 4 Vic. c. 105, enacts, that "all decrees and orders of the Court of Chancery, and of the Court of Exchequer, at the Equity side, &c., shall have the effect of judgments." Decrees being thus placed on an equality with judgments, the question arises, what would be the position of a judgment creditor, when one of the parties had died after judgment pronounced, but before final judgment entered.

At the common law, in all actions where there are two or more plaintiffs or demandants, the death of one of them pending the suit—that is, before final judgment, is an abatement of the action. *Underhill v. Devereux*, 2 Saund. 7 i.) But by the 17 Car. 2, c. 8, s. 1—7 W. 3, c. 7, Ir., if the plaintiff or defendant died after verdict, and before or even after the sittings have commenced, and before the trial, and before final judgment, the action is not abated, but final judgment may be signed, as if the party were alive, and then revived by *scire facias*, by or against the executor; and by the 9 W. 3, c. 10, Ir., it is enacted, that if any

person or persons, being plaintiff or plaintiffs, shall have an interlocutory judgment or judgments, the death of such plaintiff or plaintiffs shall not abate the suit, if the action be such as might originally have been prosecuted by or against the executors, but the judgment may be revived by *scire facias*.

But for these enactments, it is clear that until after final judgment the party entitled would at common law, have no means of recovering his costs, as judgment was not considered final until the costs were inserted, which could not be done till after taxation, except the costs were waived by the party entitled to them.

In *Blackburne v. Rymer*, (1 Marsh. 278,) and *Butler v. Bulkeley*, (1 Bing. 224,) it was held that at law a judgment was not final, till completed by the insertion of the amount of the taxed costs. Pell, Sergeant, *arguendo*, says, "The only question is, whether judgment is final, on the officer of the Court marking the *postea*, or on his taxing the costs. The mark on the record seems to be the appropriate and distinguishing indication of the *fiat* of the Court; but in *Blackburne v. Rymer* it appears to have been thought that judgment is not final till the Prothonotary's allocatur is completed by the insertion of the amount of the costs." The Court were of this opinion, and made the rule absolute to amend the *postea*, on payment of costs.

In *Pierce v. Derry*, (4 Q. B. 635,) where the plaintiff obtained a verdict in July, 1841, entered judgment on the *postea* on the 13th of December, dating the entry as of that day, and the costs were not taxed till the expiration of two terms after verdict, when the plaintiff entered final judgment, as of the 13th of December, 1841, between which date and the entry of the last judgment the defendant died. Error was brought by the executors. The Court changed the date of the judgment from the 13th of December, 1841, to the 1st of February, 1842, the day of the taxation. Lord C. J. Denman, in his judgment, says—"I should not be disposed, in a case like this, to exercise a discretion which might produce results unjust to one of the parties. But looking to the circumstances and the authorities cited, I think we have no discretion to exercise. We cannot say this was a judgment signed on the 13th of December, 1841, or permit it to stand as such a judgment, and Patteson, J., *Butler v. Bulkeley*, and other authorities which have been cited, shew that signing judgments is a thing contemporaneous with taxation of costs. If this were not so, what is judgment signed for, unless, indeed, the party signing dispenses with costs."

In *Fisher v. Dudding*, (3 Man. & Gr. 238, S. C. 9 Dowl. 872,) a question arose as to the time from which the interest on a judgment was to be computed under the provisions of the 1 & 2 Vic. c. 110, s. 17; 3 & 4 Vic. c. 105, s. 26, 1r. In that case, final judgment was signed for debt and costs on the 8th of January, 1841; a summons to review the taxation was subsequently had, whereby £12 10s. was added to the original costs, and the question arose as to the effect of the delay on the period from which the interest was to be computed. Tiudal, C.J., said this application must be governed by the true construction of the term, "entering up judgment," which occurs in the statute, without

reference to any hardship, real or supposed, in this particular case. The time of entering up the judgment appears to me to be the day on which judgment is signed and the incipit entered in the books kept by the officer of the Court for that purpose. The Court decided, the words "entering up" were to be construed as "signing," and that the original date of the signing was unaltered by the review of taxation.

These authorities and many others referred to in the argument of those cases fix the date at which a judgment at common law became incapable of abatement, to be that of the taxation of costs. That being so our next inquiry should be the time at which a decree is incapable of abatement. The rule at law and in Equity is, when examined, extremely similar. Lord Hardwicke, C. in *White v. Hayward*, (2 Ves. by Belt, 461,) states the rule to be, "That as to costs the established distinction is that whether given to plaintiff or defendant, by the death of the party *before they are taxed*, so that they are uncertain and unliquidated, they fall to the ground; because it is a personal demand in the nature of a tort, and dies with the person; but if taxed, they become a certain duty to the representative, who is entitled to some remedy or process of revivor for these costs. This has been determined by Sir Joseph Jekyl and by me in *Basset v. Prideaux*, March, 1742, where the bill was for costs only, which had been taxed; defendant pleaded that the plaintiff, as administrator, could not revive for costs only, I was of opinion the plaintiff might, and that is the difference." The practice in Equity and at common law, except so far as the latter has been changed by the statutes we have referred to, being that, in either case, until taxation, the costs may be lost by abatement, by death. We have now to consider the effect of the statute (1 & 2 Vic. c. 110, s. 18; 3 & 4 Vic. c. 105, s. 27, 1.) upon the decree. The 27th section places decrees in no higher position than judgments, and the authorities clearly show that, if it were not for the statutes, before taxation the right to costs would be lost by the death of either plaintiff or defendant, and that the 1 & 2 Vic. c. 110 makes no difference in this respect. *Fisher v. Dudding*, (3 M. & G. 238.) Unless there be some practice or enactment making an alteration in the law respecting decrees similar to that effected in the law of judgments by the statutes referred to, we do not understand how the 1 & 2 Vic. can have such an effect, unless it could be held to extend those statutes to decrees—a proposition which we think could scarcely be contended for. The 27th section enacts that no decree is to affect real estate till registered. In *Bowyer v. Beamish*, (1 Jon. & Lat. 228,) the question was raised before Sir E. Sugden, C., who, after deciding that the general rule there can be no revivor for untaxed costs, whether the abatement is caused by the death of the party to pay or the party to receive the costs is immaterial, at p. 242 says, "The law does not alter the case. If the plaintiffs have any right under that statute let them proceed under it. The existence of such a right would be rather an argument against them now. If it does exist it cannot alter the rule of this court."

As the statute cannot change the rule of equity; as at common law, before taxation, the person entitled would lose his costs by the death of either of

the parties, and as the statute has no effect in this respect upon judgments. The evident conclusion appears to be, that the rule of equity as to revivor for untaxed costs is unaffected.

THE 25 Geo. 2, c. 13, prescribes the manner in which a distress for rent is to be disposed of. Section 5 enacts "that all distresses lawfully taken for any such rent, shall, unless redeemed "within eight days" after the same shall be distrained for, be sold, &c., the person distraining, his agent, or bailiff, first causing one or more notice or notices in writing, of the place and time intended for such sale, to be posted six days previous to the time of such sale, &c."

The mode in which the time is computed is thus stated in Mr. Longfield's Treatise on Distress, p. 93—"The eight days allowed for redemption are counted inclusive of the day of distress, and the eighth day the notice of sale is posted, and on the fifteenth day the sale takes place. This method of computation has long prevailed, (*Dwyer v. Peacock*, 2 F. & S. 34), and can only be sanctioned by long custom, as it seems at variance with all legal rules established for the computation of times from acts done. *Happer v. Taswell*, (6 C. & P. 166.) If therefore, the distress be made on Monday, the notice of sale must be posted that day week, and that day fortnight is the day for the sale." The doubt expressed by the learned author as to the propriety of this mode of computation, has been fully justified by the decision of the Court of Queen's Bench in England, in the case *Robinson v. Waddington*, (13 Jur. 537.) The action was Case for an illegal and excessive distress. The question arose on the statute 2 W. & M. sess. 2, c. 5, s. 2, which enacts that when any goods or chattels shall be distrained for any rent, &c., "and the tenant or owner of the goods so distrained shall not within four days next after such distress taken, and notice thereof," &c., replevy the same, the person distraining may cause the goods, &c., to be appraised and sold, &c. At the trial it appeared that the seizure was made at eight o'clock on Saturday morning, the 25th of September, for a year's rent, and the goods were sold on the afternoon of Thursday the 30th; and it was contended for the plaintiff that the sale was too soon, the tenant having, under the statute, five clear days for replevying his goods and paying the rent, exclusive of the day of seizure and the day of sale. The jury, by the direction of the learned judge, having found for the defendant, a motion for a new trial was made absolute, Lord Denman, C.J. saying "that the court was reluctantly obliged to yield to the later authorities, which produce a revolution in the law upon this point."

The rule laid down in this case is, that where a certain space of time is given to a party to do some act, which space of time is included between two other acts to be done by another person, both the days of doing these acts ought to be excluded, in order to insure to him the whole of that space of time. Applying this rule to the practice in this country, the sale on the fifteenth day is not legal, the words "within eight days" must be construed as the words "within five days" in the English

statute, which would bring the sale to the sixteenth day; and if this rule be applicable to the six-day notice, the sale should be upon the seventeenth day; but whether it be so is not, perhaps, without some doubt, as the statute requires the notice to be posted "six days previous to the time of sale," but does not give any act to be done by the tenant within the six days, so that there may be room to contend that the six-day notice should follow the other rule of computation, that where the days are not expressed to be clear, that they shall be held to be exclusive of the first day, and exclusive of the last; and if this be the true construction, a sale upon the sixteenth day would be regular.

The Lords' committee upon the Poor Law, have at length made their final report. The substance of their resolutions is as follows:—

1. That up to 1846, the law of 1838 was efficient, and that even under the altered state of circumstances, many unions have dispensed with the outdoor relief, given by the 10 & 11 Vic. c. 31.

2. That no permanent system for the relief of the poor can be safely carried out in Ireland, without a return to the original law of in-door relief.

3. The building of additional workhouses, and the formation of new unions.

4. That for the erection of new workhouses in distressed districts, money should be advanced, and the Poor-law Commissioners invested with the same power to obtain eligible sites, as the legislature has given for the erection of county gaols, &c.

5. A re-arrangement of electoral divisions; on the principle proposed by the boundary commission.

6. That the earliest period there should be a fair and uniform valuation throughout Ireland, as a basis for rating. That such valuation should not be subject to alteration, without an order from the Poor-law Commissioners.

7. That no greater proportion than one-half of the poor-rates actually paid should, in any case be deducted from the person receiving rent.

8. That to check sub-letting, any person so doing should not have the power of deducting any part of the poor-rate from his rent, but should be solely liable.

9. That in holdings valued at £80 per annum, there should be a power of arrangement between landlord and tenant, that the latter should be liable to the whole rate.

10. That to facilitate the discharge, and prevent the accumulation of arrears of rate, that the guardians do certify half-yearly, to the landlord, the rates three months in arrear, from his tenant. And that if the landlord, within two months after notice, shall pay the whole, or a part of the arrear, that he shall be allowed 10 per cent for collection, and be empowered to recover the tenant's proportion by distress, and by ejectment where the rates of one year are out-standing.

11. That the practice of holding landlords personally responsible for rates owing by out-going and defaulting tenants is unjust, and that the responsibility should be limited to the person originally liable, and to the land on which arrears have accrued.

12. That to encourage the investment of capital, and the employment of labour, farms should not be subject to increased rating, on account of the erection of farm buildings, or of any drainage, or any other permanent agricultural improvement, until seven years after their completion.

13. That to facilitate appeals, the rate-book should be open for inspection during fourteen days before the striking of the rate; that the names of occupiers of £4 value and under, shall be in the book; that in no case the name of the immediate lessor, if discoverable, should be omitted; that the agent should have the like power of appeal as his principal; that the mode of proceeding should be either before the justices of the peace at petty sessions, or before the assistant-barrister, with appeal to the judge of assize.

14. That the names of all recipients of relief should be stated under the names of the townlands in which they are last said to have resided.

15. Enumerates the evils of the quarter acre system, and recommends a clause to enable the landlord to take possession of the land of a person holding more than a quarter of an acre, and receiving relief.

16. That the present duties of the auditors are inefficiently performed, and that the poor law commissioners should particularly direct their attention to this subject.

17. That in the distressed districts, particularly where it is proposed to establish new unions and new workhouses, that after the functions of the paid guardians have ceased, the poor law commissioners, at the request of the guardians, may appoint a paid resident guardian to assist.

18. That having had proof of the expense incurred by the town of Belfast, &c., in the maintenance of paupers transmitted there, the committee bring forward this fact for consideration, as to the means of obviating it.

19 and 20. Recommend emigration.

21. That the committee have heard with great interest evidence detailing the proceedings of the British Association and of the Society of Friends, for the improvement of the condition of the people, by promoting agricultural instruction, a development of the fisheries, and an improvement of the industrial resources of Ireland, thus striking at the root of pauperism. To this the measures recommended by the Government, and adopted by the Legislature, will, it is hoped, largely contribute, extending the means of effecting land improvements, the completion of arterial drainage, and the encouraging of fishery stations and small piers and harbours. The assistance wisely granted to railroads in Ireland has a tendency to promote the natural resources of that country, to give a better reward to industry, and thus to create a more effective demand for labour. The progress of education, the connexion of agricultural instruction, not only with the workhouses, but with certain of the national schools in Ireland, have already met the approval of Parliament. These measures will have a salutary effect in raising the moral and social condition of the people: but much remains to be done to solve that difficult problem, the present state of Ireland. In the solution of that problem, much

more than the well-being of Ireland is involved. It is inevitable that the continued depression ultimate ruin of Ireland cannot take place with the most fatal consequences to Great Britain; loss of a great home market for manufactures; danger to the social state of Great Britain, the permanent misery and degradation of people of Ireland is so great and so imminent, the committee is confident it will meet the attention it deserves from the public and the Imperial Legislature.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published by E. J. MILLIKEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, July 14, 1849.

THE Irish Jurist

No. 38.—VOL. I.

JULY 21, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d

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DUBLIN, JULY 21, 1849.

SINCE the new rules of 1832, the question has frequently arisen, whether the money counts, for the purposes of pleading, are to be considered as one or separate. In support of the former view it has been argued that the intention of the new rules was to reduce what was before separate into one, and in support of this opinion *Barnes v. Keily* (Cr. & Dix, notes, 358), has been cited; whilst the case of *Jourdain v. Johnson* (2 Cr. M. & R. 564), is relied on as an express authority the other way.

It would appear to us, (although we admit that some observations in the judgment of the court in *Barnes v. Keily*, have a tendency to the conclusion contended for), that the Irish cases are merely decisions on the effect of the words "last mentioned monies respectively;" and that the money counts, as settled by the rules of 1832, are to be considered as separate and distinct for the purposes of pleading.

There is no principle better established than this, that every count must contain a consideration, a promise, and a breach; but there may, in the same count, be different considerations for the same promise, *Webber v. Tivill*, (2 Saund. 121, n.e.), provided, however, the sum be not repeated. *Morse v. James*, (11 M. & W. 881;) *McGregor v. Graves*, (18 Law Jour. Ex. 109;) but when the sum is repeated, as in the forms settled by the judges in 1832, *Jourdain v. Johnson*, (2 Cr. M. & R. 564), clearly establishes that the counts are to be distinct and separate; Lord Abinger, page 566, says, "The court think that the last ground of special demurrer must prevail, and that the several demands on the bill of exchange for money paid, lent, and advanced, and interest, and account stated in the declaration in this form are to be considered as different counts. This declaration

is framed in compliance with the rules of court, (R. T. W. 4,) in which the demands in *indebitatus assumpsit* in the form there prescribed are not treated as one but as several counts: they are called money counts, are not one sum as the amount of all the demands, but several sums, and not one consideration and promise, but several are stated, for there is an averment of a promise to pay each sum respectively in consideration of the defendants being indebted in that sum."

The case of *Barnes v. Keily*, (Cr. & Dix. 358, notes), is the Irish case which has been relied on as establishing the contrary to the case just cited. The declaration stated that the defendant was indebted to the plaintiff in the sum of £50 for the price of goods bargained, sold and delivered, and in £50 for the price of work and materials, and also the money counts in the usual form. The defendant pleaded *non assumpsit* to the money counts and demurred to the counts for goods bargained, sold and delivered on the ground that the words "the said last-mentioned several monies respectively" at the end of the declaration did not extend to the count for goods bargained and sold. The court overruled the demurrer, and decided not that the money counts were one count, but that the words "last-mentioned" did not confine the promise, but were to be extended to the several causes of action contained in the declaration. Joy, C. B., in his judgment points out the distinction between the case before him and that of *Harding v. Hibbel*, (Twyr. 315,) cited in support of the demurrer: "In the latter case the declaration was divided into two distinct counts by the words 'and whereas also the defendant was indebted to the plaintiff,' which is not the case here, there are not two counts but one count." It must be recollected, however, that this doctrine of Chief Baron Joy, though worthy of great consideration, was not necessary for the decision of the case, and is opposed,

as has before been shown, to the case of *Jourdain v. Johnson*. *Harding v. Hibel*, followed in this country by *Wilson v. Mitchell*, (Long & Townsend, 275,) establishes that when the words "and whereas also the defendant was indebted" are used between two different counts, the effect of the words "last-mentioned" will be to confine the promise to the last count, thereby rendering the previous counts open to demurrer.

From the above observations we draw the following conclusions: 1st. Where the sum is not repeated in the naming of the different considerations for the promise, the pleading is but one entire count. *Morse v. James*; *McGregor v. Graves*. 2nd. Where the pleader uses the expression, "and whereas also" in the naming of the different considerations, the words "last-mentioned promises" at the end of the declaration do not refer to the first counts, and, therefore render them liable to demurrer. *Harding v. Hibel*; *Wilson v. Mitchell*. 3rd. Where there is a repetition of the sums of money (as in the forms used in this country,) the counts are separate and distinct for the purposes of pleading, *Jourdain v. Johnson*.

The observations of Chief Baron Joy in *Barnes v. Keily* have caused that case to be cited in support of the negative of the first proposition; but we think the judgment of Mr. Baron Lefroy in *Morrissey v. Walsh*, (9 Ir. L. Rep. 296,) is not only conclusive in pointing out what *Barnes v. Keily* did actually decide, but explains with great clearness the object and effect of the new general rules. The learned Baron, in speaking of the general rules says, (p. 296,) "Their object was not to alter the rules of pleading but to save expense, and in consequence they allow a plaintiff to include separate causes of action, which before would have been matter for several counts in one count; but the words 'promised respectively' distribute the causes of action, and those words are and mean a promise to each of the several causes of action included and contained in that one common count; it is but one count containing several causes of action, and several promises to each, and as to each cause of action a defendant must defend himself by a single defence, he cannot plead and demur to one count containing only one cause of action, whereas if the argument be valid founded on the case of *Barnes v. Keily*, a defendant might defend himself in two different ways, he might plead and demur to the same count, for that is supposed to have been decided there, because there the declaration was held to contain but one count; but *Barnes v. Keily* decided no such thing, but decided the contrary to that for which it was cited in that case. The defendant pleaded as to some and demurred as to others of the common counts, and the question was, whether the word 'last-mentioned' tied up the promise to the last count, and the court held that the word 'last-mentioned' did not control and tie up the effects of the word 'promise,' which, by the intention of the general rules, applied to the several causes of action, and the demurrer was overruled because the promise was extended to several of the former as well as the latter, and the due interpretation given to the words 'promised respectively.'"

The rules meant that several causes of action

should be put and included in one count, but that the plaintiff should have all the benefit, as if his causes of action were set out in separate counts, and that the promises to all the causes of action might be expressed by the words "promised respectively."

THE report of the Receiver Committee, which we give elsewhere, is drawn up with much ability, and written temperately and distinctly. It has already effected one important good, that it has stayed the Solicitor-general for England from proceeding with his judgment bill in the shape he originally introduced it. He has adopted the suggestion of the Committee, which were principally derived from the evidence of Sir Edward Sugden. As it originally stood the power of appointing a receiver prospectively was abolished, it is now proposed to be given in cases where the debt exceeds £150. The whole character of the bill is altered. We judge from the readiness to change his own views on this and other occasions exhibited by the English Solicitor General that he is of a very plastic disposition. He has not much knowledge of the subject or of the peculiarities of Irish law and practice, and takes up too readily any statements that may have been made to him. Take, for example, the following sentence: "Judgments sometimes stood over for fifty or sixty years, and they were frequently regarded as if they constituted the estate itself." The result was that a man wanting to sell an estate had to make out a title to all the incumbrances, and it therefore became necessary to induce all parties concerned to concur in the conveyance of the land; hence not one deed, but frequently five or six deeds became necessary, and sometimes five or six sets of deeds were required, and the expenses thus occasioned were much increased by the operation of particular acts of Parliament. There were even cases in which judgment creditors had bad judgments against themselves, and so there was judgment upon judgment, each a charge upon the land, and therefore it was almost impossible to make out a good title."

The reporters of the London papers—(we have quoted from the *Times*)—are wonderfully quick, as a general rule, in catching the Speaker's meaning; but it is possible, not being familiar with legal questions, they may have mistaken that of the Solicitor General; we incline, however, to think not. If our memory be accurate, he had been corrected—during the progress through the House of the Incumbered Estates Bill of last session—by Mr. Sadlier in some of the mistakes he has again fallen into. If the money be forthcoming, and it be desired to extinguish the judgment, the process is very simple, by entering satisfaction on the Roll, and no deed is required. We also take leave to inform the Solicitor General, that a judgment is not a charge upon a judgment, and that there are no words of any act of parliament that make it so; and that the contrary has been decided in this country.

We have great respect for the abilities, for the learning, for the distinguished name of the Solicitor General; but we deprecate again, as we have done

before, the allowance of Irish law measures to be entrusted to English lawyers; and we blame the Irish Executive for having no Irish law officer of the crown, a member of the Imperial Legislature.

It is fortunate that the Irish bar does not want a fitting representative in the person of Mr. Napier. His report in point of style, arrangement and matter do him great credit. In the suggestions which the Committee have made so far as they go, we concur; hereafter we shall state those points which, in our judgment, make us regret that they do not go far enough.



REPORT FROM THE SELECT COMMITTEE ON RECEIVERS, COURTS OF CHANCERY AND EXCHEQUER, (IRELAND.)

The Select Committee appointed to inquire into the state of the law as respects the appointment of receivers of the Court of Chancery and Equity Exchequer in Ireland, and the effect of the present laws and regulations of the said Courts in the management of estates under their control, have considered the matter referred to them, and have agreed upon the following Report:—

Your Committee have prosecuted the inquiry entrusted to them, by a careful examination of several witnesses, whose evidence is entitled to great consideration. The late Lord Chancellor of Ireland, Sir Edward Sugden; the present Master of the Rolls, one of the Masters of the Court of Chancery, the Second Remembrancer of the Court of Exchequer, together with a member of the Irish Bar,* and an Irish Solicitor,† have severally been examined. Their evidence appeared to your Committee to be so full and comprehensive, that it would be unprofitable, at this late period of the session, to prolong the investigation; nor could your Committee expect to obtain any additional information from witnesses of higher authority.

It may be collected from the evidence, that nearly one tenth of the rental of Ireland is under the management of the Courts of Equity, and that there has been a gradual increase of late, by reason of the general distress which has prevailed, the want of purchasers where properties, the subject of suits, have been offered for sale, and the facility of obtaining receivers, at the instance of judgment creditors, of which advantage has been largely taken, especially where the sums due on judgments have been of small amount.

The prominent evils of the present system of management under receivers appointed at the instance of creditors, are so generally admitted, that the witnesses are unanimous in its condemnation. As to the extent to which it might, and the manner in which it ought to be corrected, a difference of opinion, as might be anticipated, will be found to exist.

Some of these evils are inherent in the system, whilst others are the result of abuses, much aggravated by the peculiar circumstances of Ireland and the general habits of the people.

In order to apprehend clearly the effect of court management, in its influence on the condition of the estates, a classification of such as are under the courts may conveniently be adopted.

The estates of lunatics and minors form the first class; the second includes other estates subject to incumbrances, whether by mortgage or judgment.

There is a subdivision of this latter class, which it is also proper to notice:—

First, where the incumbrance and the property are of considerable amount.

Second, where either is inconsiderable.

In the case of estates of lunatics and minors, the Court of Chancery has a protective authority over the property, as exercising the parental functions of the Sovereign; but where the ordinary power of a proprietor is suspended, in consequence of a transfer of the estate to the control of the Court, by a creditor in the prosecution of his rights, the jurisdiction arises from the duty of the Court to protect and effectuate these rights when duly ascertained.

A remarkable difference in the management and condition of these two classes of estates, is on all hands acknowledged; and a further difference exists between the two subordinate classes into which the second general class is subdivided. It seems to your Committee important to investigate the source of these differences, in order to discover remedies which may mitigate, (if not abate,) the serious and increasing evils of a system which occasions private mischief and public inconvenience.

In the first general class the Court has a plenary jurisdiction, for the protection and beneficial management of the property. It is frequently aided in the execution of its functions by some relative of the lunatic or minor, in conjunction with the family agent, and thus are in some degree preserved those private and kindly influences which are calculated to operate powerfully on the general condition of a tenantry.

But when a creditor originates legal proceedings, and transfers the estate of his debtor to the dominion of a Court of Equity, the relation of landlord and tenant is virtually severed; pressure of claims, hostile litigation, evasion of liability, and confusion of rights generally follow; and the effect thus produced cannot but be prejudicial to the condition of the estate and the interests of all parties concerned in its prosperity.

The temporary control of the court, which is given for the purpose of effectuating the rights of the creditor, cannot, in its very nature, be exercised, without regard to the object for which it is conferred; and although it is suggested in the evidence of some who have been examined, that the creditor's strict rights are subordinate to the public good, and that a system of liberal management might be allowed, at the risk to some extent of the postponement or abridgment of the creditor's demand, it is urged by other witnesses, for reasons more difficult to refute, that a jurisdiction called forth by the necessity of enforcing a right, cannot consistently displace, or postpone as subordinate, that which in the very nature of the proceeding is primary and paramount. The inherent jurisdiction of the Court is different in the

* A. Hickey, Esq.

† W. M'Cay, Esq.

two classes—and even if made co-extensive, it must still be exercised in a manner peculiar to each class, and thus it could not be equalized in its effects on both.

It would, therefore, appear generally desirable, that in any case in which an estate is brought under the court at the instance of a creditor, the proceedings should be accelerated with all reasonable dispatch, and the estate withdrawn as speedily as may be consistent with substantial justice, from a jurisdiction which suspends the performance of some of the most useful duties of property, while its rights are prejudicially and expensively asserted. To this important topic it will be necessary to recur, for it seems to the committee, vitally connected with the subject of the present inquiry.

It may be convenient now to notice the peculiarities of the two classes of estates placed under the courts at the instance of creditors. It may be assumed that so far as the authority of the court is insufficient, the defect may be corrected, though not to the extent of securing such a course of management as might be exercised over the property of a lunatic or minor. The useful administration of any power which the court may either have or acquire, must mainly depend on the class of persons appointed to the office of receiver, and this is a part of the subject which, more than any other, requires a searching inquiry.

Where the estate is large, a receiver may be obtained who can manage it beneficially; where the demand of the creditor, or the property of the debtor is small, not merely is it difficult to select a receiver of independence or capability, but it would seem to be at variance with the real design for which this remedy in such cases is usually adopted. The mischievous facility, afforded by the existing law, for appointing a receiver at the suit of every judgment creditor, and over almost every species of property, and the security for the costs of the appointment, without reference to the satisfaction of the debt, have perverted what was intended to be a cheap and convenient remedy for a right, into a vexatious instrument for accumulating law costs, unproductive to the creditor, injurious to the debtor, and prejudicial to the public. Under the difficulties and pressure of the times, a large and increasing staff of receivers of this inferior class, appear to be in continual course of appointment by the courts; for it is obligatory, not optional, to appoint a receiver when a petition is presented. In one case noticed in the evidence, a petition was presented for the appointment of a receiver where the debt was £5; another, where the annual value of the property was £10; the court had no authority to refuse the appointment in either case. It appears to your committee a matter of public policy, that the power of obtaining receivers for small demands, or over a small property, should not be suffered to continue; the witnesses are nearly unanimous in the propriety of excluding all cases under £100; whilst some of great authority intimate that a higher amount might be fixed as the minimum of debt for which this remedy should be allowed. They also concur in the opinion that the costs of the appointment should not be separated from the creditor's

demand, but paid (if at all) with the debt itself. In this last suggestion your committee entirely concur.

The operation of the law which allows one species of judgment to be assigned in such a manner as to give a legal title to the assignee, connects itself with the subject of the abuse of remedies against the debtor's estate. The general lien of a judgment hovering over all the property of a debtor, produces manifest inconvenience, especially when the judgment is likely to remain unsatisfied. The assignability of certain judgments in Ireland, has rendered them a current and continuing security; they are usually designated as "the common assurance of the country." The extension of the remedy by allowing a receiver to be obtained in every case, under the act commonly known as O'Loghlen's act, and the extension of the lien as a legal incumbrance and equitable charge under the act called Pigot's act, have so augmented the general inconvenience of judgments in their operation, as to make their multiplication a great and growing evil, acting on habits of improvidence, and clogging the transfer of property. A difference of opinion, however, exists as to the policy of any immediate alteration in this law of assignment, Sir Edward Sugden pronouncing that it ought not to be touched at present, inasmuch as it might excite apprehension in the minds of those who have been accustomed to regard an assignable judgment as a current security in Ireland, and that it is impolitic and unwise to force upon a people any sudden change in their laws, against what may reasonably be supposed to be the general feeling of the country. He suggests that by the withdrawal of the power of obtaining a receiver for small demands, and giving a year of grace to a debtor after a judgment is recovered or confessed, before the creditor should be empowered to obtain a receiver over the property, together with some other alterations, mild in their character, and beneficial in their tendency, a gradual change might be introduced, which would not merely accompany, but encourage improved habits and feelings, and render it unnecessary to alter a law which, in the abstract, he considers to be founded on a sound principle, though open to easy abuse by improvident or embarrassed men.

Your committee cannot but be impressed with the force and authority of this opinion. On the other hand, the Master of the Rolls is favourable to a policy which might render judgments an unpopular security in Ireland. He thinks that the genuine use of a judgment is perverted under the provisions of the existing law, and that men are tempted to be improvident by the facility of giving a cheap security, which, even when stripped of the inconvenience of recent remedies, obstructs fair dealing with property.

Your committee have much difficulty in coming to a conclusion on this important question, but they incline to the opinion that judgments hereafter acknowledged should not be assignable at law.

It occurs to your committee that the public mind is prepared for a prudent change in the course of dealing with property in Ireland, and that there is a growing disposition to discourage a system of incumbrance, which has occasioned such acknow-

ledged inconvenience; and that on the whole it is a sound policy in reforming a law which must act on the new arrangement of a large extent of property, to recast its provisions rather with a view to secure what is generally desired in reference to the future, than endeavour to satisfy feelings connected with habits of the past, which ought never to have been encouraged.

It may now be convenient to consider the case in which the appointment of a receiver at the instance of a creditor is unavoidable; and in which an amendment of the system may be attempted with some prospect of success. With regard to the condition in which the receiver often finds the property when he enters upon his office, the evil may best be remedied by the effect which an improved system of management may have, in rendering debtors less disposed to deal recklessly with their property when proceedings are instituted against them. Under the present system, it seems to be generally assumed that the appointment of the receiver seals the fate of the debtor and his property; accordingly the resources of litigation are frequently exhausted in delaying the appointment, and the interval is employed in obtaining by collusion and contrivance from the tenants of the estate all rent due and accruing. The receiver is tempted to collect as soon and account as late as possible, using the money in the interval for his private profit; and a tenantry ready to resist, unable to pay demands collusively arranged, and pre-disposed to baffle and evade the efforts of the receiver seeking to compel the discharge of their subsequent liabilities, cut themselves off from all opportunity of improving their condition; the difficult position of the receiver occasions a frequent application to the court, thereby multiplying costs for the benefit of the professional auxiliaries; and thus the rental of the estate is wasted by a course of improvidence and litigation.

These are evils connected with the system which are the casual results of its general imperfection. The matters to which a remedy may be usefully applied, may conveniently be reduced to the two heads already noticed—

First—The want of jurisdiction in the court to exercise authority as an owner, under occasional exigencies; this defect must be remedied (if at all) by legislation.

Second—The established course of the court, and practice of receivers, for the correction of which legislation is most desirable, though to some extent not absolutely essential.

In reference to the first it is proper to observe, that although it would be advisable to confer on the court the same power as it possesses over the estates of lunatics and minors, it would not be ordinarily exercised to the same extent, for reasons already explained. There are, however, instances in which the absence of such a power produces a failure of justice. A moderate outlay for urgent repairs, an abatement of rent, solicited under circumstances which justify the request as reasonable, and other occasional allowances of an ordinary character, ought to be within the jurisdiction of the court to sanction of its own authority, and accord-

ing to a responsible discretion. It appears from the evidence of Sir Edward Sugden, that the aid of the legislature is needed for this purpose; for cases have occurred before him, when presiding in the Court of Chancery in Ireland, in which he would have considered it his duty to have exercised the power of ordering such allowances, if he had possessed sufficient jurisdiction.

In reference to the letting of land under the court, it is limited by the pendency of the suit, and the course is to make a lease for seven years, *pendente lite*. Such a tenure is most objectionable, not merely from the shortness of the full period of the demise, but from the liability of the tenancy to be suddenly determined; in both respects it is calculated to discourage improvement, and prevent a solvent tenant from cultivating the land in a husbandlike manner with a fair prospect of advantage. The course of the court as to the letting even for this limited term must be noticed hereafter; but as it is the policy of the legislature to encourage the granting of beneficial leases in Ireland, and under a recent act the stamp duty on a lease made in pursuance of its provisions for any term not less than 14 nor exceeding 31 years, has been reduced to 1s., it would seem proper to invest the court with power to grant such a lease for an absolute term of 14 years at least, to be used wherever the court could grant it with a reasonable assurance of the solvency of the tenant. In truth your committee consider it of importance that the court should possess, so long as it has the interim control over property, the authority of an owner; but to be exercised with a cautious discretion, and so as not to occasion any undue delay in the proceedings at the suit of the incumbrancer, or unreasonably interfere with his remedy against the estate itself.

So far, therefore, as the nature of the jurisdiction does not occasion a difference in the exercise of the power of the court, the estate would not, under the proposed alteration of the law, be subject to an authority inferior to that possessed over the estates of lunatics or minors.

The next matter of great practical importance, and perhaps most to be considered, as pregnant with the greatest amount of evil, is the ordinary course of proceedings taken in the appointment of the receiver, and afterwards by the receiver over the estate.

The tendency of the evidence taken by your committee shows it to be desirable that the receiver should be resident on or near to the property, acquainted with agriculture, of independent character and personal influence. But the general practice of the court, as explained by the Master of the Rolls, in effect admits the plaintiff's solicitor to appoint the receiver. This is a fruitful source of mismanagement, from the ordinary unfitness of the person appointed to discharge the duties of a useful agent; and it inflicts much unnecessary and unjust expense on the exhausted property, by multiplying applications, on what are called statements of facts, which legalize a claim for costs, to be paid out of the estate, without any corresponding advantage.

Where the Master of the Rolls has had the opportunity of making a special order, that in appoint-

ing a receiver regard should be had to qualification, without reference to the nomination of the solicitor of the party having the carriage of the order, it appears by his evidence that the court has succeeded in obtaining a competent and useful receiver. The security required is frequently very large, amounting to two year's rental, so that when the appointment is about to be made a candidate procured by the plaintiff's solicitor is ready with his security, and competition is virtually excluded. It would appear that by an alteration in the time and manner of accounting, the necessity for so large a security, and in the form of a recognizance, might be avoided and this of itself would be a step in favour of competition. Forms and amount of security less difficult to complete, and equally satisfactory, might be sanctioned with advantage.

Your committee agree in the opinion that it is against public policy to allow any member of the legal profession to act as a receiver, unless by special order of the court, made on notice to all the parties in the cause or matter pending, where the court may, under peculiar circumstances, consider the appointment entitled to its sanction. By a return of the receivers under the courts of equity in Ireland, which has been made to the house and referred to your committee, it appears that in many instances receivers have been appointed and are now acting in contravention of the rules of the courts. It would seem to be of importance to have every one removed who has been so appointed, and so continues to act; the costs of obtaining such removal to be paid by the receiver and any solicitor or party in the cause or matter who has procured the appointment. It would also be advisable to have the accounts of receivers inspected and balanced with convenient dispatch up to some fixed period. In the present state of the country, and the difficulties which press on proprietors, the most vigorous and efficient steps should be taken promptly to relieve property from the abuses of a system so ruinous to private rights and discreditable to the administration of justice.

Your committee would recommend that the courts of equity should be aided by whatever legislation is proper to enable them to arrange and execute such a code of rules as would be likely to encourage, if not secure the selection of a competent person as receiver, wherever the appointment must be made. These rules might further provide for the lodgment of monies from time to time, when received, as required in the case of county treasurers, under the act of 1 Vic. c. 54; the balancing of the accounts at convenient intervals; periodical reports of the condition of the estate; and occasional inspection and report by some competent and responsible person under the direction of the court, and unconnected with any interested party. It also appears to your committee that the mode of letting lands under the court ought at once to be discontinued. The extravagant expense of a lease and its accompaniments, as detailed by Master Brooke in his evidence, is unnecessary for any purpose of policy or justice. Although not perhaps necessary to any considerable extent to direct attention to extracts from the evidence where the witnesses are so few and competent, and their

testimony so relevant and clear, it may not be without advantage to set forth in this part of the report the description of the mode of letting land to a tenant under the court.

"What is the course of the court with reference to the letting of lands, as contrasted with a case in which the inheritor lets land to a tenant? The receiver circulates handbills in the neighbourhood, stating that on a certain day in the Master's office in Dublin, certain lands will be set up to be let. The tenants may come, or send up some one to appear for them; and it is a regular auction; they bid against each other for certain farms, upon such terms as they propose, and the highest bidder carries it; and immediately they are called upon, before they leave the office, to lodge £6 4s. 4d. for the lease and the recognizance, in which there must be two sureties.

"In addition to the lease they have to perfect a recognizance? Yes; they have to perfect a recognizance with two sureties, which I cannot but think is a very mischievous thing. No person will go surety for a tenant but one of themselves; and be either presents men who qualify upon oath, and really have no means, or he draws in one of that class which ought to be regarded with the greatest interest—I mean the solvent and industrious class of persons. I never knew an instance in which money was recovered from the tenant's surety; and I was always glad that it was so, for I felt that it would be a very painful thing to drag down, perhaps, the most useful man on the estate in the ruin of his neighbour; but in nine cases out of ten the sureties are persons who swear themselves to be worth so much, when they really are not; all that is a very expensive operation. This difficulty has been felt by the masters so much that they have agreed that in every case where the rent is not more than £15 they will allow a mere agreement upon a stamp to be received. We find it utterly impossible to induce those poor men to give this large sum of money.

"Do you think that recognizances might be, without the slightest diminution of security, done away with?—With great advantage.

"Of what items is that sum of £6 4s. 4d. compounded which you mentioned as being required to be deposited?—There is £3 14s. for stamp duties, and £2 10s. for fees. The stamp duty on the recognizance is £2 14s.; then on the lease, if it be for the lowest amount—that is, £10 and under—the stamp duty is £1. The Master's Examiner has a fee of £1 13s. 3d. for preparing the recognizance and the two parts of the lease. There is a fee upon the enrolment in the Recognizance-office of 14s. 7d. and there is a house keeper's fee of 2s. 6d. Then, besides that, the Lord Chancellor finding that these recognizances had not been registered under Sir Edward Sugden's register of incumbrances, directed that every lease should be registered; the expense of that is £1 3s. 3d., which is paid to the tenant's own solicitor, which I find works most vexatiously, for they used to feel that having paid this £6 4s. 4d., they had done with it; but now they find that the leases will not be received unless they further go to a solicitor, who will take them to

be Register office, for which he demands £1 3s. 4d.

"With the exception of the stamps, are these charges peculiar to causes in Chancery?—Yes; even the stamps are peculiar, so far as they are stamps upon the operations which go through the court.

"What are the stamps upon the lease?—Two stamps of 5s. on the lease, and as much on the counterpart.

"How many of those charges vary with the amount of the stipulated rent?—Only the two sums of 5s. each.

"Then with that exception, a man taking a farm of £10 pays as much as a tenant taking a farm of £150?—He does.

"From your experience both at the bar and as master, do you think that the recognizance, with this heavy charge upon it, affords any valid security for the payment of rent?—I think it perfectly useless, at least in 99 cases out of 100."

Your committee cannot but condemn this vicious practice, the tendency of which is to induce an improvident competition, in a country where the possession of land is regarded as almost one of the necessities of life; and especially where it is attended with an unreasonable amount of cost to the tenant. The various items which constitute the charge, it is to be hoped, will at once be swept away without reserve; for it does not appear why the selection of a tenant and the perfection of a lease might not be accomplished by the court at as moderate a cost as in the case of an ordinary letting under private agency.

On the whole, it seems to your committee, that by the exercise of a reasonable care in the selection of the tenant, and using the means now available for ascertaining the value of the land, and by inserting in the lease sufficient covenants and conditions which should provide for proper cultivation and beneficial expenditure, but prohibit subdivision or exhaustion of the demised property, the present practice of letting might be safely and usefully superseded, to the great advantage of all parties concerned. Nor should any consideration connected with fees or stamp duty be suffered to prevail against the higher exigencies of the general interest of the country.

It might perhaps be provided, that the recovery of rent should generally be enforced by summary process, on the certificate of the master, adjudicating on the amount of rent due. The facility of litigation, where facts are not doubted, enables a fraudulent tenant to postpone his liabilities, and an unprincipled receiver to abuse his powers, by frequent appeals to the law, which occasions the accumulation of unnecessary costs, and is mischievous and demoralizing. Where the question is, whether so much rent is in arrear, the fact is capable of being ascertained without vexatious litigation. Where it is of real consequence by a strict and just policy to cultivate, if not create, habits of punctuality, it would seem to be a suitable opportunity, in regulating the future management of estates under the Courts of Equity, to confer rights

and enforce remedies in a manner consistent with justice, and calculated to promote the interests of the property.

Your committee also are of opinion that the want of uniformity in the system of management under the two Courts of Equity in Ireland, and the opportunities for fraud whereby different receivers may be appointed over the same property under their concurrent jurisdiction, have materially aggravated the evils of the general system.

Your committee feel much encouraged by the manner in which these evils have been exposed by all the witnesses who have been examined; affording the assurance that in carrying out prompt and practical remedies, the cordial co-operation of those who best understand the system, and are most desirous for a thorough reform of its abuses, is at the public service.

Although your committee have felt it to be their duty to suggest the foregoing amendments in the existing system of management of estates under the Courts of Equity, they do not express any opinion whether the evils now so justly complained of will be sufficiently remedied by any such alterations. Nor are they to be understood as expressing their opinion that the substitution of a totally new system is not demanded by the exigencies of the case. The late period of the session at which your committee was appointed has prevented them from taking evidence sufficient to enable them to decide on the merits of the plans which have been submitted for consideration. In the Appendix will be found the draft of a bill prepared under the sanction of the Lord Chancellor of Ireland, proposing an official plan of receiverships; another plan has been presented by Mr. Hamilton, in his private capacity; and a third, prepared by Mr. M'Cay, is also to be found in the Appendix, and referred to in the evidence.

It is of obvious importance that, under the pressure of existing circumstances, the primary object to be kept in view should be to effect a gradual reduction in the extent of property under court management, and that any legislative interference should be regulated with this expectation.

The transfer of an estate to the dominion of the court, as it is occasioned by the creditor's proceeding, should not be attended with any delay not absolutely required for the satisfaction of the claim. The startling amount of this class of property now under the court, and every day increasing, exceeding at least one million of the rental of Ireland, is in some degree explained by the peculiar circumstances of the country, and the trying visitation with which it has recently been afflicted. Whether some means might not be devised, by which sales might be encouraged, without peril to the interests of parties whose rights attached on property estimated at a standard of value, which cannot be largely reduced without a sacrifice of these rights, is not, perhaps, within the strict province of your committee to discuss. It is, however, an important object that sales should be facilitated and receivers discharged as speedily as can be effected without injustice.

It appears from the evidence that the practice of the court might be modified so as to further this object.

In the early part of the year 1847 the Master of the Rolls, with the aid of an experienced officer of his court, prepared the draft of a bill, with a copy of which he has favoured the committee, and which is inserted in the Appendix to the evidence. The objects proposed by this draft were to simplify proceedings in Chancery for the sale of incumbered property, to remove the evils in practice which occasioned delay and expense, and to redress such abuses as had been discovered by him in the course of his professional and judicial duties.

Sir Edward Sugden, in his evidence, states that the Court of Chancery in Ireland might be worked with as much expedition in prosecution of suits as any other superior tribunal. He recommends the practice which obtains in England in suits by mortgages, as encompassed with fewer difficulties than that which has been established in Ireland; but, on the other hand, it is stated by the Master of the Rolls, that the course in Ireland is, in its general principles, better adapted to the exigencies of that country and is capable of being simplified and freed from objection by such a measure as that which he has prepared.

It may be anticipated that by the aid of the legislature, with the co-operation of the judges and officers of the courts of equity, an improvement may be gradually accomplished in this department, which must for some time, deal with a large portion of the property of Ireland.

Your committee recommend the repeal of the power of legally assigning judgments hereafter to be acknowledged; they think it also advisable to repeal the right of appointing a receiver on a judgment, where the unsatisfied demand does not exceed £150; to give a year of grace on a judgment, in all cases, before a receiver can be obtained; and to treat the costs of appointing a receiver as part of the debt, to be paid in the same priority only; to give a legislative sanction to such rules as may be considered proper to secure the appointment of competent receivers, and the useful discharge of their duties, in the least expensive manner—to give the court the authority already suggested; to be exercised according to the principles of equity jurisprudence, and the peculiar circumstances of each case, under the restrictions which have been stated.

In conclusion, your committee wish to express their conviction, that the present management of properties under the courts is attended with equal detriment to the agriculture of the country and the condition of the tenantry.

11th July, 1849.

We have received the letter of a Barrister; in much of it we acquiesce, but we cannot, as a rule, insert the communications of anonymous correspondents.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 8s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, July 21, 1849.

THE Irish Jurist

No. 39.—VOL. I.

JULY 28, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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		Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W.G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, JULY 28, 1849.

It would be impossible to predicate what changes the bill to amend the law concerning judgments in Ireland is fated to undergo. As altered by the Committee, it has assumed a very mitigated aspect from that which it wore when it made its first appearance.

As the bill originally stood, no receiver could be appointed on judgments to be obtained after the 31st of December, 1849; it is now proposed to allow the existing law to remain unchanged, save that no receiver can be obtained upon judgments, decrees and orders having the effect of judgments, entered up after the passing of the act, where the amount shall not exceed £150. Neither are such judgments any longer to remain a charge upon land from the time of their being entered up; but by the 3rd section it is enacted "That the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof is directed, at the suit of any person, upon any judgment subject to the provisions of this act, recovered in any action in any of her Majesty's superior courts at Dublin, shall make and deliver execution unto the party in that behalf suing, of all such lands, &c., as the person against whom execution is so sued, or any person in trust for him, is seised or possessed of, at the time when such writ of *elegit* is delivered to the sheriff or other officer, or over which the person against whom execution is so sued out has, at the time when such writ of *elegit* is delivered as aforesaid, any disposing power which he might, without the assent of any other person, exercise or his own benefit, which lands, &c., shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which

such execution shall have been sued out, as a party to whom execution is made and delivered under the recited provision of the said act of the 4th year of her Majesty, is made subject to under such provision."

The recited provision was the 19th section of the 3 & 4 Vic., by which the entirety of the debtor's lands, both present and after acquired, could be delivered in execution, and the *elegit* creditor was made subject to such account in the court out of which such execution should have been sued out, as a tenant by *elegit* was then subject to in a court of Equity.

The new bill varies from this provision, by leaving out the words "or at any time afterwards," and by rendering the existing, and not the future property liable to be delivered in execution; the mode of accounting is the same. It is observable, that for the last nine years a judgment creditor had the power of obtaining the entire of a debtor's lands under an *elegit*, subject to an account in a court of Law, and yet there is no reported instance of a creditor ever resorting to such a remedy, when he had the alternative one of a receiver in a court of Equity.

We commend the alteration in the proposed bill, of depriving a judgment creditor for a small sum of the power of appointing a receiver, whilst the present receiver system is allowed to continue; though the better test would probably have been the value of the debtor's lands, and not the amount of the creditor's debt; but we are by no means enamoured of the remedy by *elegit*.

The 12th Report of the Committee of Enquiry into the courts of justice in Ireland, in giving a history of *custodiams*, and the monstrous abuses to which they led, contains a few observations on some of the defects connected with the law of *elegits*. Amongst others, the expense of the remedy by

ejectment, as sometimes being very great owing to the obstacles interposed by setting up prior leases, by reason of which the creditor was obliged to file a bill in Equity to remove temporary bars. They observe, "It is likewise a hardship incident to the proceedings under the *elegit*, that the debtor, in every instance where an account is to be enforced, is obliged to have recourse to a suit in Equity; a farther disadvantage arises both to the creditor and debtor from the responsibility of the creditor, on the one hand, in a court of Equity for the full, unascertained value, and his uncontrolled discretion, on the other, in setting any lands extended which become out of lease."

It may be as well to mention what discretion the courts of law exercised in granting or refusing an account. *O'Brien v. Gould*, (Al. & Nap. 41;) *per Curiam*.—"Where it appears in the first instance that complex questions are sought to be brought before the officer, the Court will refuse the account."

Holmes, amicus Curie, mentioned to the Court that the Court of Exchequer always refuses such a reference when it appears to involve any complex question.

It was to meet this state of the law that in all probability the words were inserted in the 3 & 4 Vic. c. 105, s. 19, "subject to such account in the court out of which such execution should have been so sued out, as a tenant by *elegit* was then *subject to in a Court of Equity*." But the insertion of these words effects little or nothing, as the officer of a court of common law has not the power to take the accounts in the same way that an officer of a court of Equity could; the former cannot examine the parties themselves on oath, the power of personal examination being confined to courts of Equity.

It was not alone when considered with respect to creditor and debtor, that the system of *elegit* was productive of public mischief and private hardship; the poor working farmer was the sufferer. Powerless as the Court of Chancery has been to allow improvements, it was enabled to attend to his interests better than the *elegit* creditor; he might, if the lands were out of lease, let at what value he chose, but whilst the rent was reserved by lease, he could not abate, or improve, or do a single act of a landlord, except screw out the rent. Amid the conflict of *elegit* creditors, extending bit by bit of the debtor's land, the unfortunate tenant knew not to whom he was to pay his rent; and yet those evils are about to be re-introduced, the remedy of the creditor to be confined, and to confine him to a bad one. The question is, no doubt, one of extreme difficulty; it has not been happily solved by the present bill.

Let us take a practical test of some of the injustice likely to spring from the want of uniformity in the same mode of assurance which will be occasioned by the proposed measure.

There is no distinction made between judgments obtained in adverse actions and those by confession. Let us suppose a just debt for which the creditor is obliged to sue; he obtains his verdict and his judgment in Michaelmas Term of the year 1850, brings his ejectment, and, after much difficulty, delivers his writ, and gets possession in Michaelmas, 1851. A judgment for £160 is confessed by the same

debtor in Trinity, 1851, which becomes a charge from the date of its entry, and has thereby obtained priority over a judgment which was prior in point of time, and the latter judgment creditor can displace the former.

There is an obvious injustice in this. The cause of the outcry raised against the security by judgments has been not from its intrinsic mischief, but from that of the receiver system, and because of it are we to be forced back to the worse evils of an exploded system? It would have occurred to us as more wise on the part of the Legislature to have inquired whether the mode of managing estates under the Court of Chancery was not improvable, to have traced out the cause of the evil and gone to its root, and if it were undiscoverable or irremediable to have explored a fresh remedy, and not through ignorance or forgetfulness to fall back upon a practice which former statesmen condemned.

The Committee of Enquiry, to which we have already referred, suggested the expediency of permitting the *elegit* debtor by summary petition to obtain an account in a court of Equity, and this was by no means a bad suggestion, confining the question solely between debtor and creditor. For the sake of the tenantry we wish to go further and vest some power in a controlling hand pending the continuance of the *elegit*.

If we be right in assuming that the alterations in the bill were made with a view to keep small properties from the control of courts of Equity, and to extinguish *cognovits*, or judgments by confession for trifling sums, we think those purposes would have been fulfilled by prohibiting the appointment of receivers, and there should have been a difference as to classes of judgments, in respect of their being a charge upon lands, in cases where they have been obtained in adverse actions, and when obtained by confession; in the former they should, so long as any judgments are a constituted and fixed lien on land, be so likewise. The Receiver Committee suggested that there should be a year of grace from the entry of the judgment in all cases before a receiver could be appointed; in the amended draft bill we see no such provision; it may, however, have been, ere this, inserted. They further recommend that the costs of appointing a receiver should, as in causes, be paid in the same priority as the demand, and not be the first charge on the fund; we know not whether this provision has been inserted.

Having regard to the lateness of the introduction of the measure, its great metamorphosis since that introduction, and the importance of the subject, we trust sincerely the House of Lords will postpone it until the next session. It has not been prepared with sufficient care or thought, or steadiness of design.

As a matter of legal curiosity we should be glad to learn whether it was ever submitted to the Irish Law Officers, or whether their advice or suggestions were ever asked.

THE case of *Molony v. Nugent* will be found reported in another part of this journal. An appeal has been lodged from the decision of his Honour, and, by permission of the Chancellor, will be heard on Monday.

On the merits of this particular case, whilst it is still *sub judice*, we shall offer no opinion. The reasons assigned by his Honour for removing the receiver, raise a question of considerable public importance. It will appear from a perusal of his judgment, that the only ground of disqualification for office on which he relied, was the fact of Mr. Joly having been an attorney. There is no rule of court to prohibit such an appointment—no ground of misconduct brought against him, except general charges of having allowed arrears to accumulate—and the decision must stand or fall on grounds of public policy.

The question is raised rather unfavourably for his Honour, inasmuch as his decision has reference to a past transaction, and not to a future regulation. It is a removal from office for a cause which was not assigned at the date of the receiver's appointment, and on account of which no exception was then taken.

The case is regarded with considerable interest by the profession; the Law Society were desirous that the appeal should be made; and it is expected, whatever may be the decision of the Chancellor on the particular facts, that his judgment will affirm or disaffirm the general principles enunciated by his Honour. A decision falling short of this will be productive of dissatisfaction, and an explicit expression of the eligibility, or the contrary, of a solicitor for the office of a receiver, is, in fact, essential to put an end to the unpleasant differences of opinion, and practice occasioned by that difference, which now prevail amongst the different judges of the court.

The Masters in Chancery have declined to subscribe to the reasoning of the Master of the Rolls, and continue to appoint solicitors receivers, and they are unanimously of opinion, that their discretionary power should not be controlled. It is obvious that nothing can have a greater tendency to bring the administration of justice into disrepute, than that the judges of the same court should differ on points regulating their practice. We shall recur to this important topic next week.

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To the Editor of the Irish Jurist.

SIR,

A rumour of the foundation of lectureships for the advancement of legal education by our Irish Benchers of the Queen's Inns, which has been some time gaining ground, but of the fulfilment of which I have been unable to discover any trace, has induced me to address you, in the hope that a revival of discussion on the subject might tend to carry this desirable object into effect.

That great advantages are open to the student if he diligently attend to a well-considered course of lectures upon any branch of jurisprudence is now placed beyond doubt by the unanimous testimony of the several learned persons examined before a Committee of the House of Commons on legal education. By the able pamphlet of a member of our Irish Bar,* in a series of letters on legal education to George A. Hamilton, Esq. M. P., and the writer, if experience

* H. H. Joy, Esq. Q. C.

can add weight to testimony, recollects with gratitude and pleasure the incalculable benefits he received from the common-law lectures of our University Member† at the Dublin Law Institute, which, if published, would rank with the deservedly admired course on contracts by the late J. W. Smith, Esq.

This is but a return to the opinion of our ancestors learned in the law, and carrying out the object for which the Inns were founded. In the preface to Mr. Sullivan's series of lectures on the Feudal Law, delivered in the University of Dublin, where, after commenting on the many advantages an educated lawyer may confer upon society, either in his professional or social character, and the imperative necessity of his having in either character a competent knowledge of the laws, which magisterially or judicially he may be called upon to administer, says, "that from hence likewise abundantly appears the necessity of proper methods being laid out for the study of the laws, and proper assistance being given to the youth intended for this profession. This was always allowed, and for this purpose were the Inns of Court originally founded: and it must be owned that in ancient times they, in a great measure, answered this end. Their exercises in those days were not mere matter of form, but tests of the student's proficiency. Their leaders laid down in their lectures the principles of particular parts of the law, explained the difficulties, and reconciled their seeming contradictions."

To this I would add the opinion of Lord Brougham, whose continued zeal for the advancement of legal, as well as every other species of education, must necessarily have led him to bestow much consideration on the subject. Speaking of the utility of lectures says: "Although many men learn law very accurately and even profoundly by their own studies, they would learn it better, and at all events they would learn it easier, and save themselves a great deal of fruitless labour in its acquisition, if they had the benefit of a learned and skilful professor, accustomed to teach, and who was versed in the didactic art, which a person may be very ignorant of, and yet be very well acquainted with the art he teaches." And in the pamphlet we have adverted to, the learned author expresses himself, p. 12: "The main object of legal education ought to be to guide the young student through the labyrinth which the law presents to the uninitiated, and to establish legal principles systematically in the mind, to ground him as a lawyer in the knowledge of principles, as distinguished from a mere mechanical collector of cases."

These passages bring forcibly to the mind the present state of legal education in this country as contrasted with that of the English Inns of Court, as described in the quotation first made by my Lord Coke, (pref. to 3rd Rep.); and at the present day they have united for the purpose of fully carrying out this object.

At a conference of the deputations from the Committees of each of the Inns of Court, 3rd June, 1846, the following propositions were agreed upon to be offered for adoption to their respective Inns.

† Joseph Napier, Esq. A. M., Q. C., M. P.

"That it is expedient to institute rewards, or honours, or both, by way of encouragement to students who may be willing to undergo examinations.

"That for the purpose of preparing the students for such examinations, there should be established four lectureships in addition to that on Civil Law and General Jurisprudence already established by the Middle Temple.

"That the subjects of the additional lectures should be :—

"1. Constitutional Law, Criminal and other Crown law.

"2. The law of real property and conveyancing, devises and bequests.

"3. Those branches of the common law which are not included in the two last heads.

"4. Equitable Jurisprudence as administered in the Court of Chancery.

"That the lectureship for constitutional law, criminal and other crown law, should be maintained at the joint expense of the four societies.

"That the lectureship for civil law and general jurisprudence should be maintained as now, at the sole expense of the Middle Temple.

"And that the other three lectureships should be maintained at the expense of the three other societies respectively,—one for each as shall be hereafter arranged among themselves.

"That no examination should be required of any student as a condition precedent of his call to the Bar.

"That every student should be required, as a condition precedent of his call to the Bar, to produce a certificate of his having attended two of the courses of lectures, the selection to be determined by himself."

These suggestions appear *mutatis mutandis*, admirably calculated to form the foundation of a plan for the guidance of our law authorities, assisted by the now experience of the English Benchers, who have since brought them into operation. Taking them for the present as such, I propose, Sir, with your permission, in my next letter to consider their propriety, and the manner in which they would be best carried out in detail. But the present season, when every person, public and private, sole and corporate, is seeking out some means of testifying their joy at the expected arrival of our gracious Sovereign, to commemorate that event the present would appear to be auspicious for their creation—that Sovereign herself being remarkable for her patronage of literature, and her skill in the fine arts; her consort read in the laws of England, and a bencher of Lincoln's Inn.

B.

We purpose to give extracts from the evidence given before the Committees of the Houses of Parliament, appointed this session to enquire into the Poor Law, and the system of Receivers under the Courts of Equity in Ireland, so far as such evidence bears upon legal questions, and contemplated changes in the law. We shall commence with those portions of the evidence which bear upon the law of judgments.

HOUSE OF COMMONS.

POOR LAW COMMITTEE.

Montfort Longfield, Esq., LL.D.—March 17.

Will you state to the Committee what are the

principal obstacles to the transfer of land in Ireland?—I conceive the facility with which land can be encumbered is one great obstacle to its sale and transfer; and there are obstacles in the expenses caused by the sale, and matters of that kind; but the great difficulty is the making out a title, not as regards the land, but as regards all the encumbrancers, who must be satisfied.

Is there any other difference than that which you have alluded to between the laws of England and Ireland, which makes it more difficult to transfer property in Ireland than in England?—The law in Ireland which makes a judgment assignable has that effect also, to a certain extent. A judgment is a very common security for a debt in Ireland, and a judgment affects all the property of which a man is possessed at the time of the judgment, or which he may afterwards become entitled to; so that if a man sells a small portion of his estate he cannot give a title to it, unless he discharges all his judgment debts. The practice is to accompany every mortgage with a bond in double the amount of the mortgage, and a warrant of attorney confessing judgment is annexed to that bond. Where you talk of a bond in Ireland, it almost always means a judgment; a judgment being so much a matter of course.

Mr. Bright.] I understood you to say, that a judgment which was upon the property of an individual extended to the whole of his property, though that property might lie in the four provinces of Ireland?—Yes, it extends to the whole of his property, wherever it lies. I may give an instance of a gentleman who owes 5,000*l.* or 6,000*l.* for judgment debts; if he has bought a house, for perhaps 800*l.*, and wants to sell it, he cannot sell it till he discharges all his judgment debts.

Would you alter the law in that respect, so that each judgment should not extend over more than the property described in it?—I should make the judgment what it originally was, and give the party holding that judgment no right to take execution against any property after it had ceased to be the property of the debtor, just as personal property is situated now.

Mr. Fagan.] And leasehold property also?—The late Act of Parliament has made leasehold property subject to judgments in the same way as freeholds; that is the Act which in Ireland we call Chief Baron Pigot's Act.

Have you any other suggestion to make as to the improvement in the law respecting the transfer of property: what would be the precise condition in which you would say the law should be?—I would have judgments placed in the same position as they were in formerly; that the judgment creditor should have the right of execution against all the property which the debtor had when he took out execution against him, but he should not have the right to disturb the possession of any purchaser of real and personal property from his debtor; and the judgment then would cease to be an encumbrance.

You say you would have judgments placed in the position in which they were formerly; what was that position?—The change was gradual; first The statute of *elegit*, as it is called, which was

passed in 13 Edward I., gave the creditor the right to proceed against the land of the debtor, and the judges held that that meant the land which he had at the time of the judgment, or at any time after. That was not productive of much mischief, because the executions originally were only taken out within a year. Afterwards the statute of *scire facias* enabled parties, by means of the writ called *scire facias*, to take out execution at any period; and it was held that that incidentally gave the creditor the right, by the doctrine of relation, to take execution against any land which was in the possession of the debtor at any time after the judgment was had against him.

Have you any suggestion to make as to changes in the law, by which the evils arising from the facility of encumbering land in Ireland should be remedied?—I should reduce every mode of encumbering land to one mode of charging it, and I would not permit more than one charge to be on the same denomination of land, and I would not permit any trusts of that charge to affect the owner of the land. Let the trusts of the charge be a matter between the trustees and the *cestuique trust*, precisely like what happens with regard to the funds now, where the Bank takes no notice of trusts, but will do with the funds whatever the trustees desire.

Then, in point of fact, you would assimilate in that particular real property to the custom now observed with regard to personal and funded property?—Yes; to the law as regards funded property; it is not mere custom, but it is the law.

Have you any other observation to make with regard to the working of this measure? (Encumbered Estates Bill).—No. I think the measure will work very well, but it will be of very little use to Ireland unless accompanied with measures to prevent the making of encumbrances that is now going on. There are some estates freed from encumbrances by sales under the Court of Chancery; but on the other hand, there is a constant system of putting on fresh encumbrances, and unless you check the latter process, you will have Ireland in the same state as before.

Can you suggest any remedy for the present uncertainty of title in Ireland?—I do not think there is any considerable uncertainty of title in Ireland; I think a purchaser in Ireland can be as certain of his title as a purchaser can be in England; there is an expense in making out a title, owing to the number of encumbrances, but there is no uncertainty of title.

Mr. Bright.] Do you know whether that is the opinion of English conveyancers with regard to Irish titles?—I do not; but I am sure that the English conveyancers do not understand the matter; they do not know the law in Ireland, and I do not think they are competent to give an opinion upon the point; I never knew a title in Ireland shaken in the slightest degree, except where there was gross neglect on the part of the purchaser, and where proper searches would have shown that the person was not buying the property of the proper person.

You spoke just now of what was necessary to prevent the accumulation of those difficulties in future: do you conceive that any measures which

have already been submitted to Parliament, as far as you have seen them, tend to prevent the recurrence of the evils which are now complained of?—None whatever.

At this moment that we are inquiring is the evil going on and accumulating throughout Ireland?—It is going on, but not accumulating, for there is a double process; at one end selling estates to pay encumbrances, and at the other end putting new encumbrances upon estates by other people; you may for some years have one process going on a little more rapidly than another, but it will come to its average again.

As the process is going on at both ends, can you see a prospect of the country being restored from the condition in which it is now placed by those evils?—No, no prospect whatever, except that arising from a hope and wish that the country may amend.

Will you give the Committee your opinion as to what is necessary to be done to check the growth of those evils?—To alter the law, so that a man who wants money beyond what his income will yield him may find it cheaper to sell a portion of his estate than to encumber it; he will be pulled up much sooner when he sees the estate going from him than when he merely signs a few extra deeds, of which perhaps he does not understand the full effect. Then I would have each encumbrance expressed in a particular form, specifying the land on which it is placed, like passing personal property; and I would permit an encumbrance to be only upon one denomination of land. My idea, then, is this, that a man who wanted money would mortgage, or rather charge, (because I would put an end to mortgage)—would charge the Blackacre with it, and let the rest of his property remain untouched; and if afterwards he wanted more money he would charge another portion with that, or he would increase the charge upon the first property, still having only one charge upon it; if he wanted to sell any portion of his property he might sell that portion, because there would be only one charge upon it, and he would not be obliged to discharge all the encumbrances by which he was affected.

When you speak of increasing the charge, do you mean that you would not allow a man, having borrowed a thousand pounds from *A* on a certain property, to borrow another thousand pounds from *B* on the same property?—I would not allow it; let him go to *A* and increase his charge upon that property, or go and charge some other portion of his property to *B*, or sell another portion of land.

I collected from you that you traced the evils of Ireland, not exclusively to registration, but to registration combined with the law of judgment creditors?—The law relating to judgment creditors I think also a bad one, and that it contributes to increase the encumbrances.

Your great principle, as I collect it, is that the owner of a real estate should exercise the largest possible power over it while he lives and enjoys it?—Yes.

Is not this jealousy of yours with respect to charging inconsistent with the exercise of the largest power, during life, by the owner?—I do not think it is, for it relates merely to his power as be-

tween two innocent parties, as between a purchaser and the encumbrancer. I would let him charge it as against himself, but I would not let him charge it as against a purchaser from himself.

Why are you jealous of his exercising a minor power, namely, of charging within the full extent of the value?—Because I see the evils to which the exercise of that power leads, and because I see that it is a power which is naturally liable to abuse.

You have admitted that it is a restraint upon the right of property during the life of the owner, which restraint you think must be imposed for the public good?—It may be called a restraint during the life of the owner, but I do not think it is; it is merely limiting or pointing out the manner in which he can raise money on his property; he ceases to be the owner when he encumbers it. I merely say that he shall sell it instead of giving the party a charge on it.

As I understand you, you would have no portion of his land, whether it be a field or a township, subjected to more than one charge?—Yes, subject only to one charge.

I collect that whatever may be done with regard to arrears of poor-rate, whatever may be done with respect to marriage settlements, or even with respect to primogeniture, still you think the danger of accumulating incumbrances in Ireland would be left untouched, while assignable judgments with registration continues?—I think so.

What would be the effect of placing the law of debtor and creditor in Ireland, *quoad* judgments, exactly on the same footing as that upon which it stands in England?—The law in England respecting judgments has been altered within the last few years; and I do not think that you have had yet full experience of the mischief of the alteration.

Has there been an alteration of the law of England assimilating the law, *quoad* judgments, to the law as it exists in Ireland?—Yes; a judgment in England is now a much more formidable lien on land than it was formerly.

Does it act to the full extent to which you have gone in Ireland?—It has gone to the full extent, except being assignable; it is not assignable in England.

Is that an important difference?—Yes; because it makes a judgment a more convenient security, and therefore tends to produce the habit of accepting a judgment as a security.

And being assignable it supersedes the necessity of holding the deeds?—Yes.

In England no security is considered first-rate without the possession of the deeds?—That was the case; but I think it possible that a contrary habit will grow in England if the law is left unaltered.

There have been two great alterations in the law in Ireland with respect to judgments, have there not?—Yes.

When did they take place?—Those two alterations, to which reference was made yesterday, are hardly to be called alterations at all; they were in the time of George the Third.

Nothing since then?—Nothing since then; they were alterations relating to *scire facias*.

There has been no alteration in the operation of the law, particularly in Ireland with respect to judgments?—There is the one law, making them assignable.

What is the date of that?—I think ninth Geo. II.

Are you able, as a matter of legal history, to state that that alteration has been found in date simultaneous with the increase of encumbrances in Ireland?—No; I am not able to state that as a matter of history.

Has the net of encumbrances been more widely spread, and more difficult of extrication within the last generation in Ireland?—Within the last two generations; I think so. I have seen many old conveyances, and old searches for title, and certainly they were not attended with the same difficulties that more modern ones have been.

With regard to the operations of judgment, has not the mischief of judgments been very much increased by what is called the Sheriff's or Receiver's Act of 1835?—Very much; and still further increased by what is called Pigot's Act.

Do you think that the difference between the operation of the laws in Scotland and in Ireland might be explainable in this way, that the one rather encouraged the frailties of the people, and that in the other case those frailties did not exist?—I think that that accounts for a great deal of the difference.

Was not the extensive use of judgments in Ireland caused by the inability of the Roman Catholics to grant and receive mortgages?—It has been sometimes attributed to that cause.

Do you attribute it to that cause?—I do partly.

Therefore the confusion in our titles has been caused in fact by penal laws?—It has been increased by penal laws.

Isaac Butt, Q.C., March 22, 1849.

Will you state your opinion upon the effect of judgments upon landed property?—I have a very strong opinion that one of the greatest mischiefs to landed property in Ireland, and which is in a great degree the cause of its present embarrassed state, is, that judgments are common assurances in Ireland. The law in England and in Ireland with regard to judgments is exactly the same, with one exception, which may perhaps have caused the difference that exists between the two countries; and that is, that in Ireland the judgment is assignable by law, in England it is not assignable at law. By an Irish statute passed in the reign of Queen Anne, a judgment was made assignable at law; that is, if a party has a judgment against another, by an entry on the records of the court he can assign that judgment to any person. By this entry the assignee becomes the legal owner, and there is no other party upon the records of the court acknowledged as the owner.

And his interest may be sold?—Yes; I am disposed to think that that statute was passed in consequence of what are called the Popery laws—the penal laws against Roman Catholics holding mortgages. It had become the object both of the Protestant landed proprietors, and of Roman Catholics who had money, to get a security upon land that would be in the nature of a mortgage, and evade the law; and very probably the same circumstances have led to this, that now a judgment is a very common way of borrowing money in Ireland by a landed proprietor instead of mortgaging.

Does it not appear a very natural and proper thing that judgments should be as assignable as any other kind of property?—It does; but I think

that anything is impolitic that gives a landed proprietor facilities for encumbering his estate; and I think the use which has been made of judgments in that way, has led very much to the encumbering of land. There is this difference between judgments and mortgages which must not be forgotten; a judgment is a charge upon all the lands that a man has, and not only upon all the lands that he has, but upon all the lands that he may hereafter acquire; so that if a man has estates in every county in Ireland in small lots, the judgment is a charge upon them; if he sells one of those estates he must sell it subject to the judgment; and if he purchases another estate in another county, that other estate is also subject to the judgment. There is, I can conceive, nothing more mischievous, and more calculated to embarrass property than the system of judgments in Ireland.

Sir J. Pakington.] Is not the unavoidable effect to charge a judgment upon any species of property that a man has?—There is no provision of the law which enables you to do that.

Mr. Bright.] Is it not usual in mortgages in England for parties to insert a variety of property, far more than is necessary for the real security of the mortgagee, for the purpose of making the security still more secure? Does not the lender very frequently wish to include all the property of the party to whom the money is lent?—I should think not all; in practice it is not so; but very often where mortgage and judgment are collateral, as they generally are in Ireland, you find the judgment affecting a number of estates that are not included in that mortgage.

Has it not the effect of encumbering estates unnecessarily, if adequate security can be given to the mortgagee by encumbering only a portion of the estate, instead of encumbering the whole of the estate?—Yes; and a judgment affects not only the estate which a man may have now, but any estate which he may at any period of his life hereafter acquire.

Sir L. O'Brien.] What would you say if it were limited to the estates a man had at the time of obtaining judgment?—I think that would be an improvement; but having thought a good deal upon that subject, I would be strongly of opinion that the best thing that could be done would be to abolish the law altogether, making judgments a charge upon landed property.

Sir J. Pakington.] From what cause has arisen that practice of granting judgments conjointly with mortgages in Ireland, which is so different from the system of raising money upon landed security in England?—It is a very singular thing, that with the law the same in the two countries, with the exception of the judgment being assignable in Ireland, but not in England, this material difference has arisen; and I trace it to the circumstance of judgments being assignable in Ireland. The practice originated, I think, in the penal laws.

But you would abolish the system of judgment?—I would abolish the law of making judgment a charge upon land, as it now is; I would allow a landed proprietor to borrow money on judgment under the penalty, if he did not repay it, of having his creditor take him in execution, or take his goods

in execution, or take his land in execution; but I would not allow a judgment to subsist as an indefinite charge upon his land.

Sir J. Pakington.] Is that system carried to such an extent that an Irish proprietor would find a difficulty in raising money without a conjoint judgment?—I do not think money would be lent him without a conjoint judgment. If I myself were advising a lender, the common practice of the country being that the lender should take the security of a judgment, I should advise him to require that security to be given to him.

Colonel Dunne.] The receivers are appointed under the Pigot and O'Loghlen Acts?—Yes.

Sir J. Graham.] Do I understand the effect of your evidence correctly, when I suppose that the encumbrance of the judgment or judgments is as it were concentrated in the present owner of the land, so that however small the sum for which a judgment may run against him, he cannot part with any portion of his estate without clearing off that judgment debt?—It is so.

Colonel Dunne.] The evil effects of that system are increased by the recent Acts of O'Loghlen and Pigot?—The act introduced by Sir M. O'Loghlen enables a judgment creditor to obtain a receiver on petition over the lands of his debtor; it did not enable him to sell his estate. A judgment creditor could not then sell the estate of his debtor during his life. After the death of the debtor he had the power that any creditor, whether by judgment or otherwise, had of filing a bill to administer the assets of his debtor, and if his personal property were insufficient to pay his debts the land he left would be sold. But an act introduced by the present Chief Baron placed judgments on a totally different footing. It made them actual charges upon the land, equal in operation to a specific charge created by deed. By the operation of that act a judgment creditor can file a bill for the sale of his debtor's estate in right of the charge it gives him upon his land. I think the effect of this act has been to add to the embarrassments of the landed interest; it has multiplied suits and receivers; and I think that these suits, which may be called profligate suits, that is, suits instituted for the sake of the costs, have been in most instances instituted by the operation of this act. Small judgments have been purchased up for the purpose of instituting a suit. Before the act a judgment did not entitle the party owning it to institute such a suit.

Sir J. Graham.] You would revise the whole law of Ireland with respect to judgments?—I have formed a very strong opinion, and I think upon very good grounds, and with sufficient experience to enable me to form a judgment; I would not make a judgment a charge upon land.

And consequently the whole process of appointing receivers under judgments would fall with it?—Yes. And in causes I think the courts in Ireland grant receivers with too much facility. Receivers ought not to be appointed in cases in which the termination ought to be a speedy sale; and I think if some change were made in the Court of Chancery, the effect of which would be to bring causes to a speedy termination, receivers in causes would die away of themselves.

Then you would abolish judgments?—I would; that is, I would not let them be a charge upon land.

Mr. P. Scrope.] Would you allow two mortgages to extend over the same property, or would you prevent that?—That would be exceedingly difficult to do by a legislative enactment. I consider there is a great objection to a legislative enactment interfering with a man's disposition of his property; but I would not give him any facility for encumbering his property; the present Registry Acts do give him a facility. But I am afraid it is so interwoven with the country that it is almost impossible to get rid of it.

Sir J. Graham.] Does your observation apply to any change of the law with respect to judgments?—No.

It is not so interwoven with the country?—No; if the present system were changed, you could not say to a man who now has a judgment, "We will alter your security." But there is not the least difficulty in saying that the judgments hereafter entered up shall not be a charge upon any lands, or that any lands which a man may subsequently acquire shall not be charged by any judgment now entered up.

Therefore you see no difficulty in prospectively cutting off that mode of charge?—No.

And immediately?—Immediately. The Pigot act did what I conceive to be extremely mischievous in relation to judgments; it made them, for the first time, charges upon leasehold interests; there was a large portion of properties held for long leases that were, before that act, free; that act made judgments charges upon all that interest. The question has never come to a judicial decision; but I entertain the opinion that by the recent act of Sir Edward Sugden, the provision of that act has been repealed to this extent, that judgments do not now affect the purchaser of a chattel leasehold, who has not notice of them. But I am afraid that in practice this will be unavailing, and that to guard himself against any risk from the possibility of notice, the purchaser of such an interest will still search for judgments. If he does, of course he has notice of all that appear on the search.

If it has not been repealed, does the Pigot act render property held under long leases liable to be managed by receivers, which it was not liable to before?—The repeal of which I speak, only relates to the case of a purchaser. The judgment has in any case its full force against the property in the hands of the debtor; but Pigot's act very much embarrasses the sale of such property; and I have personally seen the inconvenience of it. Houses in towns are very often held for a long term of years; if you buy a house in Dublin, you have to search for judgments against the person holding the leasehold estate, exactly as you would do if you bought a freehold estate.

Till the Pigot act, leases under colleges and under episcopal bodies could not, in the case of a judgment, render the property liable to have a receiver appointed over it?—No; and it affects the sale of those properties which are liable to be sold in execution by the sheriff. Formerly a leasehold interest could be sold exactly in the same way as the furniture of a house; but now, in conse-

quence of the judgments becoming a charge upon it, this is impeded.

It had the further effect of making it liable to be managed by a receiver, which it was not liable to before?—By a receiver on a judgment; there was another effect of Pigot's act; formerly judgments did not bind the equitable estate; if for instance a landed proprietor had an estate that was let for 99 years, and he sold that estate, a judgment against the landed proprietor could not bind that term; if the purchaser got an assignment of that term without notice of the judgment against the proprietor, he got the estate free from the judgment, because the judgment did not bind the equitable estate unless the purchaser had notice of it. The law has been changed in that respect. In practice, however, I believe the protection of an outstanding term was not relied on in Ireland, owing to the Registry Act.

Seeing the extension which, under various acts of Parliament has taken place of the principle of judgments, with all those evils that you attach to it, you would recommend a prospective and immediate reversal of that state of the law?—I would. I do not think it can be done too soon.

IN CHANCERY, IRELAND.

Robert Edward Gibbins, Plaintiff.

The Right Honorable Henry John Reuben, Earl of Portarlington, and others, Defendants.

WHEREAS it has been represented to me, that several of the Creditors on the Estates of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, have neglected or omitted to come in and file charges on foot of their respective demands and incumbrances, pursuant to the decree of the 6th day of February, 1847, and that the time limited by and for the said purpose has expired, and that it is expedient to extend said period: Now I require all Creditors and Legatees of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, and also all persons having Charges or Incumbrances affecting the real and freehold Estates of the said late Earl of Portarlington, to come in before me at my Chambers on the Inns Quay, in the city of Dublin, on or before Tuesday, the 30th day of November next, and proceed to prove and claim the same, otherwise they will be precluded the benefit of said Decree.

Dated this 30th day of June, 1848.

K. LITTON.

John Warnock, Plaintiff's Solicitor,
30, North Great George's Street, Dublin.

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TERMS OF SUBSCRIPTION—(payable in advance):

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Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, July 23, 1848.

THE Irish Jurist

No. 40.—Vol. I.

AUGUST 4, 1849.

Price { Per Annum, 21 10s.
Single Number, 9d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

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DUBLIN, AUGUST 4, 1849.

THE differences of opinion which exist between the Master of the Rolls and the Masters in Chancery as to the eligibility or non-eligibility of attorneys to be receivers cannot but tend to accelerate a change in the whole present system of the management of estates under our courts of Equity. "A house divided against itself cannot stand." That change we have long advocated as important, has now become inevitable.

The Master of the Rolls has enunciated the principle that an attorney is not eligible for the office of receiver, and that "on the plainest grounds of public policy." His Honor's observations, or rather his deliberate judgment in *Molony v. Nugent*, lead to the conclusion that, in own court, he is prepared to act universally on this principle; and, in the case before him, he enforced the rule with a retrospective operation.

On the other hand, Master Litton, in a carefully prepared judgment, has expressed his dissent from the principle, and stated his own deliberate conviction, that attorneys, when resident, are the best receivers. The decision of his Honor has been reversed, and the Chancellor has decided that there is no rule of court, or of law, to prevent the appointment.

The evidence of Sir Edward Sugden before the Receiver Committee was relied on as implying that the rule of law was against the appointment; and he certainly does state that the practice of the court was against it, and, therefore, that the General Order was only directed against attorney's clerks and apprentices; but his unpremeditated answer, after a retirement of three years, may have resulted from mistake or a lapse of memory. The practice of appointing independent solicitors to be receivers always prevailed; that of appointing a partner of

the solicitor for the plaintiff, or some nominee of his on "a proper understanding," at one time also extensively prevailed, and led, we do believe, to the foulest abuses and grossest system of plunder and jobbing.

It was to this practice Sir Edward Sugden must have alluded, and this he and every other judge has discouraged, but we fear not yet entirely annihilated. But there has never been a positive rule of court or of law disqualifying attorneys, disconnected with the cause or matter, from being receivers. Speaking generally, we concur in the view of his Honor that practising attorneys and barristers are not fit men to be receivers; those of both classes who have much practice are very unlikely to accept the appointment, but we think it unwise to lay down an unchangeable rule; but, in truth, having regard to the only duty of the office—to receive—it matters little under the present system what may be the profession of the individual who fills it. Under existing circumstances an inflexible rule it certainly ought not to be; and, for various reasons, a discretionary power should be vested in the Master.

It is impossible for the great majority of men who are really competent to fill the office;—from their education as land agents—to obtain securities to that amount and number which would give them an aggregate rental, upon the percentage allowed for the collection of which, they could live independently, and devote themselves entirely to the management of estates under their controul.

Mr. M'Cay's very valuable evidence before the Receiver Committee has shown that the vast bulk of properties under our Courts of Equity are small: they are also scattered; or in cases in which they are adjacent, so circumstanced, that the former agent or nominee of the plaintiff, frequently must obtain the Receivership. It is, as a general rule, impossible to combine a sufficient

number of Receiverships in one locality, to secure a resident agent who will attend to no other duties; and even if that number could be found, it would be impracticable for one individual to obtain the number of distinct securities that are required by the rules of court. The multiplication of recognizances would, in most cases, be found an insuperable bar.

The best class of Receivers are men educated for the purpose, but that class cannot be had in most cases, so long as the practice of the court remains unaltered.

If then, in cases of small properties, the court cannot procure the undivided services of a well qualified Receiver, and if the Receiver, in order to support himself, must unite other business with that of his office, the objection to a solicitor is no greater on that ground than would apply to any individual who would take the appointment in connection with his other avocations.

Other reasons may be suggested why the rule should not be inflexible. Suppose the property to be house property in a town: where is the superiority of an agricultural over a legal receiver? Suppose again that the family solicitor had been the family land agent for the last twenty years, and the property were placed under the court for the discharge of a judgment debt which would be paid by the perception of two years rent; in such a case, would it be just or advisable to remove the former agent, with his pre-existing knowledge of the estate and the tenantry, and substitute a farmer, grocer, or absentee land agent in his stead?

In discussing the capabilities of the different classes for office, the important testimony of Master Henn and Master Litton cannot be discarded, and their reasoning is almost conclusive in favour of solicitors, but only so long as a system continues to exist, which is so cumbersome and complicated that no uninitiated country gentleman can understand it.

The grounds of public policy which his Honour adverted to, but did not state, must in some degree rest on the fitness or unfitness of a person immersed in other pursuits engaging in one, which requires an attention he cannot bestow, and a knowledge he does not possess. This applies very generally, and we concede at once that town solicitors and barristers in practice are unfit to be receivers, and unquestionably none of that class should ever be appointed, or seek the appointment; but there may and do exist members of both professions whose early habits and pursuits, whose tastes and connection with the estate may eminently qualify them for the office, and we should pause before we laid down an inflexible rule of exclusion.

Another ground of public policy—stated to be sufficient to disqualify attorneys—is the tendency that legal men have to create costs, to “give more law and less money,” to look at everything through a legal medium, and if they cannot make costs themselves to create a job for a brother. It is idle to say that too much of this system has not been adopted, and it is notorious that numbers of estates are thrown into the Court of Chancery to create costs, but it is rather the office of solicitor for the receiver than that of receiver-solicitor that, in this view, is the really desirable appointment.

Delinquencies and delinquents should be punished in proper cases, in every case where the office of receiver or receiver's solicitor is practised corruptly, whether it be by attorney, private gentlemen, grocer, land agent, or farmer; no class is immaculate. “Even virtue's self will sometimes bear away her outward robes, soiled in the wrestle with iniquity.” But an entire body is not to be punished because it possesses unworthy members. The opinion of Master Henn, which, founded on his long practice, is deserving of attention, is, that attorneys are the least expensive receivers, as they cannot charge for attendances, or for advice given by themselves to themselves. We agree that there are certain items they cannot charge for; but there are law proceedings which an attorney receiver will be more apt than a layman to deem necessary, and which a Master will be sure to sanction.

The Master of the Rolls has appealed to public opinion; a discriminating public opinion, we think, will pronounce against the exclusive rule.

It is one thing to be convinced that abuses do exist—and public opinion will unhesitatingly coincide in that; but the reflecting public will differ as to the mode of administering correctives for those abuses. The Chancellor has pointed out the mistake into which his Honour—actuated, we have no doubt, by the sincerest desire for the public good—has fallen, that he has considered the question more in the character of the legislator than that of the judge.

The Master of the Rolls cannot entertain a stronger opinion than we do of the necessity for a thorough reform of the administration of estates under our courts of Equity. We want a concentrated governing body, acting with educated and trained officers on a uniform system.

But we must distinguish the evils of a system from the shackled agents who have to carry it out; we should not visit on the latter those offences which are chargeable upon the former.

We have felt the question to be of such general importance, that we have opened our columns to the letter of our correspondent P. It was a question on which we knew that we could not be silent; and we cannot close this article without expressing our deep regret at the mode in which the Master of the Rolls has expressed his opinion, towards a brother judge, who never said an ungracious thing; whose courtesy, whilst it never interfered with the firm and conscientious discharge of his duties, has endeared him to every professional man who has had the privilege of practising before him.

We can conceive no deeper wound capable of being inflicted on the administration of justice in this country, than that by which members of the same court are shewn to be at variance, one speaking disrespectfully of the opinion of the other, and the other replying in language of strong retort. Men in high official legal position should be guarded in their use of language; an expression by them of approval or of dislike to an individual, may make or mar his fortune. When one judge differs from another, if he wish to preserve the respect of the public for the judicial office, he will treat the opinion of the judge from whom he differs, with courtesy and respect. There never was a better aphorism for judges than

that which tells them "to express their own opinions with moderation, and to treat those of others with deference."

To the Editor of the Irish Jurist.

SIR,

In your last number you promised to recur to the important question of the propriety of appointing solicitors as receivers under the courts. Having spent some thought on this subject, I take the liberty of addressing you thereupon. The whole question of receiverships under the Courts of Chancery and Exchequer has been lately brought much before the public; but the attention of the profession has been particularly turned to this peculiar branch of it, by a series of judgments, in which the practice of nominating as receivers, solicitors, or persons in any way in their confidence, has been most energetically denounced. It is true that barristers, physicians, and traders were also stigmatised as improper persons to undertake the office; thus including almost all the classes amongst which we can find men trained to habits of thought, of method, or of accuracy; but it is quite plain that the judicial mind was more appalled by the enormity of permitting one solicitor to be appointed, than it would have been by the distribution of all the receiverships of both courts amongst the other disqualified classes. Sir Edward Sugden in his examination before the Select Committee of the Commons on Receiverships,* stated that by the practice of the court a solicitor could not be a receiver. Had not the assertion been made by so very eminent a judge, it would have seemed impossible to suggest that solicitors were hitherto disqualified; and the only probable mode of accounting for the opinion is, that Sir Edward Sugden meant to confine it to solicitors in the cause. The Master of the Rolls, however, stated to the Committee† that Sir Edward Sugden was under a misapprehension on the point, and the doctrine of the text books, the reasoning of Master Litton in *Molony v. Nugent*, (1 I. J. 322), the constant practice of both courts, and the Lord Chancellor's decision in *Geale v. Nugent*, leave no doubt that no inflexible rule exists which binds the Masters to reject a solicitor in exercising their discretion as to the fittest person to be appointed receiver. It does, however, seem very doubtful, whether any single judge has it in his power now to lay down any such rule, with no higher authority in its favour than the recommendation of a select committee of the Commons, which can hardly be considered as effecting a change in the law; still less ought any one to be punished by the infliction of costs for having acted upon the law as heretofore understood. Many of the members of the Select Committee seemed impressed with the idea that much might be accomplished by the exertions of individuals; but in acting on the great maxim "*Aide toi et le ciel t'aidera*," the self-dependent reformer should be

careful not to encroach on the duties of the higher powers.

If, however, a principle be in itself correct, much allowance should be made for the person, who, in attempting to carry it out, should even exceed the limits of his jurisdiction; but there seems grave doubt as to the expediency of the proposed rule. We may assume that the organization of a staff of professional agents—men whose lives should be devoted to the management of property, is for the present hopeless. It would be difficult to find the materials from which to form such a staff, and the opinions of many authorities of the greatest weight are opposed on principle to its creation. For some time longer it is certain that estates under the courts must be managed by persons not possessing any special professional qualifications. Is it, under those circumstances wise, that barristers, physicians, traders and solicitors should be absolutely disqualified from becoming receivers? Such is the question.

Almost all those best acquainted with the management of property in Ireland dwell much on the necessity of the agent residing upon or near the property under his care. Amongst those who have expressed this opinion most strongly may be mentioned the Master of the Rolls* and Master Brooke;† the report of the Select Committee also presses on this point, while the evidence taken by the Land Tenure Commission contains many complaints of the non-residence of agents. Without this principle all hope of improvement seems vain, and its operation will certainly exclude any man, law or lay, who does not reside for the greater part of the year on or near the estate, if any one can be found who does. If the estate be one where the fees afford a sufficient remuneration for the whole time of men of character and intelligence it seems but common honesty and common sense that the whole time of the receivers should be devoted to it, and the court may well, in such cases, insist on his relinquishing all pursuits which may in any way distract him from his duties. But it appears from the evidence of Mr. McCay‡ that scarcely 12 per cent. of the estates under the courts amount to £1000 a-year, the receivers fees on the remaining 88 per cent. are consequently below £50 per annum. Who will give up all other employment for such a salary? Is it likely to be a man of "independent character and personal influence?"

When the estates under the courts are concentrated it may be possible for one person to undertake the management of several; but they are frequently much scattered, and the choice must then be made between a man whose active labour is worth but £50 per annum, who cannot procure any higher remuneration, and one, a portion of whose more valuable time is already occupied. Can there be a doubt which to choose? Surely where the receivership is so small that its fees cannot purchase the whole attention of a competent person, the best possible arrangement is to employ a portion of the time of one who has already some other occupation. It will be conceded then that the receiver may have

* Examination of Select Committee, p. 47, ques. 518.

† Examination Select Committee, p. 93, ques. 1038.

* Ev. Sel. Com. p. 98, qu. 1116; p. 103, qu. 1165.

† Ev. Sel. Com. p. 18, qu. 148 to 151; p. 16, qu. 192, 193.

‡ Ev. Sel. Com. p. 139, qu. 1564, 1565.

some other employment. We have seen that he *must* live on or near the estate; the most suitable resident in the neighbourhood must, therefore, be appointed. Now, what are the component parts of rural society? which of its members are best qualified? Clergymen are excluded by statute; traders, physicians and solicitors by the proposed rule; there remain land proprietors and farmers. But what proportion of the land proprietors would accept receiverships? What proportion of those who would accept them are capable of fulfilling the duty? Do they in general manage their own estates so well as to make them models for imitation? If not, why do we expect more favourable results where there are less powerful motives for exertion? It is to be feared that too many of our country gentlemen are sadly deficient in those habits of business and accuracy by which alone property can be satisfactorily administered. As a normal school for proprietors the arrangement might be valuable, but it would hardly be just to complete their education at the cost of encumbered estates. Farmers, when men of intelligence and education, frequently make excellent receivers; but, unfortunately, the number of farmers who possess those qualifications is very limited. In many parts of the country there are few, if any, above the rank of manual labourers; and even the agricultural knowledge of too many of those who consider themselves of a higher grade is limited to the alternation of exhausting white crops with scanty pasture. Almost all who live in the country have, at least, such a knowledge of farming; but those whose chief profession is not agricultural, have, in general, the additional merit of not being wedded to old and erroneous systems.

It does indeed seem difficult to say why the classes mentioned in *Reynolds v. Reynolds* [cited in *Geale v. Nugent*, (1 Ir. Jur. 321)] were singled out. If inconsistent occupation be an *objection*, (and we have shewn that it cannot be considered a *disqualification*), it applies as much to those who were admitted to be qualified. The business of a large farmer must demand at least as much of his time as that of a trader in a small town, a country doctor, or a local attorney. That seems to be the only objection pressed against two of the classes; but with regard to solicitors as receivers, a further prejudice seems to exist, apparently founded partly on a species of legal fiction, that they are always in the superior courts attending to their clients' interests, and a complete ignorance of the existence of such beings as country attorneys; but chiefly upon the idea that they are in some way or other interested in increasing the law costs of the estate. The simple answer to this is, that they are not, and can not be so interested, for the practice of the court will not permit them to act in their own behalf. It is sometimes hinted, that in order to evade this rule, they, while actually doing the business, and receiving the profits, use the name of other solicitors. It might be a sufficient answer to say, that even the Select Committee, though not a little actuated by something of the prejudice against lawyers which distinguished the Lack Learning Parliament, could procure no evidence of any such case; but when we recollect that the court exercises a most summary jurisdiction over its officers, that any solicitor who

was convicted of such a fraud would very probably be struck off the roll, and that any attorney permitting his name to be so used, violated a solemn oath, we must believe that if such cases do occur, they are very exceptional, while the appointment of farmer receivers does not prevent at least an equal suspicion of similar fraud.* Master Litten, in his very able judgment in *Molony v. Nugent*, (1 Ir. Jur. 322,) shows how much the legal knowledge and business habits of a solicitor receiver may often save and benefit the estate, and without going quite so far as to say that they should be preferred, there certainly does not seem any sufficient reason for their exclusion.

The report of the Select Committee recommends: "that the receiver should be resident on or near the property, acquainted with agriculture, of independent character and personal influence." How is such a man most readily to be procured? Is it by narrowing or by extending the qualification? There are not so many such men in every district in Ireland, that it is expedient to reduce the number from whom to select. Let the office be made less hazardous, let the difficulty of arranging security be diminished, let the Master have more opportunity of testing the fitness of the candidates, and we may hope for at least some such appointments. The report of the Committee of the Law Society gives some most valuable suggestions for the improvement of the practice in appointing receivers; going pretty deeply into the details requisite to carry out the principle of careful selection advised by the Master of the Rolls and the Select Committee; and by the working of some such principle may we hope to see a better class of receivers, which is not likely to be produced by any rule of exclusion—of all systems, that most opposed to the feelings, the tastes, and the tendencies of this age.
P.

◆

Report of the Committee of the Society of the Attorneys and Solicitors of Ireland, on the subject of managing Estates by Receivers under the Court of Chancery in Ireland, with the suggestions of the Committee for the improvement of the present system.

We have considered the subject of the management of estates by Receivers under the Court of Chancery in Ireland, and beg to state that we conceive the change of property likely to take place in consequence of the measures now before Parliament, the probable decrease in the number of orders for Receivers, which will be consequent on the bill to amend the law concerning judgments, should it be passed and the capability which exists of improving the present system, render it exceedingly undesirable, that any new tribunal, or new machinery for the management of estates in the hands of the Court of Chancery should be established; any measure of the kind must entail serious expenses, on owners of estates, and the officers of the Court, and it must be difficult, if not impracticable, to foresee to what extent officers and assistants would be required by

* Ev. Sel. Com. p. 15, qu. 182.

† *Infra* Ed.

such a tribunal for an efficient discharge of its duties. The present system secures the important principle of making each estate defray its own expenses of management, and no more, and all that is required is to add to the despatch of business, to diminish expense and to place the management of estates under the Court upon an improved footing, and we are of opinion that this can be accomplished with ease and by reforms involving no fundamental changes.

For the purpose of carrying out these views, we suggest that the jurisdiction of the Masters in reference to the management and setting of estates under the control of the court should be enlarged, and in particular that they should be enabled to make leases for terms not exceeding 21 years, without the consent of the inheritor, adopting in suitable cases the form of lease prescribed by the 9th & 10th Vic. c. 112, and that they should be empowered in all causes and matters to entertain applications for reductions in rents, and with or without the consent of the parties, and whether the tenants hold by leases or not, to make such reductions as they may think proper for any period not exceeding the pendency of the cause or matter, and that the Masters when letting property should be at liberty to dispense with security, or take any description of security they may think suitable to the circumstances of each particular case.

That the Master should have power to delegate to the receiver authority to act in certain cases on his own judgment without coming to him for formal orders; but in such cases the receiver should be responsible for his acts, and should on the next proper occasion bring the matter before the Master for his approval and confirmation; and that the Master, on the application of any party interested, should be at liberty to enquire into any matter connected with the management of the estate, and the conduct of the receiver, without any order of reference from the court for that purpose.

With the view of securing in every case the appointment of the most eligible person as receiver, that it should be the duty of the solicitor having the carriage of the order for the appointment of the receiver, to insert advertisements in the local papers, stating shortly that a receiver is to be appointed over the property in question; and that all persons are at liberty to send in applications to the Master and the solicitor; and that any applicant may be put in nomination, and that the Master may be at liberty to appoint any such person, although he may not have been put forward on behalf of any of the parties in the cause or matter, and in furtherance of the same object of having the most efficient and eligible persons appointed, that the present mode of giving security should be altered. That the security of the Guarantee Society, or of any other public company approved of by the Master should be accepted, or that the receiver should be at liberty to transfer to the credit of the cause or matter an amount of Government Stock not exceeding one year's income to be dealt with in a summary way on the order of the Court or Master, or that the security by recognizance should be limited to one year's income; and that every receiver within six months after his appointment, and

within six months after passing each account, without any special direction for the purpose, should file an affidavit in the Master's office, stating the amount received since his appointment or last accounting, the amount disbursed by him, and the net balance then in his hands, and that such balance should be then invested or otherwise disposed of as the Master should direct.

That in all cases, unless the Master should otherwise direct, applications in reference to the management of estates, and the letting of lands should be made to him on notice to the parties without a statement of facts being filed, and that the Master should make such order thereon as may be necessary.

That a separate book should be kept in the office of the Master, in which should be exclusively entered all orders and directions in reference to receivers, and the management and letting of estates; that copies of such orders signed by the Master's examiner should be a sufficient authority to the receiver for acting thereon; and that this receiver's book should be open to the parties and their solicitors, to inspect and extract therefrom without fee, (certified copies when required to be paid for.)

That receivers' accounts, after being vouched and passed, should remain in the Master's office, and at regular periods be bound up and indexed, and should not be filed in the register's office, but that the Master should certify to the court that he had passed and allowed the account, and stating the amount of the receipts and disbursements, and the balance due to or by the receiver on foot of the account, and which certificate should be of the same effect as that now annexed to the receiver's account, and that the receiver's solicitor should not be obliged to take out an office copy of his own account.

That the expenses attending the management of estates under the court may be curtailed by a more careful and economical mode of advertising, and by diminishing the present heavy fees payable on office copies, which, in most instances, are much higher than those paid in England, and as we understand there is a large surplus arising from the fees paid to the credit of the "Suits' Fee Fund" account of the Court of Chancery in Ireland, we suggest that those fees should be now reduced in pursuance of the act 6th & 7th W. 4, c. 74.

Signed on behalf of the Committee of the Society of the Attorneys and Solicitors of Ireland,

WILLIAM GODDARD, *Chairman,*
PRESIDENT.

Solicitors' Buildings, Four Courts,
4th July, 1849.

HOUSE OF COMMONS.

POOR LAW COMMITTEE.

James A. Lawson, Esq.—May 18.

9798. *Mr. Bright.*] What is your profession? —I am a barrister of ten years' standing, and I have been Professor of Political Economy in the University of Dublin.

9799. Have you ever considered the laws relating to the sale and transfer of land in Ireland?—

Yes, I have; I have practised in the courts of Equity, and am familiar with those laws, and have devoted a good deal of consideration to them.

9802. Are those laws to which you have referred principally those which affect the purchase, the sale, and the transfer and possession of real property?—Yes.

9803. Will you state what are obstacles to the transfer of land in Ireland, which have come under your notice?—I think the principal obstacles are, the expense and delay of searches, the difficulty and uncertainty of title, and the number and complication of encumbrances.

9804. With regard to searches, is it not a fact that in making out a title it is necessary to search for a very long period, say 50 or 60 years, so that the purchaser may be certain that there is no encumbrance nor any past settlement that may endanger his title?—Yes; the rule is this: the abstract must commence 60 years back; the purchaser then will require searches against every party who, during those 60 years, appears on the abstract to have had an estate in the lands; searches must be had in the registry against that party during the whole period in which he had any estate or interest which could enable him to affect the lands.

9805. Will you explain why there exists that necessity of making searches for 60 years back?—There are several reasons for it; the principal, of course, is the existence of family settlements and the law of entail; another is the present length of the period of limitations. According to the present law, a party having a right, may assert it at any period within twenty years; and if he is under what is called, technically, disability, a still further period is given to him, so that very frequently, after a lapse of 30 years, a party may come forward and assert title to the lands. I met a case very lately, in which a party had been in America for thirty years; he left this country for America before his right accrued, and after seven years he was believed to have died; the property was dealt with by his brothers during all that period as if it had been their own; he came back at the end of thirty years; there was no statute of limitations to bar his property, and of course he recovered the property. All these circumstances render it necessary that the abstract should go back for a period of sixty years.

9808. Does the cost of transfer depend upon the amount of the purchase-money, or is it dependent upon a variety of other circumstances?—The cost of the transfer does not bear any proportion to the amount of the purchase-money; if I am proceeding to sell a small portion of a large estate, it is very nearly the same expense as if I sold the entire of it, because there must be the same searches both in the registry and for judgments, and the only difference would be, perhaps, the stamp upon the conveyance. The expense of the investigation of a title to a very small lot of land is very nearly as great as the expense of investigation of a title to a large lot.

9809. And is it not a fact that on large properties there is likely to be greater number of encumbrances, and that as they all attach to the small

property about to be sold, the expenses of investigating the title for the small property are especially increased, because of its being a portion of a large property?—Certainly; you cannot get well a good title to that small portion without procuring a release, or a satisfaction, from every encumbrancer who affects the entire.

9810. Therefore with regard to many large and deeply encumbered estates in Ireland, there is almost an entire impossibility of a portion of the estate being disposed of?—There is; and in the same way, when parties are going to sell by private contract, it deters them from setting up the land in lots, which otherwise would be a very advantageous proceeding, because, generally speaking, the purchase-money is higher when the estate is set up in small lots, but the expense which falls upon each of these lots deters parties from doing that; and this is a very great evil.

9811. Does not that tend to prevent the growth of a middle proprietary class, a yeomanry class in Ireland, and therefore is it not injurious?—Certainly; it has that effect.

9812. Generally, with regard to the effects of this heavy cost of transfer, you would say that it acts injuriously upon the proprietary class, and upon the industrious class in Ireland?—It acts very injuriously, both on those who have to sell, and on the public, who are always interested that there should be as free a circulation of land as possible.

9816. With regard to waste lands, is the cost of transfer which arises, especially in the sale of portions of a large estate, not such as to make it absolutely impossible that portions of waste land should be sold in many cases, by making the cost of the transfer greater than the value of the land which is waste?—It is; it has that effect. If there is a judgment against the party it over-rides the entire of his estate.

9817. Waste and cultivated?—Waste and cultivated. Then if you come to sell a small portion of the waste you must trace the devolution of that judgment through the different parties to whom it passes, and you must procure the party in whom it is then vested to release the land. I may also observe that until very recently even that could not be done, because it has been held that a judgment creditor could not release one portion of the lands without losing the security of the judgment altogether; that was the law until lately.

9818. Therefore that which is a very serious injury with regard to retarding changes in cultivated land, acts as an almost entire prohibition with regard to waste lands?—It does; the purchase-money frequently would not pay for the cost of making out the title.

9820. Can you suggest any remedy for the expense and delay of searches which you have described?—I think that a very simple and practical remedy can be devised for the expense and delay of searches; the way in which the searches are made now is this: When a deed is executed which affects the particular lands, a memorial of that deed is brought into the registry and lodged there. When advising searches, you direct searches against A. B. from such a year to such a year; then the officer must go over all the books of the registry for that

period, and must abstract all the memorials of the deeds which relate to those particular lands. Now that is a very tedious and a very expensive process, and it very often leads to mistakes, because of course clerks cannot be perfectly accurate in going over those books; and you cannot be sure that there may not be some omission or some mistake in the names of the lands. I think therefore that the registry ought to be altered, which I think might be very easily done.

9821. Will you describe the alteration which would be necessary?—When the Commissioners were inquiring into registry in England, one great difficulty which presented itself was the non-existence of any general survey. We have in Ireland an Ordnance Survey, which is quite perfect, and which could be made the basis of this registry. I would therefore propose that the Ordnance Survey should be incorporated into the registry; that on one side of the page should be introduced a map of the particular townland against which you were about to register the deeds, and on the opposite side a registry of title, with the names of all parties claiming any estate or interest in the lands. I have just drawn out a short form of the way in which I think it ought to be done: I would have the Ordnance Survey delineated, and then, under the head of "Registry of title," I would have first a column for the townland; then the name of the party having an estate or interest; then a description of the part of the lands in which the estate or interest is claimed, because it might not extend to the entire townland; then the nature of the estate or interest, and under what deed or instrument derived. I would then have another column for the registered residence of the party having the

estate or interest (that is with reference to what I shall mention presently), for the purpose of giving notice to the parties when a sale is about to take place. I would make it incumbent upon every party claiming an estate or interest to register it in this form, and to insert his residence, where any notice would be transmitted to him; and in the case of change of residence, it would be his duty to register it. That would constitute what I would call the registry of title. The memorials might be registered as at present, and if a party wished for any fuller information than that short registry of title would give him, he might get a copy of the memorial as at present; but I think that for general purposes that registry of title would be sufficient. In addition to that registry of title, I would have what I would call a registry of encumbrances, and I would arrange in precisely the same way: name of townland, name of party entitled to the encumbrance, description of the part of the lands charged with encumbrance, the nature of the encumbrance, its date, and by whom created, and the registered residence of the encumbrancer. You would then have upon one page the names of all the parties who claimed any estate or interest in the lands; you would have on the next page the names of all the parties who claimed any encumbrance against the lands; and then instead of a long and expensive search through all the books, and the very expensive stamp duties and fees upon all those searches, I would give to every party requiring a search, simply an attested copy of those pages of the book relating to those particular lands; on payment, of course, of a very small fee.

[*The Witness delivered in the following Paper.*]

REGISTRY OF TITLE.

Name of Townland.	Name of Party having an Estate or Interest.	Description of the part of the Lands in which such Estate or Interest is claimed.	Nature of the Estate or Interest, and under what Deed or Instrument derived.	Registered Residence of Party having the Estate or Interest.
Ballymoreteerin.	A. B.	That part marked with red on the map annexed hereto.	Tenant for life, under settlement, dated the day of 1848.	32, Sackville Street, Dublin.

REGISTRY OF ENCUMBRANCES.

Name of Townland.	Name of party entitled to the Encumbrance.	Description of the part of the lands charged with the Encumbrance.	Nature of the Encumbrance, Date, and by whom created.	Registered Residence.
Ballymoreteerin.	C. D.	All the townland.	Judgment of Hilary Term, 1836, obtained by C. D. against X. Y.	Cashel, County Tipperary.

9829. *Mr. Bright.*] What legal effect would you give to the map as compared with the general description by names; would you make it evidence in the same way?—I would make the map the evidence; it should be at the peril of the party registering to find out the lands upon which his encumbrance was charged.

9830. With regard to the registry of judgments, will you turn your attention to that, and say what alteration you think would be desirable?—Formerly judgments were registered in the offices of the three law courts, the Court of Queen's Bench, the Exchequer, and the Common Pleas; and therefore when you wanted to search for judgments, you had

to search the books of all those courts. An Act introduced by Sir Edward Sugden made a great improvement in that respect, for it rendered it necessary that all the judgments, in order to affect the land, should be registered in one office; it put the three offices in fact into one, and thereby simplified the search very much. But, in addition to that, I conceive that a judgment, in order to form a charge upon lands, should be registered against the particular lands which are sought to be charged thereby. Now if a judgment is obtained against a party, it affects all the estates which he has.

9831. In which way is that; is it a judgment against the person which involves a judgment against all his property, or is all his property named, or is it stated in general terms, so that all his property then held, and thereafter to be held, is involved in it?—There is no property named at all in a judgment; a judgment merely is, that A. B. has recovered a judgment for £1,000 against C. D.; that is registered in the office, and by virtue of that, all the property which C. D. had at the time of the entering of that judgment, is affected by it.

9832. Then if your suggestion were adopted with regard to the judgment attaching to a specific property, and to that only, would it not leave the waste lands now in the hands of proprietors, at liberty to be more easily disposed of, in order that they might be more frequently brought into cultivation?—Unquestionably; because the judgment creditor would not think it worth his while to register his judgment against lands of no value.

9833. Against waste lands?—Against waste lands.

9835. Therefore waste lands would be practically, by your suggestion, free from encumbrances?—They would; and it would also have this very beneficial effect, that it would define the estate upon which the judgment was a charge; for instance, if I obtained a judgment against a man of large estates, I would not be unreasonable enough to register it against every one of his estates. I would be quite satisfied with registering it against one which was sufficient security.

9836. Would an alteration in the law as to registering judgments, injure their value as a security?—No; I think it would very much raise their value as a security, because the state of the law now with respect to judgments is very anomalous; although they require to be registered, in fact they have not the benefits of registration. As between deeds, the Registry Act of Anne gives a priority to the deed registered first, over the deed registered afterwards; and if a deed is executed and not registered, and then a subsequent deed is executed and registered, the subsequent deed takes priority over the first deed, unless the party having the subsequent registered deed had notice of the prior unregistered one; then he cannot take advantage of the subsequent registered deed. Unless there be a conflict between deeds, judgments are not assisted at all by the Registry Act; so that if a man executes a mortgage, and that mortgage is not registered, and then immediately afterwards confesses a judgment, still the mortgage has priority over the judgment: accord-

ing to the principle which I would recommend, while I would impose upon judgment creditors the onus of registering their judgments against the particular lands, I would also give them what they do not now possess, namely, the benefits of registration; that is, that their judgments should have the same benefit from the Registry Act as deeds now have.

9837. As a mortgage now has?—As a mortgage now has. The effect of judgments not possessing that advantage now, is in fact to render them a very uncertain security; for instance, this case has occurred and is reported: a man deposits his deeds as an equitable mortgage, with a party who has advanced him money; he then goes to another and borrows money from him on the security of a judgment; and although that judgment creditor knew nothing whatever of the existence of the mortgage, or of the deposit of the title-deeds, the judgment is postponed to the equitable mortgage. Now that would not be the case if the system of registration which I have suggested, extended to judgments.

9838. Do you think it advisable that judgments should continue to be a charge upon land?—I think it was a step in the wrong direction to make judgments a charge upon land; it was done by the Act of 3 and 4 of the Queen, cap. 105; but at the same time, now that that has been done I think it would be very difficult to retrace our steps in that respect.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Half-yearly, 30s. Yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 11, FLEET-STREET, in the Parish of St. Andrew, and published at E. J. MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, August 4, 1866.

THE Irish Jurist

No. 41.—VOL. I.

AUGUST 11, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, AUGUST 11, 1849.

PUBLIC attention has been so prominently called within the last six months to the whole receiver system that we have no doubt whatsoever that a thorough reform in the abuses which have grown with the growth of receivers must take place.

If we were told that 500 attorneys were receivers—and we have been told that the number is nearly, if not quite as great—and were asked our opinion whether those gentlemen were the best qualified to be receivers, and whether estates would be as well managed by them as by resident trained agents, we should answer in the negative.

If, again, the question were put, would you exclude attorneys from being receivers? Assuming that trained resident agents were procurable, we should answer in the affirmative. In those two questions and answers lie much of the principle on which a change should be worked out.

At present we cannot have men whose sole business is to manage the estates under their care; and the office is so full of peril, and so undesirable that few men, unacquainted with the practice of the Court of Chancery, will venture to undertake it.

It is universally conceded that were properties to remain under receivers to their present extent, or an approximation of that extent, the public good demands a better management of those properties, than, to use the language of a receiver, "that most vicious of vicious systems which plunders the landlord, demoralises the tenant, and victimizes the really efficient and conscientious receiver."

Two millions of rental under that system, a seventh of the rental of the whole island, and probably an eighth of the population!

The Law Society, whose suggestions to the late committee, are deserving of the utmost attention, as they come from practical men, deprecate a change,

and look forward to a rapid transfer of property, (and, consequently, removal of it from our Equity courts), under the Encumbered Estates Act, which is now the law of the land.

It would have been exceedingly desirable that Lord John Russell should have announced the names of the Commissioners; on their character and competency the fate of that measure will greatly depend. If those gentlemen do not possess the confidence of the country and of the law professions their usefulness will be materially impaired, and the operations of the act greatly limited. We trust for the sake of this country that these appointments will be made from none other than the purest motives.*

We quite admit that the first and primary consideration is to free land from its encumbered thralldom, but we are not so sanguine as to suppose that the present enormous amount of property in and out of court can rapidly change hands, that purchasers can be found ready to invest their forty or fifty millions; and the fact must not be overlooked with reference to the property under our courts of Equity that much of it is there which it would not be expedient, and much which it would not be possible to sell.

The total repeal of the power of appointing receivers under the judgment acts would have prospectively diminished the amount brought in for now sale, (if we may use the expression,) but the very limited nature of that repeal will create no sensible future diminution of the rental under our courts of Equity, though the scandal of having receivers over miserable incomes of £5 per annum will be avoided. Irrespective of the future prospect of a steady influx into court, we cannot disregard the fact that there is an enormous mass of property which is now locked up under the judgment acts, and that for the lives of many of the present generation of proprietors.

* This was written before the Commissioners had been appointed.

There has been no classification of receivers in matters and causes, but there can be no doubt that the number of the former largely preponderates, more especially when the estates of minors and lunatics are thrown into the scale, and the sojourn of those estates will be for no brief period. It may still be predicated that it is much easier to get into the Court of Chancery than it is to get out of it.

We cannot, therefore, reasonably expect that there will be such a sensible reduction of property under courts of Equity, from the sale of present incumbered estates, and the non-introduction of new ones as to render an improvement in the receiver system on that ground unnecessary.

That gradually one-half of the present two millions may be withdrawn, we believe probable; but the utmost buoyancy of hope and confidence in the revived energies of the country, does not enable us to look forward to the time when much less than a million a-year of income will be under receivers.

We cannot believe that a much less expensive mode of managing that vast amount of property, than the present cannot be devised.

Another reason against a change, which was not so clearly expressed, was the laudable objection to a system by which extensive patronage and jobbing might be introduced. The misfortune of this country being that every office is almost always jobbed; at present—to use the language of one of Sir James Graham's questions to Sir Edward Sugden—"the multiplication of receivers produces many little jobs; but the concentration of them would produce great jobs."

We should be reluctant to give power where there is not a rational expectation of its being worthily used; and we should prefer a small present evil, to increased government patronage; but we cannot, for an apprehension of this sort, allow a gigantic evil to remain unredressed; and we should take care that whoever are to be the dispensers of patronage should be obliged to exercise it under responsibility, and the broad eye of public opinion.

The Law Society states one of the excellences of the present mode of management to be, that each estate pays its own expenses; and certainly that is an excellence; but it might be added that it very often pays nothing else. The carrying out of this principle is so costly that small estates are absorbed in the expenses of management.

We find on looking at the language used by the Law Society that we did not express ourselves with half the clearness they have done on the point of each estate supporting itself. We had better give their own words: "The present system secures the important principle of making each state defray its own expenses of management, and *no more!*" What an important admission from men best capable of forming a deliberate judgment!

That respectable and useful body will excuse us if we mingle a little playfulness (a characteristic of our Irish nature) with the discussion of a serious question, it would be well if it had been discussed calmly at all times and on all occasions.

We cannot allow ourselves to be too much influenced by the suggestions of the Society; it is impossible for human nature to be altogether disinterested, and, to some extent, the Law Society must

be looked upon as interested parties. Many of their body are receivers; whilst the present system lasts it would be impossible and impolitic (as we have shewn in our last number) to introduce an absolute rule of disqualification. Under the present system solicitors who would not accept the appointment of receiver have more or less of patronage in the nomination to the office, and more especially to the lucrative one of solicitor for the receiver.

There is as much of gangrene in that department as in any other branch of the whole system; and if that post were abolished or rendered undesirable, much of the stimulus to throw properties into the Court of Chancery, and to keep them there, would be removed. We impute no improper motives, we merely look to those which must more or less animate human nature, and sway human judgment. The document to which we have adverted contains hints that go a great way towards amelioration, but they do not go far enough; when the wound is severe the surgeon's knife must go deep to effect a cure. To adopt the idea of Sir Robert Peel, let us take hope from the magnitude of the evil, its importance, its hold on public opinion has brought it to that point, that it can no longer be disregarded.

In the case of *Kinnersley v. Knott*, (13 Jur. 658, C.P.) the question arising on the 12th section of the 3 & 4 W. 4, c. 42, Eng., the 41st sect. of the 3 & 4 Vic. c. 105, Ir., was raised and determined whether in actions upon written instruments the description by an initial letter only, without any averment of an excuse for not setting it forth fully, is a good cause of demurrer. The action was by the indorsee against the acceptor. The declaration stated that the plaintiff complained of John M. Knott, the acceptor's name, &c. The causes of demurrer assigned were that the Christian name of the defendant was not fully stated; that he was described with the initial letter "M." for his Christian name, which should have been in full, or a sufficient excuse for the omission. The court relying on the cases of *Nash v. Collins*, (17 Law Jou. N. S. C. P. 91, S. C. 5 C. B., 177,) and *Miller v. Hay*, (12 Jur. 985, Ex.) held that the demurrer was good. Maule, J., in his judgment, says, "I think that the statute which enables an amendment of the declaration to be made on summons, in lieu of a plea of abatement for misnomer, assumes, that when the court sees letters put as initials, and which cannot be sounded by themselves, it will treat them as initials. The cases which have been decided have recognised that principle, namely, they have decided that the party pleading must particularise the name of the person described in such pleading, or give some reason for not so doing. Where the initial is a vowel, the courts have, I think, rightly been astute to understand it as the Christian name; but when the initial letter is a consonant, it must, I think, be understood as an initial only of the Christian name."

The great practical importance of this case, arising from the great uncertainty in which the law upon this subject has been thrown, has induced us to bring the attention of the profession to it at the earliest moment. For ourselves we do not, in

this respect, clearly see the soundness of the distinction between vowels and consonants. The letter "M." sounds in our ears as like a surname as A. or I. when standing alone; it is in the combination of letters only that vowels have a particular efficacy. However this case and *Lomas v. Landells*, (18 L. Jour. N. S. 88, C. P.) where the initial letter was "L," established the distinction.

We believe that the Courts of Queen's Bench and Exchequer in this country have taken different views of the question. The cases have not been reported, but there is a received impression among the profession, that under circumstances similar to those in the case stated, the former court overruled, the latter allowed, the demurrer. We hope this case, in the decision of which the court appears to have adopted the view taken in the majority of the previous cases, will be adopted by the courts in this country. In questions of this nature, almost purely practical, it is much more important that the law should be settled, than that the conclusion arrived at should be the true one. If this be done, the rule will be plain. If there be no Christian name whatever fully stated, and no excuse for the omission, whether the letter be vowel or consonant, the declaration will be demurrable. *Appleman v. Blanche*, (14 M. & W. 155); *Turner v. Fitt*, (3 C. B. 701); *Esdaile v. McClean*, (15 M. & W. 277); *Lovv v. Wilkes*, and *Gatty v. Webb*, (9 Q. B. 427, 431.) If the defendant have two Christian names, the first of which be fully set out, the second by the initial letter alone, and that letter be a vowel, the court, to use the language of Maule, J., "will be astute to understand it as the Christian name." *Lomas v. Landells*, (18 Law Jour. N. S. C. P. 88.) But if the letter before the surname be a consonant, the declaration will be bad on demurrer. *Kinnersley v. Knott*, (13 Jur. 658); *Noah v. Collier*, (17 Law. Jour. N. S. C. P. 91); *Miller v. Hay*, (12 Jur. 985.) The only other question that could be raised would be whether this rule applies as well to parties named in the record, but not parties to the suit. This, we think, must necessarily follow the same rule; before the statute the rule of law required the names of such persons to be fully given, or an excuse for the omission—(Plow. 128; Stephen on Pleading, 1 Ed. 320)—and the statute raises no ground for the distinction. The words are, "that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter, or letters, or some contraction of the Christian name, it shall be sufficient so to designate them."

THE Right Honorable John Richards, Third Baron of Her Majesty's Court of Exchequer; Montfort Longfield, Esq., Q.C., LL.D.; and C.J. Hargreave, Esq., Barrister-at-law, 65, Chancery-lane, have been appointed the Commissioners for the sale of encumbered estates in Ireland.

HOUSE OF COMMONS.

POOR LAW COMMITTEE.

James A. Lawson, Esq.—May 18.

(Continued from p. 308.)

9843. *Sir J. Graham*] Any search, however diligent, does not necessarily exhaust all encumbrances which may exist in Ireland?—No, but then a purchaser will take discharged of encumbrances which are not registered.

9844. *Mr. Napier*.] By registering his deed?—By registering his deed. A judgment creditor is not a purchaser.

9846. Can you suggest any remedy for the present uncertainty of a good title to the purchaser?—I think that where a party purchases under the court, and where notice is given to all the persons who appear upon the registry, the form of which I have suggested, that purchaser paying his purchase money into court should get a parliamentary title.

9847. How do you think the purchase-money ought to be disposed of?—I think, of course, that in sales under the court it should be paid into the Court of Chancery; then all the encumbrancers and the owners who claimed to be entitled to any portion of that purchase-money should get it out of court; but the purchaser should have nothing to do with that; he ought, the moment he pays his purchase-money, to get a good parliamentary title.

9890. Is it your opinion that the alterations which you have suggested, and which Dr. Longfield has suggested, or alterations in that direction, are calculated to give great relief to proprietors in many cases, and to place all classes depending upon the land in a more independent, and comfortable, and safe position than they are at present?—I think they are; they must inevitably have that tendency. There was one suggestion which Dr. Longfield made—namely, that of preventing parties from creating encumbrances; I do not acquiesce in that; I do not think it would be practicable to prevent parties from creating encumbrances, because, although you may prevent them by law from making a second mortgage, they may create annuities, rent-charges, and various other encumbrances, therefore I think that it would be found impracticable; but what I have suggested would give them increased facilities for selling portions of their estates; and consequently, as parties will always act for their own interest, if it were for their own interest to sell portions of their estates in order to raise the money, rather than to create encumbrances, the effect must be to diminish the number of encumbrances created.

9892. Then you would give him the greatest possible facility of borrowing money, or lending money, or buying estates, or selling estates?—I certainly would; it may be very desirable for a party to purchase an estate, and it may be very desirable for a party to raise money for the purpose of improving that estate; I do not see why he should be prevented from doing that; I think as he has the power of selling, he ought to have all the lesser powers of charging and encumbering.

RECEIVER COMMITTEE.

Sir Edward B. Sugden, June 21, 1849.

416. During the time that you were Lord Chancellor of Ireland, was your attention much directed to the management of estates under the Court of Chancery?—My attention was very much directed to the operation of judgments, and also to the operation of receivers under judgments, and generally to the management of estates under the Court of Chancery.

417. You introduced a good many important changes in the proceedings of the Court?—Yes, I did. The second time, when I went to Ireland, I found judgments very much increasing in number, and of course that had been occasioned by the Sheriffs' Act; and the question arose, which it was necessary to decide, whether it was necessary to make every judgment creditor a party to a suit in relation to the sale of the estate. As that was a question of very great importance to Ireland, I begged to have the assistance of the then Lord Chief Justice, and the then Master of the Rolls; and the question was fully argued, and they delivered their opinion in open Court, in which I concurred with them, that every judgment creditor was a necessary party to such a suit. The consequence of that was truly alarming, and therefore I immediately, with the concurrence of the Master of the Rolls, introduced a new rule, which very much lessened the evil, by rendering it not necessary, except under peculiar circumstances, to make all the judgment creditors parties to such a suit.

418. You are aware of the Act of Parliament which we call the O'Loughlen Act, which gave the power to the Court, on the application of a judgment creditor, to appoint a receiver over a property?—Yes.

419. Do you consider that, under the true construction of that Act, it was imperative upon the Court, on the application of a judgment creditor, to grant a receiver?—Certainly; the Lord Chancellor makes conditional orders for receivers; he has no power except ministerial, and every morning, when I was Lord Chancellor, I signed conditional orders for receivers upon statements properly verified by affidavits; the Chancellor has no power whatever to withhold the receiver; it goes as of course.

420. It was in the nature, in fact, of a statutory execution?—Undoubtedly; it was in lieu of the old remedy, very much enlarged, and I was going to say, very unwisely accelerated.

421. Do you conceive that the operation of that Act in compelling the Court to grant receivers in cases of judgments was injurious to the public interests?—I never had the least doubt of it, and I did all I could to correct the evil arising out of the multiplicity of judgments; for example, when in this country I was instrumental to the passing of the Act of Parliament which brought together for the first time into one office, the Queen's Bench Office, all judgments of every sort, crown debts, *lis pendens* and other things; instead of having to search in a number of different offices, I brought all the judgments, &c., into one office, and a small fee was paid; that is in full operation now. And with reference to England, where judgments are not as

in Ireland, considered the common assurance of the country, and where receivers cannot be obtained upon judgments as they can be in Ireland, upon petition, I introduced a clause, which was passed, that every judgment in England, and every Court bond also, should be registered every five years; it was intended to operate against purchasers of mortgages or creditors. That lessened the evil in this country very much; instead of having to go back for many years, and having to search in a dozen different courts, you go into one court and pay half-a-crown for searching one book which contains all the registers. When I returned to Ireland my desire was to assimilate the law in Ireland to the law in England, and believing that to be even more necessary in Ireland than in England, I prepared a bill of the same nature as the bill which had been passed with reference to England, applying it to Ireland, and introduced the same clause requiring re-registration every five years. There was a convulsion almost in the country; the solicitors in a body resisted the measure, and prevailed upon their clients to believe that it was a great infringement upon their rights and would be the destruction of securities in the land; the bill came as far as the House of Commons, and then I was under the necessity of giving it up. I subsequently got a similar bill passed without that clause, but with a mitigated clause that parties should register every 20 years; and in Ireland, where the evil is far greater, it is probably greater than it is in England, parties keep their judgments alive, without taking any step to indicate their intention to enforce them against purchasers and mortgagees or creditors, for 20 years. In England nobody objected to putting under re-registration every five years. When a party has been paid off, or his claim has been satisfied, and he does not desire a lien against the estate, he does not re-register; but if the party wishes to bind a purchaser, he ought to show, by re-registering his judgment, that he wishes to keep it alive as a lien still existing; and in England, as I have already mentioned, the parties re-register every five years.

422. *Sir J. Graham.*] Sir Michael O'Loughlen's Act, with regard to judgments in Ireland, is the only legislative enactment which has recently passed upon the subject; we have heard of Mr. Parnell's act; did not that act extend the operation of the law of judgments in Ireland?—That act was, in point of fact, nearly a copy of the English act of the 1st & 2nd. of the Queen, which had extended very largely the operation of judgments; their operation was extended from the moiety of the estate to the entirety of the estate, and their binding power was also extended to many descriptions of property which never before that act could have been reached by a judgment; but so far as the Legislature gave additional privileges to the judgment creditor, the wording of the act made it necessary to go into equity to give it effect in many cases. But the act very unwisely, I think, declared that every judgment creditor should be considered to have a charge precisely the same as if the person against whom the judgment was recovered had executed an actual agreement to charge his land

with the amount of the judgment, and that was extended so as to operate on a general power. But the legislature provided that so far as that additional security was given, the creditor should not be at liberty to resort to a court of equity to give force to it till the expiration of a year. So that they did not allow a judgment creditor, the moment he got his judgment, to go at once under this new power, and seize all the property. Mr. Pigot's act, the 3d & 4th of the Queen in Ireland, was, in point of fact, all but a copy of the English act, but with this important addition: it not only referred to the power in the Sheriff's act to appoint receivers on behalf of judgment creditors, but it extended that power to all the additional properties which had been included in the English act, and in like manner in this Irish act; and rather inconsistently I must say, the framers introduced the clause postponing the right for a year, which is in the English act. Now under the English act, where a judgment creditor could not obtain a receiver by petition and where this new power could not be exercised except after a year, it was evidently intended to give the landowner a little time to look round him, and to prevent butchers and bakers from snatching a judgment and fixing it upon the estate; but in Ireland it would scarcely have any operation, because the Sheriffs' act had already given the power over the whole property. It was before liable, and a judgment creditor could, notwithstanding the late act, obtain a receiver in a very short time. It was, therefore, of very little importance in Ireland, though of very great importance in the English act.

423. Leasehold property, which is very extensive in Ireland, especially collegiate and chapter property, until the passing of Mr. Pigot's act, did not fall under the operation of the law of judgment creditors?—Yes, all leasehold estates were bound by judgments before Mr. Pigot's act; a *fiery facias* would issue against them on judgments.

424. You have stated that you do not think the provisions of Sir Michael O'Loughlen's act judicious. Do you entertain the same opinion conjointly with that act of the provisions of Mr. Pigot's act?—I think that taking that law as it now stands in Ireland, it is mischievous to everybody. It leads to the rapid accumulation of judgments on estates, which are created as permanent debts, and for which receivers may be obtained at once; and these charges prevent the owner from selling his estate to advantage, and constantly occasions litigation, with heavy costs.

425. You mentioned a considerable extension of the effect given to judgments in the law of England, by the alteration which took place in the 1st & 2d of the Queen. Can you point out to the Committee the difference now existing in the law of England, with respect to judgments so extended, as contrasted with the law of Ireland under Sir Michael O'Loughlen's and Mr. Pigot's acts conjointly?—I do not apprehend that there is any difference as to the property which they bind; the question is not to the extent of the right to bind any species of property, but the difficulty arises from different remedies being given in the two cases.

426. Practically, judgments are in much more

general operation in Ireland than they are at present in England?—From an early period judgments in Ireland have been considered as a common assurance, and a great misfortune it has been to the country; it was a very common thing, before the Sheriffs' act, and before Mr. Pigot's act, for an old judgment—60 or 70 years old—to be settled by the person entitled to it upon his wife and children as a permanent security, with which he was perfectly satisfied; the family could ultimately hardly escape being involved in an equity suit.

427. Have you ever considered the question whether the penal laws as existing in Ireland, with respect to real property, and the restricted rights of real property as originally enjoyed by members of the Roman Catholic religion, accelerated the action of judgments and that particular mode of obtaining security?—I do not apprehend they did, but I do not mean to speak with any confidence upon that point.

428. Whatever may have been the cause, the fact still remains, that practically judgments have been used from early times much more extensively in Ireland than in England?—Yes, so as to be considered in their own expression, a common assurance of the country.

429. Are judgments assignable in England as they are in Ireland?—Certainly not; they are assignable undoubtedly, but the assignment has not a legal operation. In Ireland judgments were made assignable as early as the act of the 9th of George the 2d. One object evidently of that act was to secure purchasers, for the act recites that it was common to assign judgments upon purchases. If you bought an estate, you would take an assignment of the judgment against that estate in order to secure you, and you would have the legal interest by such an assignment; the assignee under that act and the later act of the 25th of the same King, is placed in the same situation exactly as the conusee of the judgment.

431. Is that distinction with respect to the public good in your opinion in favour of the law in Ireland as it stands, or in favour of the law of England with respect to judgments?—If I were to answer that as an abstract question, I should say that the rule in Ireland is the right one under which you may legally dispose of your whole beneficial interest in the property; it is only by a strictness of the old law that you are prevented from exercising the usual rights of property over that subject; and therefore as an abstract question, I should say that the law of Ireland is a reasonable one, and that the law of England requires a remedy. But if I were to be asked whether it is a desirable law for Ireland, I should say that it has increased the mischief considerably as regards judgments which ought, in my opinion to be discouraged, but which are used almost like common bills of exchange, and that has led to a great many of the difficulties of the landed interest in Ireland.

432. We have been told, that for small debts due to tradesmen, it is a growing practice in Ireland to give judgments?—Not only at this time, but when I was in Ireland, it gave me pain to discover that practice. I had every day to make a good many orders in chamber; I believe I may

safely say that I had hardly ever occasion to sign petitions which did not include petitions for receivers upon judgments, and for the smallest sums.

433. Though the law of England, as extended, is very similar to the law of Ireland, the practice under it has not arisen to the extent, or anything like the extent, that prevails in Ireland?—Certainly not. I am not aware of there being any evil arising out the law in England. Perhaps I may be allowed to observe that the truth is, some of the landed proprietors in Ireland require a little protection, they are so careless about their property and their money. Before I left Ireland one or two instances struck me very much. Under the tithe commutation act the court appoints a receiver (if the occupier is not liable to the payment), if the tithe rent-charge is 31 days in arrear. I have, as Chancellor, signed orders for receivers under that act, in one case for £4, and in another case for £5 only; it is a sort of insanity on the part of the owner; for the moment that order is signed it entails an expense of £30 or £40 for putting a receiver upon the property for a debt of £5.

435. On the whole, do you approve of that principle, that the judgment shall not attach to any particular portion of the property, but that it shall over-ride the whole, however small the amount of the judgment may be?—I think it is too late to alter the law of England as to judgments, where it has been carried so far. I think as the law stood before the 1st and 2nd of the Queen, the law of England intended to affect only a portion of the property, for it gave execution only against the moiety; and the legislature have gone on extending it not wisely, I think; but still you cannot now alter the law of England as regards the general operation; the 2nd of the Queen requiring a registration in the first instance, and a registration every five years, reduces to nothing the danger to purchasers, mortgagees and creditors, which is one great point to look to.

436. It has been represented to the committee that the operation of the registration of judgments is this: that it gives facilities to owners of real property in borrowing, and makes judgments a valid security almost up to the full amount of the property; while it is a great impediment to the sale of the property; is that your view of the operation of the registration?—You are asking me a question of great extent. Many people think, and I myself have thought, that as far as regarded judgments and Crown debts, and *lis pendens*, that it is necessary to have a register to secure purchasers. I am responsible for that Act; but I have always opposed a general register, for very different reasons; I think it would be a great expense imposed upon the country. If country gentlemen would estimate what it would cost for a year, I think they would find that it is an immense burden imposed upon the public for which there is no corresponding benefit. I hear it said, "Go and register in full." That is not the evil, there has never been any want of knowledge of the contents where there is a register. The Registration Act goes upon a very different principle; that is, not to disclose more than is necessary, and not to tell to the whole world all my concerns, because I have

executed a deed of a peculiar nature; for you can never keep people out of the Register Office. It used to be said that people would not go there; Do they, it was asked, go as to wills? We find that they do go as to wills; one reads every week in the newspapers the gifts by will of men of whom you have heard, and of whom you have not heard, if they happened to have any property. And that would be the case with deeds, if you gave them in full to the registry: their contents would be furnished ready for every body's breakfast table in the morning. The Registration Act has not the operation which people think it has; the Registration Act never comes into operation till there is a conflict between *bonâ fide* parties, of whom the one must suffer. It has not the merit, except indirectly, of saving any body; but if a man has notice of a registered deed he is bound by it; but if a person has not registered his deed, though it may be by the carelessness of the attorney, (I have known cases in the course of my experience, in which attorneys' clerks have put the fees in their pockets and have not registered deeds at all, though they have been regularly charged for), the man's estate may be lost. A general register would not improve any man's title to his estate, but I will not enter further into that. But in answer to your question, I should say that if you are to consider it an evil that the owner may encumber his property to the whole extent of its value, then of course the more you enable a man to make a good title, the more surely you lead to that conclusion; but the same thing that would enable him to encumber the estate, would enable him to sell it if the rules were properly carried out; however, as the law stands, I think that judgments in Ireland have the operation represented to the committee.

437. You stated that the owners of real property in Ireland, from the peculiar circumstances of the country, should, as far as possible, by law be guarded from their own improvidence; the question I put was, considering the practice in England as to charging land, which is generally by mortgage, attended with peculiar difficulties; and considering the facility that exists in Ireland for charging land by means of assigning judgments, whether the policy of the law in Ireland does not rather contravene that which you believe is desirable as a protection against the improvidence of owners?—My answer to that is, I think it does.

438. You have said that, whether wisely or not, we have gone too far in establishing the effects of judgments in both countries to recede. Having given that answer generally, what would you say to a reversion of the law in Ireland, especially with respect to judgments being made assignable, and the effect of Sir Michael O'Loughlen's Act more particularly?—I think it would not be advisable to take away the power of assigning judgments, though it may be open to abuse, because now judgments have become almost as universal as bills of exchange. I can imagine now a small tradesman getting a judgment for a mere household debt, and then assigning it to another person in order to avoid the odium of getting a receiver over his customer's property. I think that not at all desirable, but that is the custom of the country generally. It

is very desirable, in my opinion, that the law of Ireland should be altered in this respect; it might, perhaps, be considered a strong measure to take away receivers upon petitions altogether; but I should have no hesitation, if I had the power, in very much limiting the operation of the Sheriffs' Act and the subsequent Acts, and in placing judgments in Ireland more upon the footing on which they stand in England; for example, if I had the power, I should not hesitate to limit the amount of money for which a judgment should bind the property, so as to give a right to a receiver under those Acts; that is, I would take some reasonable sum as a proper subject for a judgment and receiver, considering the expense attending such a proceeding; but as regards smaller sums, I would leave the creditor to his common law remedies, and to that credit upon which he no doubt relied when he furnished the matters in his trade. If that line were drawn, and another provision were introduced into the law, that no judgment creditor should have a receiver until after a certain period from the time of his obtaining judgment, I think the evil would be very much struck at, without alarming, which one would be very unwilling to do, the people in Ireland at the change in a law which they seem to be very much attached to.

439. Would you limit the period to a year?—I should say that that was a very fit period; it gives a man a little time to look round him, and to provide for the payment of small demands, or even of larger demands; for it is to be recollected that this system of a receiver on petition is a great boon to the creditor; it is beyond what the old law gives him; it is a pure creature of statute; and therefore, if there are evils attending it, they may be, of course, remedied or altered by statute.

440. If the line were drawn as you propose, with regard to the amount, would a judgment below a certain amount affect the realty?—Yes.

441. But the remedy of a receiver would not exist in that case?—No; and it would be no hardship upon the creditor that I am aware of; he would not have the remedy, which I think he ought never to have had, of obtaining a receiver upon petition, but he would be in the same situation as a creditor in this country would be in.

443. But can the judgment creditor apply for a receiver in England?—No; he cannot obtain a receiver in this way in England; there is no similar appointment of receivers in England upon judgments.

445. Considering the present unhappy circumstances of Ireland, and the extensive use of this power of charging land, with its present accompaniments, would there be danger in making a change of the law at this juncture?—On the contrary, I think this is the very moment at which to do it. As far as estates are so encumbered that the present owners cannot retain them, you are now attempting to introduce new blood or new life into Ireland, and it is therefore the precise moment, as it appears to me, at which to introduce a measure of that sort.

446. The general outline of the law with regard to judgments in Ireland you would leave unchanged?—Yes, I would.

447. And you object to extending to England a practice which does not now exist here?—Yes.

448. The practice being established in Ireland, through *a priori*, you may not consider it a desirable practice, would you leave it untouched?—Certainly; I think it would revolt the whole feeling of Ireland, which ought to be kept studiously in view and held sacred, as far as it is possible to do so; I would do nothing to outrage the feeling of the people of Ireland in that respect, for I am sure such a change would create universal alarm in the country. When a suit is instituted to sell an estate which is encumbered, by a judgment creditor or mortgagee, they have a habit of making every person a party to the suit who is a necessary party to the conveyance; that is not the case here in England; you bring the parties who have the title into court, and you do not bring other parties into court; you have them ready to join in the conveyance, but you keep them out of the suit, and when the purchaser is entitled to a conveyance, those parties come forward and execute it. I will mention the case of a lady in this country who was with a medical man under restraint: she died; she was entitled to a rent-charge upon several estates in Ireland, and there were three years' arrears; this medical gentleman (I have no fault to find with him) took out an administration to this lady, who had been his patient; he filed a bill in Ireland to make good his charge; there were only three years' arrears of rent-charge to collect, and the charge for searches preparatory to filing the bill in order to ascertain the proper parties to the suit was £720; I disallowed a great portion of it, but it was done under great advice; under the new rules that abuse could not occur again, because now solicitors in Ireland are paid, which they very much complained of, according to their labour; I do not know what such a case might cost now, but I should imagine that £20 or £30 would be the payment. I state this to show what great expenses have heretofore been incurred in selling an encumbered estate in Ireland.

449. Does the multiplication of parties to a suit which you have mentioned, and which is attended with great expense, arise out of the state of the law, or is the remedy for that evil within the purview of the rules of the Court?—The Chancellor in Ireland has very great power under Acts of Parliament. I have exercised that power to a very great extent, and even to a diminution of the revenue of the country; I could give an example. There was in Ireland, and which still prevails in England, the abuse (for I cannot call it anything else) of hourly warrants before the Master; a cause lasted for six or seven years in the Master's office, the parties met for an hour, and when they met again at the end of a week or a fortnight, you found that half of the time was always lost in considering what had been discussed or decided upon at the previous meeting, and so the cause went on from year to year. In Ireland there was a difficulty in altering that, because there was a stamp duty upon every hourly warrant, and that went to the Consolidated Fund; but I found that I had power to alter that system, and consequently I made a rule that there should be no hourly warrants, but

that there should be one warrant for a cause unless the Master directed an additional one, and that every cause should be heard straight through. The consequence was, that instead of there being scores of warrants in causes, there were only two or three, and instead of there being meetings which, for example, in one case had lasted six years, I found that after the new rule had come out the whole matter was disposed of in three days.

451. After the remedies which have been applied to the registration in Ireland, have you anything to suggest upon the subject of receivers?—I am not prepared to give any advice upon the subject of receivers, but I have no doubt it wants some correction.

452. Then we are to understand that, on the whole, the law as regards receivers you would maintain?—Yes.

454. *Chairman.*] When you mentioned that you would, for judgments above a certain amount, grant receivers, would you still render it obligatory on the court to grant receivers, or would you leave it optional with the court to grant receivers or not, according to their discretion?—I think the court ought to have no option. The granting receivers ought to be a ministerial act merely. The duty of the court should be merely to see that the party applying is entitled to the remedy which he seeks; otherwise one Chancellor would give a receiver, and another Chancellor would not do so; and expense would be incurred, and nobody would be sure what the remedy was.

455. Have you thought of the limit that you would propose as to the amount of the judgments for which receivers should be granted?—I cannot say that I have seriously thought about it, but I should have no difficulty in stopping at £100. I should be inclined to take even a higher sum.

457. With reference to the number of receivers that have been appointed, is it your opinion that that is a great evil?—Undoubtedly; the evils are so great that no country can prosper under them; I cannot conceive any greater evils. The first effect is to sever the relation of landlord and tenant; the receiver is not the landlord, and the consequence is that the receiver of course has nothing to look to but to get the rent, in order both to get his poundage, and to keep himself right with the court and the creditor. There has been a great misapprehension in the public mind as to the power of the Court of Chancery over receivers. In the case of the estates of minors and lunatics, the court has perfect power; and I have dealt with lunatics' estates just in the same way as I would have dealt with my own estate. In the case of a peer who was a lunatic living on his own estate, I added a large sum to his allowance on my own motion, in order that, as he was living upon the estate, he might be able to live as the landlord, and fulfil the duty of landlord to his tenants. The court has the power to act as it thinks proper to any extent in these cases; but in cases of judgment creditors and mortgagees, it is said there is no money laid out in repairs, or in favour of the tenants; of course there is not, because the court has no power; the creditor does not care one farthing about the estate; he looks upon it merely as a security for his debt, and

he does not care whether the farms are dilapidated or whether the land is out of heart. He says, "I will have every shilling of my debt out of the estate." Now I would correct that at once; in my opinion if an estate is brought under the dominion of the court for the benefit of creditors, public necessity demands that if you make the court as were the master of the estate for the time, you should give to the court all the power which belongs to an owner; and therefore I should feel no difficulty, if I had the power, in making a law which should give to the court a power, to be exercised of course according to its judicial discretion, with relation to the estates of encumbrancers generally as to their management, cultivation and allowances, and so forth, in the same way as the court would do with the estates of minors and lunatics.

(To be continued.)

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All communications for the IRISH JURIST are to be sent, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications;—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 5, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, August 11, 1849.

THE Irish Jurist

No. 42.—Vol. I.

AUGUST 18, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, AUGUST 18, 1849.

THE recent decision of *Crosbie v. Thompson*, (11 F.E.R. p. 404), is one of a series of cases, by which evidence tantamount to an admission is allowed to be given in proof, though not mentioned in the pleadings.

The suit was, amongst other matters, to raise the amount of a mortgage, and it was alleged that the defendant had taken upon himself its payment, on the completion of the sale mentioned in the bill. In support of this averment, two accounts were given in evidence between the defendant and the land agent of the vendor, in which the defendant took credit for part of the purchase money retained on account of the mortgage.

These accounts were not put in issue, nor referred to in the bill.

His Lordship held that they were admissible in evidence; and having cited the judgment in *Malcolm v. Scott* (3 Hare 39), "this bill, however, expressly charges that there was an agreement for giving the lien in question, and I am perfectly clear, according to the rule Lord Cottenham laid down, that whatever would be evidence of an agreement at law is evidence in equity, subject to this: that if one party should keep back evidence, which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence without first giving the party an opportunity of controverting it." His lordship observed, "That doctrine is approved of in *M'Mahon v. Burchell*, and taking it to be the rule, I must allow these accounts to be read subject to observation, and to have their effect qualified; the course pursued will, however, have great weight in the question of costs, if the court should feel coerced to give a decree on these documents."

The old rule unquestionably was different, and

we are not clear that it was not more consonant with the spirit of equity jurisprudence than the modern one.

It used to be considered essential, that every matter intended to be proved, should be put distinctly in issue, to guard against the opposite party being taken by surprise, by proofs of which he could have no intimation, from the manner in which evidence in courts of equity is taken, and could not disprove before publication of that evidence.

Thus there was much reasonableness in the rule, when the mode of examining witnesses in equity is considered. The plaintiff knows no doubt what he requires his own witness to prove, although he does not know whether it has been proved or not; but the defendant does not know what particular facts the witness of the opposite side is called upon to depose to, except they be put in issue by the pleadings.

So long as the evidence of each witness is given in secret, and that the attention of the opposite party is not directed, as in the Ecclesiastical courts, to the particular branch of the case the witness is to be examined to, it appears desirable that there should be some clue to guide the party cross-examining. The points even distinctly put in issue in the pleadings formed a very wide boundary, but yet they did form a limit and a test.

An inconvenience, and which led to breaking down this rule, arose from prolix pleaders stuffing the record with every letter or document *in extenso* on which they relied, and it was relaxed by Sir A. Hart in *Fitzgerald v. O'Flaherty*, (1 Moll. 351.), to prevent equity pleadings becoming endless. The rule has now become established that where letters or documents are intended to be used as evidence of facts charged in the bill they need not be specifically put in issue. A general averment of their existence is, however, if not indispensable, very prudent, and the rule of their admissibility was by the

same learned judge restricted to cases where they were used as evidence of facts; and it has been decided that they could not be used as *admissions* or *confessions* of facts without being mentioned in the pleadings. *Blacker v. Phelpoe*, (1 Moll. 354); *Houlditch v. Marquis of Donegal*, (ib. 364) And conversations between a witness and a party to the suit in which the latter admitted his having defrauded the other were rejected because not noticed in the pleadings, and the judge to whom we have already referred used the strong language that "no man would be safe if he could be affected by such evidence."

It is obvious that a question of exceeding nicety must very often arise between what is evidence of a fact and what are admissions of a fact, an inconvenience that must be the result of breaking down a general rule; cases for its relaxation will be of frequent occurrence, and give rise to the nicest and most subtle distinctions. The marginal note to *Crosbie v. Thompson* states that "any documents which could be used at law as *admissions* to prove an agreement pleaded may be used in evidence in equity for the same purpose, though not noticed in the bill, subject to enquiry, if the defendant be taken by surprise." We apprehend the learned judge did not mean to go this length, and that he admitted the accounts as evidence of the agreement, and not as an admission of it.

In this and in many other cases there is, however, almost a distinction without a difference, because here the accounts apparently were more efficacious for the purpose of admission than of evidence, and the existence of the practice excluding them in the one and admitting them in the other instance proves that the rule has been too broadly laid down by Lord Cottenham, "that whatever would be evidence of the agreement at law is evidence in equity."

An oral admission would be evidence at law, but would it be admissible in equity? No man would be safe if it were.

The principal case stands on the verge, it is a compound of evidence and admission, and it is exceedingly difficult to discriminate why oral testimony should be discarded, (as we apprehend it would be,) and written admitted, in cases similar to the principal one.

We conceive it almost impossible to adhere to Lord Cottenham's general rule, and that it would be a very unsafe one for the pleader to rely on. It must, we apprehend, introduce great laxity of pleadings, and loose general averments.

On the balance of convenience, it would appear better that the facts relied on should be distinctly stated in the first instance, than that there should be a discretion reposed in the judge "of giving the party taken by surprise an opportunity of controverting" the newly offered evidence, by further inquiry. Will not this lead to greater inconvenience than if the old rule were adhered to; and, in many cases, to save this further inquiry, the judge will either not give the evidence its true weight, and rest his decision on other grounds, or if he gives it the weight of a feather in the scale, he will, imperceptibly to himself, decide on evidence which was unfairly brought forward against the opposite party.

The analogy of a court of common law is not

tenable in all its parts; the administration of justice, and the mode of its being administered in the two courts, is widely dissimilar, and the class of evidence that might answer for the scramble at *Nisi Prius*, would be unsuited to the deliberate inquiry of a Court of Equity.

In a recent case [*Webster v. Delafield*, (13 Jurist, 635,)] considerable doubt has been thrown upon a practice connected with the law of Interpleader, (1 & 2 W. 4, c. 58, Eng., 9 & 10 Vic. c. 64, Ir.) which had previously been considered settled, viz. that the statement, and nature, and particulars of the claimant's case should be upon affidavit. This is the principle feature of the decision; but two other questions, also of much practical importance, were discussed: First, as to the authority of the court to bar the plaintiff, under the 3rd section of the 9th & 10th Vic. c. 64,* he having appeared, and no rule after appearance having been made upon him; and secondly, whether the affidavit on which the claim was founded should necessarily be made by the claimant himself.

The facts of the case were, A., the plaintiff, seized the furniture and goods of B., the defendant; at the time of the seizure, C. and D. attorneys for E. the claimant, gave notice to the sheriff that the house and goods were the property of E. The sheriff having obtained a summons for an interpleader order, C. attended before Coltman J. at chamber, and produced an affidavit sworn by E. before an English consul at Paris. This affidavit was refused by the judge, not being sworn before a competent person. C. then made an affidavit of his belief that the goods in question belonged to E., and that he (C.) was in possession of the title deeds of the house; that E. had left the country in 1848, and left the house and furniture in the custody of his servants. The case was adjourned to allow a proper affidavit by the claimant to be procured, but there being no competent authority at Paris to administer such an oath as the English law requires, C. again came before the judge at chamber, and made another affidavit to the effect that from papers in his possession he believed the goods seized to be the property of E., that ineffectual efforts had been made to obtain an affidavit from E., who was too unwell to travel to England. The learned judge being of opinion that the claim was insufficient, made an order to bar the claimant under the third section.

Against this order it was contended that as the order to appear and state his claim had not been served on E.,† he could not be barred, and that the affidavit of C. was sufficient. On the other hand, it was said—first, that there must be an affidavit, *Powell v. Lock* (3 Ad. & El. 315, S. C., 4 Nev. & Mar. 852); that this affidavit was insufficient; and that, therefore, not having maintained his claim, the claimant was barred.

* The Irish act is cited to prevent confusion, being identical with the English.

† This argument does not appear tenable; if the order was not served, the court could have no jurisdiction to adjudicate on the claimant's rights. The service upon his agent or attorney was probably that which was acted upon.—Ed.

The court were unanimously of opinion that the claim need not be supported by the affidavit of the claimant himself. Maule, J. was of opinion that there was no necessity for any affidavit, that the statute required none; that the judge may make an order, calling upon the party to appear and state the nature and particulars of his claim, and under certain circumstances, may declare him barred. "As to this, I do not think that the judge has any different power when the sheriff is the applicant, from that which he has when any other person applies. The true construction appears to me to be this:—Sec. 1 empowers the judge to make an order for the claimant to appear and to state the nature and particulars of his claim, which he is either to maintain or relinquish. If he maintain his claim, the judge may order an issue or action; or if the claimant and the plaintiff consent, the judge may dispose of the merits in a summary manner, which is, by sec. 2, to be final and conclusive; or the claimant may relinquish his claim; and I think it is wrong to hold that he must maintain or relinquish it by affidavit. Then comes sec. 3, which enacts, that if he shall not appear upon such rule or order, being duly served therewith, to maintain or relinquish his claim, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the judge to declare him to be for ever barred from prosecuting his claim against the original defendant. Sec. 1, gives the judge no power to make an order to bar a claimant; and the rules or orders mentioned in sec. 3, mean rules or orders not inconsistent with, but subservient to those authorized by sec. 1. The only section conferring the power to bar, is sec. 3, and that applies (in a case where a party appears and does not relinquish his claim) if he neglects or refuses to comply with any rule or order made after appearance. In this case no order has been made after the claimant's appearance. He has not failed to comply with any order so made. There has been no decision upon the merits by an action or feigned issue, or by the judge with the consent of the parties; nor has the claimant relinquished his claim; therefore I think his claim ought not to be barred. This view, I think, is in conformity with both the letter and the spirit of the act, which was intended to substitute a remedy for the previous tardy and expensive process in Chancery by bill of interpleader. The Legislature intended, with the addition of protection to the sheriff, to leave the rights of conflicting parties in as nearly the same state as they were in before the interpleader. Before that, the claimant might bring his action without consulting anybody; he might sue out his writ and pursue his remedy without stating any claim; and this, his right at common law, it was not the object of the statute to do away with, except so far as might be beneficial to defendants who might be sued, and have no interest in the subject matter of the suit. Further, to qualify this right does not benefit his opponent, but must prejudice the claimant; and there is no reason for imposing restrictions upon him rather than upon any other party. But it may be said, of what use is it that a judge should have power to make an order, if it may be disobeyed with impunity? It

seems to me, that the claimant's duty is to obey the order, and if he does not, that he is to be mulcted in costs, but not that the penalty of his disobedience is to be a forfeiture of his whole claim. In the case of *Powell v. Lock* (3 Adol. & Ell. 315) the application was to the full court, and not to a judge at chambers. The objection was, that there was no affidavit, and the dicta of the judges, and the questions put from the bench were to the effect that the claim ought to have been stated on affidavit. The decision of the court was, that the party should have time to make an affidavit, and more than this they did not intend to decide. Nothing was said about the claimant being barred; and although the court thought that there should be an affidavit, they did not say what the consequence was to be if there was not one." Cresswell, J. was of opinion, on the authority of *Powell v. Lock*, that an affidavit was necessary, though it need not be made by the claimant. Williams, J. agreed that the affidavit need not be by the claimant himself; but was of opinion that the statute required an affidavit; and that the order of Coltman, J. should not be set aside, as the true ground on which he proceeded was, that the claim was not sufficiently stated, of which he was the judge.

We agree that an affidavit by a third person, in support of a claim, is sufficient; but it also appears to us that an affidavit is necessary. The 6th section enacts, "That when a claim shall be made to any goods or chattels, taken or intended to be taken in execution, the court or judge may call before him or them, by rule of such court or judge, as well the party to every such process as the person making the claim, and thereupon to exercise for the adjustment of such claims, and the protection of the officer, all of the powers and authorities herein-before contained." The course of proceeding then is, that if a claim be made, the court, "by rule," will direct the claimant to come before them, and then will exercise the powers vested in it by the act. What then, are those powers and authorities? The first is to call upon the third party, to state the nature and particulars of his claim, or to maintain or relinquish it. How is this to be done? except by affidavit, which, by the 7th section is to be filed as a record. How, in case of an appeal, from the decision of the judge at chambers, are the facts to be brought before the court above, except they appear by affidavit? What is the nature of the evidence, on which the judge is to decide whether he will grant an issue, or, with the consent of the parties, give his final adjudication? On these grounds, together with the practice of the court, in not admitting any statement not upon affidavit, we think this case requires it.

The question then arises, whether the claimant having appeared, and failing to maintain, is barred? but for the opinion of that able and experienced judge, Mr. Justice Maule, we should have thought he was.

To follow again the course of proceeding pointed out by the statute, the claim requires no affidavit; but when made, the judge, under the 6th section, "by rule," is to call the claimant before him, for the purpose, under the 1st section, of maintaining or relinquishing his claim; upon such rule, he is to hear the allegations on the one side and the other;

and to adjudge finally, or direct an issue, as the case may be. The 2d and 3d sections refer to the first section, and the 6th section, the proceedings under which the judge is empowered to carry out according to the powers and authorities previously given, is, for the purposes of the 2d & 3d sections, to be incorporated in the first. The 3d section enacts, "That if such third party (the claimant), shall not appear upon such rule or order to maintain or relinquish, being duly served therewith; or shall neglect or refuse to comply with any rule or order to be made after appearance, he shall be barred from prosecuting his claim against the original defendant, &c." The legitimate reading of the first section appears to be, that stating the particulars of the claim, is of itself, either maintaining or relinquishing; if the claimant's statement be, in the opinion of the judge, satisfactory, the claim is maintained; if the claimant can make no such satisfactory statement, he must relinquish. What then was the state of the facts in the case before us? The claimant himself, or through his attorney, was served with a rule under the 6th section, or the court had no jurisdiction. He was bound "being duly served therewith" by the third section (under the penalty of being barred) "*to appear upon such rule to maintain or relinquish his claim;*" not only to appear, but in addition to maintain or relinquish. The claimant did appear, but having, in the opinion of the judge, failed to maintain, he abandoned or relinquished his claim, and was, therefore, barred.

This construction would, on the ground of convenience also, seem to be best, as the claimant having appeared, and disobeyed no order of the court made after appearance, in the opinion of Mr. Justice Maule the only penalty would be being mulcted in costs; and an action against the sheriff or execution creditor would help to compensate him for the loss of the costs of a motion.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

Sir Edward B. Sugden, June 21, 1849.

(Continued from p. 316.)

471. In point of fact, the ownership of the estate has passed from the original owner, the debtor, to the judgment creditor?—No doubt; and one of the greatest mischiefs of judgments in Ireland has been, that the owner of an estate has gone on insensibly increasing the incumbrances on his property. He is regarded as the ostensible owner of an estate of £9,000 or £10,000 a year, when he has not more than £200 or £300 a year interest in the property, and he cannot accommodate himself, no man can, to that state of things. He represents an ancient family, possessed of a fine estate, and he is necessarily driven into expenses which he would not incur if he had not that estate, and yet he has no substantial interest in it.

543. *Mr. R. B. Osborne.*] Are you aware whether the greater proportion of the receivers that have been appointed, have been appointed for small or for large debts?—I should apprehend that till the late Acts had come into operation they would be for large debts; but since those Acts,

every creditor, every butcher or baker, the moment he has got a certain amount of debt gets a judgment, and comes instantly to the Court of Chancery with a petition for a receiver. The court has avoided the difficulty of going on appointing receiver after receiver, by extending the receiver. I have seen, in cases where the court has extended the receiver, page after page filled with the names of the different matters in which he has been extended. For instance, originally it has been, "A. B. petitioner, and so and so respondent in the matter," and then the other judgment creditors who have got the receiver extended follow in succession.

545. It is considerable?—The expense of extending a receiver is about £8, or something of that sort. I would observe that there is another result of those numerous receivers which is very serious, inasmuch as it infringes upon the rights of third persons; when those receivers were not very common in the courts of equity the rule of the court did not operate injuriously; as soon as the court has granted a receiver it will not allow any third person to interfere; so that, supposing you have granted a lease for 100 years, and have a rental of £400 or £500 a year from the estate, if a party has a judgment against your tenant and gets a receiver, the court will not allow you to distrain the tenant for your own rent, or bring an ejectment if he will not pay it; if the landlord comes into court in order to obtain permission to distrain, it will give him leave to distrain, but then the court makes him pay his own costs. What the court intended to do was to prevent any unnecessary proceedings being taken, and there was no great grievance when receivers were granted with deliberation, and in suits; but when every tradesman can get a judgment for a debt, and the next morning apply to the Chancellor for a receiver, and the receivers are multiplied as they now are, the rule is a very great deprivation of the rights of property, and operates most injuriously.

546. The receiver in Ireland is only looked to as the man who can get the greatest amount of rent from the tenants?—Yes.

547. Without reference to the improvement in the mode of agriculture?—Yes, it must be so; in Ireland the creditor wants his debt, and nothing less will he have; but that is not confined to Ireland.

575. *Mr. Keogh.*] With reference to the immense extent to which receivers are continued from one matter to another, are you aware that the costs of appointing a receiver are paid out of the estate in the first instance, though the motion should be made by a person who never had an interest in the property?—Yes.

576. Are you aware that that has induced some persons to apply for the appointment of receivers over property where they never expected to realise their demand?—I am not aware of it, but I think it very probable.

577. Do you think it would contribute to the proper appointment of receivers if the cost of their appointment were reserved in the same way as the demand?—I think it would.

578. As regards the multiplicity of suits, a number of creditors' suits may be going on at the same time till a decree is pronounced; one creditor files his

bill and then another creditor, for the purpose of accumulating costs, goes into the office and takes a copy of that and files it on his own account. Has the court power to stop those suits till the decree is pronounced?—The court has usually not exercised that power, because you can never be sure that the party who has instituted a suit will go on with it.

579. Do you think it would be possible to prevent a multiplicity of suits at the same time?—Yes.

580. It would greatly contribute, if it could be done, to save the estate from costs?—It would.

581. *Sir J. Graham.*] I apprehend from the former part of your evidence that you would not think it desirable to alter the law with reference to judgments as affecting the whole property of the debtor?—No. I think general public opinion is in favour of that law, the Legislature having taken away the right of arrest upon meane process.

582. It has been suggested to the committee that prospectively it would be desirable to make the judgment apply only to a particular portion of the property?—That would be very difficult.

583. To black-acre for instance?—That cannot be from the nature of the proceeding; but the court has been in the habit of putting a receiver upon a portion of the estate to pay a particular judgment which comes to the same point.

584. *Sir R. Peel.*] Is not the power of making the whole of an estate responsible for a judgment debt a great encouragement to improvidence and extravagance?—I think so; I have never had the least doubt about it; and particularly operating as it does in Ireland, where a judgment creditor can get a receiver instantly; if a man could only get judgment as in England, and then he had to work it out, he would not in that case be so anxious to obtain a judgment. Supposing a party did not pay his butcher's bill, the butcher would wait as a tradesman does in England, till the party were able to pay his bill, instead of which now he gets a judgment, and then a receiver, and the attorney gets his costs, and that proceeding of obtaining a receiver may never produce a single farthing to the man; but it is a great encouragement to extravagance and improvidence, and also to giving undue credit; the evils are universal almost.

585. *Sir J. Graham.*] You have stated that you have no hesitation as to the propriety of appointing receivers generally speaking, in cases above £100; if you raised the limit to £500 you would impose a stronger check, and so on in the proportion in which you fixed the minimum high?—No doubt, but I should not propose to take away the operation of a judgment at all; I think such a step would be very badly received in Ireland; and I think it of great importance that any alteration made in the law should carry with it the feeling generally of the people, and that you should not do anything which is adverse to their own sense of what is due to them; and they have so long considered judgments as the common assurance of the country, that they would consider it very hard if you took away the operation of judgments; but nobody would have a right to complain of your altering an Act of Parliament which was passed only the other day, and which gave creditors rights in addition to the rights they had under the old law.

586. With respect to appointing receivers, you would alter the law?—Yes; judgment creditors would then have the same rights as a judgment creditor has in England.

587. Would you make the judgment assignable?—I think that the power to assign should not be taken away in Ireland.

588. The only alteration you would propose is with respect to the appointment of receivers for sums below a certain amount?—Yes, and that no receiver should be appointed at all till within a certain period after the judgment has been obtained, say a year or some such period; I would not allow a judgment to be snatched and a receiver to be appointed instantly; I should look to England as the country in which charges on real property are properly regulated, and I should like to see Ireland placed on the same basis; it is utterly inconsistent with the prosperity of the country that there should be so many judgments upon the property and so many receivers.

589. *Sir R. Peel.*] Supposing the case of a creditor dealing with an improvident young man, and that young man wanted to raise £200, and that for £200 a receiver could not be appointed, might not the effect of such a restriction be that the creditor would say, "Though you only want £200, borrow £500 from me, because by lending you £500 I shall have the security of a receiver?"—No doubt that might be done, and I am not aware of anything that you could do that is not open to abuse.

590. In that case there would be a temptation to the young man to borrow money that was not absolutely required, and thereby to involve himself in greater embarrassments?—Numbers of those judgments are not for borrowed money; they are for ordinary debts, contracted in the course of a man's living, with his tradesmen, one after the other, and a person to whom he is debtor obtains a judgment; they have nothing to do with contracts, beyond the actual contracting of the debt by purchasing the goods.

591. Would not the same case occur with a tradesman who would say to the young man, "My debt amounts to £400; run it up to £500 and I shall have the benefit of a receiver?"—It does not appear to me that that is an objection to the thing. It may happen, as it happens at College, while a man goes on increasing his debts they never press him, but the moment he leaves off spending, then they press him. You cannot guard against a case of that sort.

592. *Sir J. Graham.*] Are not receivers appointed very often for debts under £10?—Yes.

593. You must draw the line somewhere if you strike at the abuse at all?—Yes; there would be cases such as Sir Robert Peel puts, in which there would be evasion in order to get within the rule, whatever the rule is; you can have no rule that would not be evaded, but its general leading operation would be useful. A man would, I think, not advance more money in the case Sir Robert Peel put in order to obtain a receiver upon petition; or if so, it would probably be an unfair transaction, which the Court of Chancery could correct.

594. The public good appears to you to demand the alterations of the law which you have suggested,

and those alterations are the mildest that you think are indispensable?—Yes.

595. Time may show that rather stronger measures are necessary?—Yes.

596. But you recommend the alterations which you have suggested to be tried in the first instance?—Yes; and if I found the evil was not cured by them, it would be time to see whether you would strike at the receiver on petitions, or leave every thing as it stood. The Sheriff's Act not only extended this remedy over the whole estate, but gave extraordinary power besides.

597. *Sir R. Peel.*] Anticipating for the sake of argument a failure of the measures which you now suggest, can you state what are the other measures which you would in that case suggest?—No, I have not thought of anything beyond; I should like to see what the evil was before I addressed myself to the consideration of what would or would not be the cure.

598. *Sir J. Graham.*] You have mentioned incidentally what would be a stronger measure, namely, the abolition in all cases of receivers on petition?—Yes.

599. But you would not think it wise to go that length at once?—No; I should think it would be too strong a measure.

Right Hon. T. B. C. Smith.—June 28.

945. Will you state to the Committee what you think the prominent evils connected with the system of the management of estates under creditors' receivers?—The mode in which the receiver is appointed is this: an order of reference is made to the Master to appoint a receiver, either upon a decree or upon motion in a cause, or upon petition under some of the statutes in force in Ireland; when the order is made, the solicitor who has the carriage of the proceedings, who is usually the solicitor for the plaintiff or petitioner, lodges an attested copy of the decree or order in the Master's office, to whom the reference is made, and a summons is issued for some particular day, as I understand, and the Master directs who shall get notice of the proceedings; however, practically, as I understand, the solicitor for the plaintiff or petitioner is the only person who attends. I am speaking now of the majority of cases; he proposes to the Master some person to be appointed receiver, and I believe it would appear, if returns were called for, that in the vast majority of cases the person so proposed as receiver is the person appointed. I think that system has led to most injurious results, and I think it has led to the appointment of a very improper class of persons as receivers.

946. The multiplication of receivers so selected must act very injuriously upon the general interests of the country?—I think so. It would be well that I should explain to the Committee why it is that, in my opinion, improper persons are appointed as receivers. In the first place, it frequently happens that in petitions under Sir Michael O'Loughlen's act, and Mr. Pigot's act, the judgment is for a very inconsiderable amount; if that be so, of course the receiver is appointed over a very small portion of the property; but it sometimes happens, without regard to the amount due on the judgment, that the

property over which the receiver is appointed is very inconsiderable. I can give two examples, which occurred before me in the present sittings. In one case, (and I have brought over a copy of the petition for the Committee,) there was an application to extend the receiver, and if you add the costs at law and the costs in equity, the debt being £5, you find a most enormous disproportion between debt and the costs. The judgment was for more than £5, because it included the costs at law; the petition stated that the debt was £5 8s. The other case was an application to continue the proceedings under the provisions of Sir M. O'Loughlen's act, which, by the death of one of the parties, became necessary to continue. The property was £10 a-year; and I need scarcely say that appointing a receiver, either with respect to a debt of £5, which was one of the cases which was before me this term, or with respect to property worth £10 a-year, must work most oppressive.

947. *Sir R. Peel.*] Can you give the whole story of the £5 case?—I directed the registrar to give me a copy of the proceedings in that case which I have brought with me. It may be that, however, to say, in justification of the petition that he had thought it right, on account of the amount, to resort in the first instance to some mode of recovering the debt, and had failed in that, but I only give the case as an example; and I gave the registrar at the same time to furnish me with what he believed would be the costs in equity attending the receiver. Now, in these cases it is very difficult, considering the very small remuneration which the receiver obtains, to get proper persons to be receivers. But the second cause which leads to improper persons being appointed receivers over property, and which applies to every class of property, is, that the solicitor for the petitioner or plaintiff has, in my opinion, a direct interest in nominating an unfit person.

948. Will you explain to the Committee in what manner the solicitor would have an interest in not having a fit and proper person appointed receiver?—If he was to appoint a completely independent person, in all probability he would have no legal profit on the transaction; that independent person so appointed would either select his own solicitor, or would endeavour to manage the property in such a manner as to incur as little legal expense as possible; whereas the plaintiff's solicitor has a direct interest in appointing some person who will be a complete tool in his hands.

957. Have you traced the origin of the law of judgments in Ireland as contradistinguished from the law of judgments in England to any connexion with the penal laws of Ireland?—My attention has not been called to that. I think there was a case relating to that point before Lord Redecdale, which is reported in Schoales and Lefroy, I speak from memory, the popery laws not having been in force since I was called to the bar. I believe judgments obtained by Roman Catholics were not within the popery laws, save that the amount could not be recovered by elegit; but I wish it to be understood that I am speaking from a vague recollection.

958. The penal laws in Ireland affected the title

of land as enjoyed by Roman Catholics?—No doubt they did.

959. But judgments, when held by Roman Catholics, were an available security to their full extent without regard to creed?—I do not know that, I shall look in the House of Lord's Library, at the rising of the Committee to-day, for the case I have mentioned; [see *O'Fallon v. Dillon*, (2 Schoales & Lefroy, 21,) and *Read v. Aylmer*, (Howard's Popery Cases, 80.)] but as this question has never arisen since I was called to the bar I am not familiar with it.

961. Do you believe that the effect of the conjoint operation of Sir Michael O'Loughlen's act and Mr. Pigot's act has been advantageous or not?—That is a difficult question to answer; they have produced evil effects, no doubt; but Sir Michael O'Loughlen's act was introduced with a view to remedy a greater evil. If the Committee would wish to know the cause of the introduction of Sir Michael O'Loughlen's act I think I can refer them to a document which explains it. I cannot give the exact date of the report, but several years ago there was a commission to certain gentlemen to inquire into the proceedings of courts of justice in Ireland. One of their reports related to the mode of levying the amount of a judgment by a custodiam proceeding and outlawry, but the remedy by outlawry and custodiam was so oppressive that I believe it was that circumstance which induced Sir Michael O'Loughlen to bring in his measure.

964. Do you think that giving the right on the part of the judgment creditor to obtain the appointment of a receiver, considering the extent to which that right has been pushed, has been advantageous or otherwise?—I should say that it has been disadvantageous in this way. I am quite sure that there are a greater number of judgments affecting land in Ireland now, than there would have been if Sir Michael O'Loughlen's act had never passed.

965. Has the power of judgments, as affecting all property in the possession of the debtor, or to be acquired by the debtor, been enlarged to that extent by recent enactment?—Yes; Mr. Pigot's act introduced a clause independent of the clause which was contained in Sir Michael O'Loughlen's act, and the clause which was so introduced into Mr. Pigot's act, irrespective of Sir Michael O'Loughlen's act, was in fact copied from a recent act relating to England; the clause which authorises you to take the entire of the land of a debtor under an *elegit* instead of a moiety was copied from a clause in the English act.

969. Then the extended effect of judgments in Ireland under Mr. Pigot's act, as contrasted with England, has arisen from the circumstance of the power of appointing receivers existing in Ireland?—Yes; Sir Michael O'Loughlen's act gave for the first time the power of appointing receivers to the petitioner who either had sued out an *elegit*, or was entitled to sue out an *elegit*, and the receiver was not to be over the moiety, but over the entirety if necessary. There was a conflict of decision upon the construction of that act, between the Court of Chancery and the Court of Exchequer; the Court of Exchequer applying a strict construction, and only appointing a receiver in cases where the *elegit*

could have been made available. Sir Michael O'Loughlen at the Rolls gave a more extended construction to the act, and considered that it authorised the appointment of receivers over an equity of redemption, or over terms for years. He so expressed his opinion; and the effect of the amendment of Sir Michael O'Loughlen's act by Mr. Pigot's act, was in fact to extend the remedy under Sir Michael O'Loughlen's act to those cases in which the Court of Exchequer had given a limited construction to the statute.

970. Then the conjoint effect of those acts has been to render a much larger surface of the whole of Ireland liable to management under the Court?—Certainly.

971. And you have already said, that with respect to the appointment of receivers, the system is not satisfactory, in your opinion?—It is not.

972. Therefore if the evils of the appointment of receivers remain unchanged, the effect must be very injurious to the cultivation and the management of property in Ireland?—I think it must.

985. As relates to the public good, the effect of judgments remaining unchanged in Ireland, and the power of appointing receivers still remaining unchanged, would there not be an advantage to the public in having only one jurisdiction by which receivers could be appointed?—I think so; if the Court of Chancery was capable of doing the whole equity business of the country, it would be better to have only one equity jurisdiction. I had returns made to myself of the business done at the Rolls in the last nine or ten years; I could not lay my hands upon the returns previous to the last two years, but I have the latter with me, and when I rise from the present sittings, the number of orders which I shall have made for one year from the first day of Michaelmas Term, will be about 4,700, and the number in Sir Michael O'Loughlen's time did not, I believe, amount in any one year to 3,000.

990. Since the passing of Mr. Pigot's act, tenants under long leases may obtain loans upon judgments, with all the law of judgments affecting those long leases?—No doubt they may.

991. Do you think that it is politic in the present circumstances of Ireland, to extend the leasing power of tenants for life?—That is a very large question, which I do not know that I have considered very much.

992. But it has a bearing upon the question of judgments and receivers: for as you extend the leasing power, you extend also the liability of the property so leased to judgments, with the appointment of receivers; do you not?—Of course all leasehold property is subject to the operation of Sir Michael O'Loughlen's act.

993. By splitting the reversion, and by multiplying middlemen, you subject the same farms, the same corpus, to various judgments, and with various judgments to the appointment of different receivers over it?—No doubt; and there are cases in which there is a receiver over the middleman's interest and over the landlord's interest at the same time.

994. As you multiply leases, and as you split the reversion, under the operation Mr. Pigot's act and the Sheriffs' act conjointly, you render more and more of the property of Ireland subject to the

effect of judgments, and to the consequent appointment of receivers?—I think you do.

995. Then if that be an evil, has it not been the tendency of legislation to increase and aggravate the evil?—Certainly. If you authorise a tenant for life to make long leases, there is no doubt that that leasehold interest becomes subject to a receiver; but I feel some difficulty in stating how that exactly bears upon the consideration of the question.

996. If you were to increase the power of the tenant for life to grant leases, would it not be politic, conjointly with that power so about to be granted, to look at the operation of Mr. Pigot's act and the Sheriff's act, with the view of checking the obtaining of judgments and receivers as affecting property of small amounts?—I think it might. I think myself that it was very questionable whether subjecting terms for years to judgments was a beneficial alteration of the law.

997. Looking at the present state of Ireland, with judgments the common assurance of the country, and the extended use which is now made of that mode of obtaining credit, would you think it prudent at once prospectively to put an end to judgments with the power of appointing receivers?—That is a question of very great difficulty. I apprehend that you must give the judgment creditor some remedy against the land; but the great difficulty of dealing with the question, is to determine which is the least oppressive mode of levying the debt out of the land. The oppression which outlawry proceedings led to, and which was the origin of Sir Michael O'Loughlin's act, is detailed very clearly in the report to which I have referred. If you were to repeal both the statutes, no doubt it would get property out of Chancery to a certain extent, or rather it would prevent property getting into the Court of Chancery, but you would still leave the debtor open to a proceeding by elegit; and it is right that the Committee should understand that the proceeding by elegit will of necessity lead to difficulty. I shall endeavour to explain how an elegit proceeding would lead to difficulty. Suppose there is a tenant in possession of lands and a judgment against his landlord, if his lease bears date subsequent to the date of the judgment, the creditor may issue an elegit; he may have an inquisition in the ordinary way, and a finding upon that; and upon that inquisition he may serve an ejectment on the tenant, and turn the tenant out of possession altogether. If the judgment is subsequent to the date of the lease, he cannot turn the tenant out of possession, but the judgment creditor, by the operation of the inquisition, is regarded as in the nature of the assignee of the reversion; he stands in the shoes of the landlord—and the difficulty is this: one judgment creditor having proceeded and attached the rent, may be dispossessed by a prior judgment creditor, and that prior judgment creditor may be dispossessed by another prior judgment creditor; and in this way the unfortunate tenant in possession may suffer very nearly as much by that elegit proceeding as he suffers at present by a proceeding by a receiver; the difficulty is, whichever way you turn it is only a choice of evils.

1002. *Sir J. Graham.*] Have you seen the bill that has been introduced by the government with respect

to judgments in Ireland being no longer assignable?—I read it hastily.

(To be continued.)

CHANCERY.

Walter Humphreys, Plaintiff, } PURSUANT to the Decree
John Bowen, the younger, } made in this Cause, bearing date the
and others, } 10th day of May, 1849, I hereby certify
Defendants. } all persons having Charge of Issues,
branches affecting the Annuity of £300 per annum, and the other limitations comprised in the Indenture of the 12th of May, 1847, being
pleadings mentioned, to come in before me, at my Chambers, in the City of Dublin, on or before the 22nd day of October next, and pay same, otherwise they will be precluded the benefit of said Decree.
Dated this 4th day of August, 1849.

R. LITTON.

GEORGE BEAMISH, Solicitor for the Plaintiff,
No. 38, Lower Gardiner Street, Dublin.

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All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, in the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, August 18, 1849.

THE Irish Jurist

No. 43.—VOL. I.

AUGUST 25, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 6d.

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DUBLIN, AUGUST 25, 1849.

WHERE several suits are instituted in Equity against the same defendant, it is the practice, both in the Court of Chancery and Exchequer, after a decree has been pronounced in one, to obtain an order staying further proceedings in the other causes, and that the parties may come in and prove their demands under the decree; and in the Court of Chancery a practice has prevailed by which the plaintiff in a stayed suit is rendered personally liable for the costs of the several defendants in that cause.

The case of *Loflie v. Forbes*, (2 Ir. Eq. R. 443,) is to be considered the first in this country which distinctly lays down the rule that the plaintiff in a stayed suit is personally liable to pay the costs of the several defendants in that cause, and that, whether the stayed suit has been vexatiously instituted or not. It often happens that from the obstinate litigation of defendants it is impossible for a plaintiff to obtain a decree for a considerable time, while a friendly suit, commenced it may be long after the other, is brought to a hearing first, and a decree to account obtained, from the facilities afforded by the very parties whose utmost exertions were used to retard the progress of a suit commenced by a *bonâ fide* creditor, and absolutely necessary to obtain payment of his demand. It appears to us that in such a case this rule, if laid down inflexibly and acted on without regard to the circumstances of each case, is calculated to work great hardship and oppression.

In *Croker v. Copley*, (2 Moll. 469,) there was a suit in the Exchequer to which the plaintiff in the second cause was a party, a receiver was appointed before the suit in Chancery was instituted, and the case came on by motion to dismiss the second bill for want of prosecution. The Master of the Rolls, in giving judgment, went very fully into the special circumstances of the case, and said, "Incumbran-

cers who can have no relief in the suit, and are merely brought before the court as necessary parties, are entitled to their costs, and that in the first instance *out of the fund*, and every plaintiff files his bill subject to this liability." This would appear to us to point out precisely the proper fund out of which a defendant's costs should be paid; for why should he be put in a better position by the order to stay than he was before? and why should a *bonâ fide* creditor plaintiff in a suit fairly instituted, be placed in a worse? Besides, by such a practice the plaintiff is injured far more than a defendant would be, were he obliged to wait until the fund be realized; there is no balance of inconvenience from which it might be said that where a plaintiff and defendant would suffer equal inconvenience, in order to discourage unnecessary suits, the leaning should be against the plaintiff who is active, and in favour of the defendant who is brought before the court *in invitum*, and such indeed was the reasoning of Sir Michael O'Loughlen in *Loflie v. Forbes*, (as reported in 2 I. Eq. Rep.) and if there was but one defendant who might become entitled to his costs such reasoning might be conclusive, but where such defendants are very numerous, and although individually their costs may be inconsiderable, yet the aggregate sum for which a plaintiff becomes personally liable may be very large, and much more than he can pay or procure until the funds in the cause are realized; the rule, therefore, does not work fairly, for though a defendant or his solicitor may be inconvenienced by having to wait for a small sum, the plaintiff may be utterly ruined by being compelled forthwith to pay a very large one.

In the case of *Jackson v. Curtis*, cited in *Croker v. Copley*, there was but one suit, and by the decree costs had been ordered to defendants, who having proceeded to enforce payment by an attachment, upon application to set it aside the Master of the Rolls considered that the costs were properly pay-

able out of the fund; on appeal this order was set aside, and the Lord Chancellor held that the plaintiff should forthwith pay them. This case, however, would seem not to be an authority, for these defendants were prior incumbrancers, and the plaintiff when filing his bill must have been aware that they were entitled to be redeemed, and it is on that ground Lord Manners based his decision when he says, "The rule that the fund and not the plaintiff is to pay the costs only applies to formal parties, not to prior incumbrancers, as to them it is a redemption bill." This case, though cited by the Master of the Rolls in *Croker v. Copley* as shewing that a plaintiff is personally liable, distinctly lays down that the costs of formal parties, not prior incumbrancers, are to be paid *out of the fund*. And it does not appear to us that this learned judge would have sanctioned the practice which now prevails, by which all costs, whether of prior or subsequent incumbrancers, formal or other parties, are to be paid by the plaintiff in a stayed suit, although he may not have any other property whatever beyond the subject-matter of the suit.

In *O'Keefe v. Holmes*, (1 Irish Jurist, 78,) a defendant in a stayed suit applied that the plaintiff might pay his costs; counsel for the plaintiff insisted very strongly upon the great hardship of compelling the plaintiff to pay these costs before the funds were realized, as she had very little property except the subject-matter of the cause. The Master of the Rolls, however, was of opinion that although there might be hardship in the case he was bound by the decision in *Lofthouse v. Forbes*, and that it was desirable not to break in on a rule which tends to check the institution of several suits. If that was the only effect of the rule, and if it worked only to the prejudice of plaintiffs who—a suit being already in progress in which they could obtain full relief—commence another for the mere purpose of operating the estate with costs, we would be sorry to see it relaxed in the slightest degree; but when, as we have already shewn, it may injure the *bonâ fide* plaintiff, perhaps the first to take proceedings for the recovery of a fair demand, there we certainly think the rule should be relaxed.

The case of *O'Keefe v. Holmes* was again considered before the Lord Chancellor on appeal, who affirmed the order of the Rolls. In the same case (reported 1 Irish Jurist, 162,) an application was made by the plaintiff that the costs of the defendant, which he had been ordered to pay, should be paid to him by the receiver, and it was held that the plaintiff, who was a puisne incumbrancer, was only entitled to have these costs paid in the same priority as his demand; there was no positive decision as to the costs of prior incumbrancers; his Honor intimated, however, that a case might be made out which would entitle the plaintiff to these costs, not in the priority of the plaintiff's demand, but in that of the prior incumbrancers; but the notice not having been so framed the motion was refused. It would appear to us that the costs of *all* the incumbrancers, whether prior or puisne to the plaintiff's demand, should be paid according to their respective priorities, otherwise the severity of the rule, making a plaintiff personally liable, would be carried still farther, as if the fund only sufficed to reach the plain-

tiff's own demand, or, as often happens, his entire claim should not be paid, it would be rendered still more deficient if to that claim were added the costs of puisne incumbrancers, which never could have been paid if the suit had gone to a hearing.

In *Levinge v. De Montmorency*, (1 Irish Jurist, 251,) the Court of Exchequer, upon full argument and having all the cases before it, came to a conclusion which supports the view we have here taken. A bill had been filed in that court, and a decree to account pronounced. Subsequent to the institution of the suit, but before the decree, a bill was filed in the Court of Chancery by two of the defendants in the Exchequer cause. After the decree an order was made in the Exchequer restraining the plaintiffs from proceeding in Chancery, giving them liberty to come in and prove their demand in the Exchequer; subsequent to this, an order was made in the Rolls for taxation of the costs of a defendant in the Chancery cause, these costs were paid by the plaintiff in the stayed suit, who applied to the Court of Exchequer to be repaid by the receiver. Baron Pennefather in giving judgment said:—"The present motion is, that the costs to which the plaintiff in the Chancery cause is liable, should be paid in the first instance, by the receiver out of the funds collected by the receiver, or that the defendants in the Chancery cause be restrained from taking proceedings against the plaintiff in the stayed cause on their demand for costs against him. In justice, it would appear that the plaintiff in the Chancery cause who is restrained from proceeding there by the order of this court, is substantially entitled to relief in one or other of the shapes in which he seeks it." And his Lordship referred to the manuscript note of *Lofthouse v. Forbes* by Sir M. O'Loughlin.* Baron Pennefather also said:—"As to the costs of prior creditors whom the plaintiff brings before the court in the Chancery cause, he is undoubtedly liable in the event of a deficient fund." "With regard to subsequent creditors they must get their costs in the same priority as their demands. The costs of puisne creditors are not to be put out of their proper priority." It appears to us that the rule as laid down in that case is calculated to work fairly and justly and does not expose to utter ruin a plaintiff who, as we have shown, may have acted with the most perfect good faith, and without the slightest intention of instituting oppressive or unnecessary proceedings.

To the Editor of the Irish Jurist.

SIR,

In a very recent number you expressed a hope—in which all your readers participated—that the appointment of commissioners for the sale of incumbered estates should be made from none other than the purest motives.

The motives which led to these appointments I do not question, but to one of the selections I object—that of Mr. Hargreave. Towards that gentleman personally I not only entertain no ill-will, quite the reverse, I admit his talents; I acknowledge with the utmost satisfaction that general rumour does

* See 1 Irish Jurist, Rep. 352.

not overrate his capacity; I concede that he ran a distinguished career in the London University, that his mathematical abilities are of a very high order, and that his reputation at the Bar is that of an able and rising man; my objection will not, I hope, be imagined to arise from any other than public and professional grounds—personal, I have none. Mr. Hargreave was called to the English Bar in the year 1844; he has not yet, consequently, completed his fifth year of practice. Of a standing which, in this country, is insufficient by law to justify an appointment to the office of Assistant Barrister, and to a jurisdiction in civil actions where the debts do not exceed the paltry sum of twenty pounds; this young gentleman—who never yet spoke in a court of justice—is sent over to Ireland as a judge in a court invested with more arbitrary powers than were ever yet conferred upon any court of judicature in this or the sister country. He is sent, armed with a casting voice in decisions which may affect millions of property! sent to preside in a court clothed with greater powers than the Court of Chancery, in a court whose decision is final and irreversible except its own members think fit to allow an appeal from their decisions!

Let me assume that the other two members of the court may differ; that the one judge may incline to decide according to the rights of creditors and owners as now existing in courts of Equity; the other—impressed with the idea that he holds his office more for a political than a judicial purpose, and that the great object of the Legislature and of the Act was to effect sales and a transfer of property—may be disposed to deal more summarily with those rights, and that the junior commissioner gives his judgment, (I care not on which side,) I ask, will that judgment be calculated to carry with it weight to satisfy the public, or be one in which the professions will be disposed to acquiesce?

Nay, without speaking of his *judgments* will his *appointment* be calculated to inspire that public confidence which is so desirable to invite incumbrancers and owners to make trial of a new and untried tribunal, where the claims of the one, and the rights of both may be dealt with in a manner they know not of, and according to the unlimited discretion of the commissioners?

Lord John Russell was frequently asked to state the names of the proposed commissioners, and he postponed his answer until Parliament rose. His Government passed a measure constituting a court which can override the established tribunals of the country—even the Court of Chancery itself—a circumstance never previously known in legislation—in which is vested the determination of questions that may affect half the properties of this country, and the adjudication of rights of the utmost magnitude and the most extreme importance. Was it too much to expect that the Crown should have chosen judiciously, should have chosen men calculated from professional reputation to create confidence in their decisions?

Most assuredly the Government should not have so outrageously shocked professional and public opinion by the selection of an English conveyancer of five years standing, who, however respectable his

abilities may be, was but little known in his own, and absolutely unknown in this country.

There should have been a *prestige* about the name of each judge which would have carried with it the favorable testimony of the public.

Mr. Hargreave is an English conveyancer. His brother commissioner, Dr. Longfield, was examined not very long since before a Committee of the House of Commons, (the Poor Law Committee,) he was asked, "Can you suggest any remedy for the present uncertainty of title in Ireland?" "I do not think there is any considerable uncertainty of title in Ireland. I think a purchaser in Ireland can be as certain of his title as a purchaser can be in England, there is an expense in making out a title, owing to the number of incumbrancers, but there is no uncertainty of title."

"*Mr. Bright.*] Do you know whether that is the opinion of English conveyancers, with regard to Irish titles?—I do not; but I am sure that the English conveyancers *do not understand the matter; they do not know the law in Ireland, and I do not think they are competent to give an opinion upon the point.*"

It is one of this class who is sent over to administer the law of titles in Ireland!!! For my own part, I rather think the witness judged the English lawyers harshly, and I am satisfied, in Mr. Hargreave's instance, that he is too conscientious to accept an appointment, if he had not a knowledge of his profession; but in this I can agree with Dr. Longfield, that the English practice differs in some respects from ours, and that there are questions of daily occurrence, particularly with reference to searches and judgments, with which they are by no means familiar, and that an English conveyancer will have much to learn before he can make himself familiar with the titles and practice of this country as connected with them. Now the junior Commissioner should have been precisely the one most familiar with both; on him will devolve very probably the reference to take accounts, and ascertain priorities; and the preliminary training of an Equity lawyer would have been an important advantage, if not an essential, in the future Commissioner. His legal education should not be completed at the expense of the public; his ephemeral existence should have been one marked with the fulness of life, and with nothing of the incipient stage.

A court of a limited existence, which will commence proceedings at once should at least possess Heads intimately acquainted with the people and the country, of whose properties they were to take the disposal; a knowledge of the character of the solicitors who were to practise before them would have been desirable; and the junior Commissioner, who will be the auctioneer of his brethren, should of the three be precisely the one best acquainted with the mode of transacting business in this country.

Never, in the history of judicial appointments, was there a graver error, on public grounds; never on professional, a deeper insult to the Irish Bar.

It is true that there used to exist a practice of appointing an English lawyer to be an Irish Chancellor. These appointments were—inasmuch as

there was no reciprocity—unjust towards a bar composed of as distinguished lawyers as ever adorned Westminster Hall. They were felt to be unjust by the Whig government, and the appointment of the present Chancellor was looked upon as an earnest that the practice would never again be repeated. It had, however, as an apology, though not an excuse, this argument, that the judges sent here were men who had been long before the public, whose fame had built itself secure upon the discriminating judgment of the profession before whom they practised, and who could best test their merits; they were men who stood out prominently, and who deserved judicial elevation, and I, for one, should never desire an absolute rule of exclusion. If there were a fair interchange of judges between the two countries, I should rejoice at the introduction of reciprocal appointments; but there was no reciprocity in the case. Your readers will remember that when one of the greatest lawyers of the Irish Bar, one of the most eloquent members of the British senate, whose name sheds a lustre on our profession—when Lord Plunket was nominated to the high office of the Master of the Rolls in England, the Bar of that country were so strong as to procure the withdrawal of that appointment. That bar rejected Lord Plunket—we need not say how great a man they rejected—and are we, members of the Irish Bar, so degraded, that we must accept every gentleman of the English Bar that the government may choose to nominate to our offices? Members of the Irish Bar, this should not be. The Bar of the richer country has not only appointments at home, which she *altogether* monopolizes, but appointments in every quarter of the habitable globe, which she *almost* monopolizes, to your exclusion; within her own metropolis she has courts of justice, which give to her members occupation much more extensive and varied than you can ever hope to have, and rewards infinitely more dazzling than you can ever realize in your more restricted sphere; and yet, not content with her monopoly, she would now rob you of the poor prize which is justly yours!

I advocate a principle—I will not depreciate an individual; had Mr. Hargreave actually attained the reputation which I feel satisfied he will yet acquire, (though I should prefer its attainment in his own arena), I should still state my objections, on public grounds, to his appointment.

I, at least, feel that I have done my duty in my endeavour to evoke somewhat of professional, but much more of national feeling. If we have not the spirit to assert our rights, we deserve our degradation. Members of the Irish Bar, you should be up and stirring; it is time to put a stop to this system of things—it is time, high time, that you should be insulted no longer, at least that you should not submit to this insult tamely. The English Bar would not have “our foremost man”—will you have one who, without disparagement, cannot be as competent as hundreds of yourselves?

A.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

Right Hon. T. B. C. Smith.—June 28.

(Continued from p. 324.)

1003. That bill goes the whole length of abolishing, after the 31st of December next, the right of judgment creditors applying for receivers?—Yes, no doubt you will thereby remedy the existing evil; but the question is, whether you do not leave the tenant open to an evil which is not quite so great, but which I have endeavoured to explain, namely, of proceedings by *elegit* creditors one after the other; you might have half a dozen judgment creditors, the one proceeding against the other, rendering it impossible for the tenant to know to whom he was to pay his rent. By Mr. Pigot's act, the party is enabled to take the whole of the land instead of the moiety.

1004. In what court would that *elegit* process be instituted?—In a court of common law; and I have to make this observation that it may not be misunderstood; the effect of repealing or modifying to a certain extent, or altogether, Sir Michael O'Loughlen's act, and Mr. Pigot's act so far as it amends it, would be to diminish the number of cases in which proceedings would be taken against land; and therefore benefit would be gained by the modification of Sir Michael O'Loughlen's act.

1007. Supposing receivers to remain the same, would you not think that there should be a limit in point of time, before which no judgment creditor should be entitled to apply for a receiver?—I have no doubt that that would be an important alteration.

1008. Would a year be a fair time to fix?—I would not allow a party the day after he had obtained judgment to apply for a receiver, without giving his debtor proper time to realise a fund with a view to pay him off; I should say a year, by analogy to proceedings in a plenary suit, would be a fair time.

1009. We have had Sir Edward Sugden before us, and he has expressed an opinion that, considering the extent to which the law regulating judgments has been carried both in England and in Ireland, it would be inexpedient now to go back and to entirely abolish the effect of judgments in Ireland as the common assurance, or materially to interfere with the present practice, both as respects the appointment of receivers and the operation of judgments in affecting the property to its full extent as it now affects it; but he has suggested that instead of going the whole length of the government bill, which has lately been introduced, a line of demarcation should be drawn with respect to the amount, and that no judgment creditor prospectively, for a debt under £100, should be entitled, under any circumstances, or at any time, to apply for a receiver?—I should entertain a very strong opinion, that to that extent, at all events, it would be desirable to go.

1010. Mr. R. B. Osborne.] Do you think £100 is high enough?—I should say not; I would rather go higher than that.

1011. Sir J. Graham.] Supposing the principle

were admitted that there should be a line of demarcation between smaller debts and larger debts, as you fixed your minimum high, you would restrict the operation of judgments *quoad* receivers?—I certainly consider that the Legislature has a right to qualify the rights of creditors, to the extent to which those rights are detrimental to the public at large; and I consider that one of the greatest grievances existing in Ireland, is the extent to which property is now under the Court of Chancery.

1012. Do you think that the shock to public opinion, by going the length of the proposal by government, and entailing the consequences of throwing parties back upon their common law remedies, would be great?—I believe the government propose to prevent judgments being assignable in future. I confess I am disposed to agree in that, and for this reason, I think it is rather desirable to make judgments cease to be a common assurance in Ireland. I know there is this advantage arising out of their being a common assurance, that you can purchase upon a sheet of paper a printed form of bond and warrant of attorney, which almost any one can fill up without the help of a barrister or an attorney at all, and so far there is a benefit in it. But on the other hand, the very facility of obtaining that security works injuriously. The man who signs his name to that document, very rarely knows the extent to which he involves himself; and I think he would very often pause before he would execute a mortgage, when he would have very little difficulty in signing his name to the document.

1013. As relates to the limit in point of time, you would agree with Sir Edward Sugden, that the period of a year should be fixed by act of Parliament, before a receiver should be applied for?—I think it would be reasonable that if a person proceeded within a year, he should be left to his common law remedy.

1014. Would you prefer the government measure, which provides that judgments shall not be assignable, and that after the 31st of December next, no judgment creditor shall be entitled to apply to the court for a receiver, or would you prefer Sir Edward Sugden's proposition, that judgments should continue assignable, but that no judgment creditor should apply for a receiver until 12 months elapsed, and that a line should be drawn with reference to the amount; and that no receiver should be appointed for property under a certain amount, but that the law should remain unchanged with respect to all judgments above that amount?—It is a difficult question to answer what would be the comparative effect of the two plans; but if I were at liberty to give an indirect answer to the question, I would say that I should like to have a compound of both. I should be disposed to repeal the Act which authorises the assigning of judgments, and try for the present the modified remedy that is proposed by Sir Edward Sugden, of preventing any person from obtaining a receiver unless the judgment exceeded a certain amount.

1015. And you would fix that certain amount somewhat higher than £100?—I think I should.

1016. You think the state of credit, and the feeling of the public mind in Ireland, would bear such an alteration of the law as that?—It is difficult to say that, but one of the reasons why I object to assigning judgments is, that it is made one of the means of accumulating costs. If the Committee were to call upon me to prove what I am now about to state, I could not at the moment give evidence of it, but matters occur before me constantly which lead me to suspect the existence of facts which I could not positively prove; my belief is that attorneys themselves get judgments assigned to some friend, and then issue a *scire facias* to revive the judgment at the suit of this assignee, and costs are accumulated to the extent of that assignment; and even if the same attorney happened to have the beneficial interest in three or four judgments, if he were inclined to make costs, the course which he would adopt would be this; he would get one of his judgments assigned to *A.*, he would get another judgment assigned to *B.*, a third judgment assigned to *C.*, and a fourth judgment assigned to *D.*; and he would present a petition to appoint a receiver at the suit of the first party, he would present another petition to extend the receiver at the suit of the second, a third petition to extend the receiver at the suit of the third, and a fourth petition to extend the receiver at the suit of the fourth; and the decision of the court is given in ignorance and doubt whether those assignments are *bonâ fide*, or whether they are not made merely for the purpose of accumulating costs.

1020. What would be the effect of making the law of assignment in Ireland identical with the law of assignment limited as it is in England?—It would be calculated to check the course which is adopted of making judgments a common assurance. At present it is a most usual thing in Ireland to assign a judgment upon marriage; and parties assign judgments just as they assign mortgages in England; in England judgments are considered as securities which are not to remain outstanding, but in Ireland it is quite the contrary; they are considered as securities which are to remain outstanding.

1021. Considering how long that practice has obtained under the sanction of the law in Ireland, and the delicate state of credit in that country, would you be afraid of altering the law of assigning judgments in that country?—There is no doubt that the proceeding ought to be taken cautiously. I am rather stating my opinion in the abstract, than with reference to the exact time at which the measure should be adopted.

1022. What Sir Edward Sugden has stated is, that with regard to his limited plan restricting the appointment of receivers to judgments of a certain specified amount, and to allowing a year of grace, this is the particular moment when the change should be made; do you concur in that opinion?—The opinion I entertain is this, if the measures now in contemplation should be effectual to get property out of Chancery, I think it is most desirable if possible to prevent property getting back again into Chancery; and of course any measure that diminishes the number of applications for receivers will be a beneficial measure.

1023. And it will be wise to make the change at this moment?—That is a difficult question to answer.

1084. *Chairman.*] You observe that the Government Bill abolishes the operation of judgments prospectively?—Yes.

1085. Do not you apprehend that there would be some confusion as to the point at which the new law would come into operation, from the system of continuing judgments by means of revivors?—There is no doubt it would be inconvenient to have a class of judgments before a certain date assignable, and a class of judgments after a certain date unassignable; but I think that the law would be shortly understood; and the fact is this, that there is only at this moment a certain class of judgments assignable; you cannot assign every judgment; that point was brought under the consideration of an English court in the case of *O'Callaghan v. Marchioness Thomond*, (in 3rd Taunton's Reports.) The assignee of an Irish judgment sued in the Common Pleas in England upon the judgment, and the question was raised before the Judges in that Court, as to whether the Act of Parliament authorised the assignment of judgments generally, or only the assignment of a particular class of judgments; and it was decided, and the reasons for that appear very satisfactory, that it did not authorise the assignment of judgments generally, but that the Act applied only to the case of a consor and conusee, not to the case of recoveror and recoveree; that a judgment was assignable where it was a common assurance, but that an ordinary judgment recovered in an adverse suit is not assignable. Therefore there are at present two classes of judgments as to which the law varies, and I do not know that it would be productive of any great inconvenience.

1086. A law drawing a distinction between different classes of judgments, would not in your opinion embarrass the proceedings or be productive of inconvenience?—It might; but I think the object to be attained is to prevent judgments being continued as the common assurance; I should drive a party to have a mortgage; I think he will hesitate before he signs a mortgage, but he will not hesitate before he signs a warrant of attorney.

1087. You think it would be wise to make the security of judgments unpopular?—Yes; I should like to have a judgment in Ireland a security that was sought to be recovered as quickly as one could, and not a security to remain outstanding for ever. I may mention a case which has occurred within the last twelve months in the Court of Chancery, and at the Rolls Court, which will exemplify the inconvenience of judgments remaining outstanding. A party has obtained a decision of bad title in his favour which I was obliged to pronounce, and which the Lord Chancellor has confirmed, in consequence of the existence of a judgment of the year 1788, which has remained outstanding on the estate ever since; that is 110 years ago, and upon which interest has been paid.

1088. *Mr. R. Osborne.*] You stated that there were cases where two receivers were placed over different parts of a debtor's estate, the one appointed by the Court of Exchequer, and the other by the

Court of Chancery?—It has so happened. But I may observe that when I was first appointed Master of the Rolls I found that this course had been adopted under Sir Michael O'Loughlen's act; a judgment creditor by his own solicitor obtained an order for a receiver against Black-acre; another judgment creditor presented a petition, without saying one word about the receiver appointed over Black-acre, and got a receiver over White-acre; another creditor would get a receiver appointed over Green-acre in the same way. That appeared to me to be a monstrous abuse; because, in the first place, the expense of appointing a receiver is considerably greater than the expense of extending a receiver, and in the next place you have the unfortunate debtor subject to three receivers' accounts, and you multiply costs enormously by that plan. I require now, and have for a long time past required it, that the solicitor shall state, which appears upon the order, that there has been no receiver appointed over any part of the estate, either in the Court of Chancery or in the Court of Exchequer; because I do not think you ought under the Judgment Acts to have a separate receiver even in both courts, and that is the opinion I have acted upon. But the case that Mr. Osborne has referred to is a case where the proceeding is by a plenary suit in Chancery, where there is a receiver appointed by the Court of Exchequer under the Sheriff's act. When a creditor files a bill for the general administration of an estate in the Court of Chancery, it is the practice to appoint a receiver over the estate, because more extensive relief can be given in Chancery; but the order directs that it shall not be acted upon till the Court of Exchequer discharge their receiver. The party then who obtains the order produces that order of the Court of Chancery in the Court of Exchequer, and discharges the receiver, and then you have one receiver in Chancery for the benefit of all the creditors.

1090. Might not the equitable jurisdiction of the Court of Exchequer be abolished, and would not that diminish expense?—Considering the quantity of business in the Master's Office, and that I make at present 1,700 more orders in the year than were made 10 years ago, if you were to give the Lord Chancellor and myself the whole of the equity business, I much doubt whether the business would not get into arrear.

1096. What, according to your knowledge, is the present class of receivers?—I cannot perhaps answer that question positively; but I must say, from the cases which have come before myself, that I do not think that proper persons have been appointed; I have found, for example, in different cases that have come before me, that solicitors have been appointed receivers, and I highly disapprove of solicitors being appointed receivers.

1098. Sir Edward Sugden stated to the Committee that there was an absolute rule of court prohibiting the appointment of solicitors as receivers?—Sir Edward Sugden was under a misapprehension upon that point. It has been decided that a solicitor, if he be a party in the cause, cannot be appointed receiver, but a solicitor unconnected with the cause may be appointed receiver, as far as any order or rule of court is concerned. I have stated

my opinion often, that a solicitor ought not to be appointed receiver; but I think it right to state that my opinion has not had much effect, because one of the Masters has pronounced a very elaborate judgment in favour of appointing solicitors receivers, and it is a common practice to appoint a solicitor to be a receiver.

1099. *Mr. R. B. Osborne.*] Then the rule governing the Court is not the same in all cases?—No. Some of the Masters do not think it a disqualification.

1101. Then there is no order against an attorney being appointed a receiver?—None that I am aware of. I may observe that the Court of Exchequer, after Sir Edward Sugden's order, adopted an order very nearly in the words of this order; the present Lord Chancellor having been Lord Chief Baron at the time; but they had inserted the additional words: "no solicitor for any party in the cause;" and impliedly it was to be inferred from that, that a solicitor who was not solicitor for a party in the cause, was not a disqualified person.

1105. *Sir J. Graham.*] Is there anything wanting in that order of Sir Edward Sugden with respect to receivers if it were only made quite clear that no solicitor should be appointed a receiver?—I think there is nothing whatever; it might be worth while for the Members of the Committee to read the judgment of Sir E. Sugden which arose on that very order in the case in *re Stokes*, in 1st Jones and Latouche's Reports, p. 175; so anxious were the solicitors to put a narrow construction upon this order, that one of the solicitors got the clerk of an attorney, who was not his own clerk, appointed receiver, and there being an application to Sir Edward Sugden to set aside the appointment of this clerk, there were actually three counsel employed before Sir Edward Sugden, one of whom happens to be a member of this Committee, Mr. Keogh, Serjeant Warren, and some other gentleman, to insist that this order disqualified only the clerk of the particular solicitor; but Sir Edward Sugden had no difficulty in expressing an opinion, and he pronounced an excellent judgment, as all his judgments are, pointing out the evil that this order was intended to remedy, and that it applied to the system which had existed of trafficking in receiverships and actually selling the office; and this general order he held to apply to the clerks of all receivers.

1106. I asked you if the addition of the prohibition of attorneys would make that order perfect, and you, as I understood you, said it would not; what is the other addition?—I do not think any addition will make it absolutely perfect; there will always be a determination to evade it.

1107. Then you would say that the appointment of receivers was an incurable evil?—I do not see that that necessarily follows; but so long as you leave the appointment of receivers to the nomination of any solicitor in the cause, you will, I think, have a bad class of receivers appointed.

1108. If receivers are to be appointed under any circumstances by judgment creditors, what is the plan which you think, with your experience, would be less open to abuse; you being of opinion that that order is imperfect, and that the prohibition of

solicitors in terms would not render it perfect, what in your opinion would be an adequate precaution to adopt?—One which would take from every solicitor or party connected with the cause, any interference, directly or indirectly, with the nomination of the receiver.

1110. Are you aware that Sir Edward Sugden's order, prohibiting the appointment of clerks of solicitors as receivers, has been evaded?—I have not heard of it since 1844; but I should not have the slightest hesitation, if a case of that kind came before me, in punishing the solicitor severely by fixing the costs upon him personally; and I think it singular if it has occurred.

1111. When you say that there has been a system of trafficking in receivers, what do you mean by that?—That system existed at the time Sir Edward Sugden made this order, as appears by the judgment I have just referred to, and I think the practice continues, as a case occurred before me in which it came to light, that when the receiver was appointed by the solicitor in the cause, there was an agreement that the solicitor should not only have his own costs of the application for the receiver and the further costs in the matter, but should pocket a certain portion of the poundage, and in point of fact he did pocket a certain portion of the poundage. I made an order that he should disgorge the whole of that and pay it into court, with six per cent. interest; but though no other cases of that kind occurred before me, I have reason to believe that such cases exist.

1115. You would not say, from your experience, that an attorney was a person qualified to manage landed property?—I should say most decidedly not. That is not merely my own opinion, but I can refer to a high authority in a case reported in 15th Vesey, junior. An application was made to Lord Eldon that a person who was appointed a receiver, he being a practising barrister and a Member of the House of Commons, should be removed. The power of the Court in making the master review his report in respect to the appointment of a receiver, is very slowly exercised. But Lord Eldon expressed a strong opinion that the duties of a Member of Parliament and a practising barrister were inconsistent with his devoting proper time, independently of anything else, to the management of an estate; and without deciding that a Member of Parliament or a practising barrister was necessarily disqualified, he made an order directing the Master to reconsider his report.

1116. In your opinion ought not the receiver to reside upon the estate, if it is of any magnitude?—I have no doubt that he ought to reside upon the estate, and to be in the habit of seeing every property upon the estate every week of his life.

1120. *Sir J. Graham.*] Sir Edward Sugden was asked two questions, which I will read to you (Nos. 495 and 496): "But for property which, after you shall have abated the quantity of it by your legislative interference," (that was according to the plan which he had sketched to the Committee), "shall still be under the management of the Court, you do not think that anything can be done, with respect to the appointment of receivers?" Sir Edward's answer was, "Not by legislation; I think the head

of the Court can do a great deal in correcting abuses where he discovers them, and providing against them by proper rules." The next question asked was, "There is no alteration in the law with regard to receivers that you would recommend?" and Sir Edward's answer was, "No, I think not; I would prevent the appointment of so many receivers. Supposing it were an inevitable evil that they should now have £1,700,000 of property under the Court (which I think it is not, and I should be very much disinclined to appoint receivers over such a large amount of property, and I would take care that such an amount of property should not come under the management of the Court); but supposing it were inevitable under the law as it stands and is administered, that there should be that amount of property under the Court, it might be very desirable to have something in the nature of a Master, who should have his whole time and attention directed to the management of receivers." Do you agree with Sir Edward Sugden in considering that it is not possible for legislation to deal effectually and advantageously with the appointment of receivers?—I cannot say that I agree in that; it may be difficult to point out an adequate remedy, but of this I am quite clear, that you will never have estates properly managed under the Court of Chancery, so long as you have the present system existing of the solicitor for the plaintiff or the petitioner in the cause nominating the receiver, because Master Murphy has informed me that in the majority of cases nobody attends before him except the solicitor for the petitioner. The Master cannot appoint any body of his own motion without having some person named, and the only person who attends to name the receiver is a person deeply interested in having the estate ill managed, because if it is well managed it will diminish the costs.

1121. Though Sir Edward Sugden in his answer rejected legislation, he points to rules of Court meeting the evils as they shall arise, and he suggests the appointment of a Master, whose exclusive duty it shall be to look after the appointment of receivers and the conduct of receivers?—I have no hesitation in saying that I agree with Sir Edward Sugden in the propriety of having an officer in Dublin who should have nothing whatsoever to do but to attend to the general superintendence of Chancery property. That has always been my view.

(To be continued.)

IN CHANCERY, IRELAND.

Robert Edward Gibbins,

Plaintiff.

The Right Honorable Henry John Reuben, Earl of Portarlington, and others,

Defendants.

WHEREAS it has been represented to me, that several of the Creditors on the Estates of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, have neglected or omitted to come in and file charges on foot of their respective demands and incumbrances, pursuant to the decree of the 9th day of February, 1847, and that the time limited by and for the said purpose has expired, and that it is expedient to extend said period: Now I require all Creditors and Legatees of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, and also all persons having Charges or Incumbrances affecting the real and freehold Estates of the said late Earl of Portarlington, to come in before me at my Chambers on the Inns Quay, in the city of Dublin, on or before Tuesday, the 30th day of June next, and proceed to prove and claim the same, otherwise they will be precluded the benefit of said Decree.

Dated this 30th day of June, 1849.

E. LITTON.

John Warnock, Plaintiff's Solicitor,
30, North Great George's Street, Dublin.

IN CHANCERY.

Executors of Price, and others, }
Hall and others, Defendants. }
PURSUANT to the Decree of the Court in this cause, bearing date the 1st day of June, 1849, I hereby require all persons claiming to be Creditors of Nicholas Price, late of Scotland, in the County of Down, Esquire, deceased, the Testator in the pleadings in this cause named, to come in before me at my Chambers on the Inns Quay, in the City of Dublin, on or before the First day of October next, and prove their respective demands, otherwise they will be precluded from all benefit under the said Decree.

Dated this 30th day of July, 1849.

E. LITTON.

William Nevill Wallace, Solicitor for the plaintiff,
30, North Great George's Street, Dublin.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET-STREET, in the Parish of St. Andrew, and published at 15 COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, August 25, 1849.

THE Irish Jurist

No. 44.—VOL. I.

SEPTEMBER 1, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, SEPTEMBER 1, 1849.

THE course pursued by Her Majesty's Government with reference to the Irish Poor Law has been marked with precipitancy at the commencement, and infirmity of purpose at the close. Lord John Russell appointed a Poor Law Committee, and before a single witness was examined carried a resolution in favour of a rate in aid. He subsequently made that resolution law. His Committee examined a very large number of witnesses, and undertook a very laborious and vast enquiry, but before they had reported to the House, the Poor Law bill was introduced. This was disrespectful to the Committee. Enquiry was either necessary or it was not; if necessary, the result of that enquiry should have been made known before legislation were attempted; if unnecessary, no Committee nominated by the Government should have been appointed.

Assuming, however, that there was no intention to cast a slur upon the Committee, we can arrive at no other conclusion than that the Government had seen and heard enough to prepare them for legislation, and that their minds were made up to introduce a bill on their own responsibility.

Accordingly, Lord John Russell, on the 26th of April, deliberately laid his plan for an amended Poor Law on the table of the House. It was short, but proposed two important alterations in the law, which were received with very general satisfaction;—one by which jointures and rent-charges for life were made liable to deduction for poor-rate, and the other which adopted the principle of a maximum rate.

The Act has passed, without the clauses embodying these two changes. The sections were struck out by the House of Lords, and the alterations were submitted to by Lord John Russell.

The position of the Minister must be indeed pain-

ful who has not the power to carry in their integrity the measures which he introduces. It is to us almost incomprehensible how an objection could be persisted in and allowed to a change in the law so just as that which proposed to make rent-chargers liable to poor-rate.

We have shown to demonstration in previous numbers the glaring injustice of allowing the *life* proprietor to pay the whole landlord's rate, whilst the *life* rentcharger pays nothing; and this is strikingly exemplified in the case—which is probably not of unfrequent occurrence—of the owner settling a rent charge upon one son for life, with remainder to trustees for the use of that son's issue, and then settling the corpus of the estate upon another son for life remainder to his issue. The first son contributes nothing in aid of the poverty of that property from which he draws the first fruits, whilst the whole burden of supporting its pauperism, and contributing to a costly poor-law establishment is thrown upon the next son, who may be left with a miserable remnant to support the position and respectability of the family.

In both cases the quality of estate is equal, there should be an equality likewise in payment of a tax which has hitherto been, and ought always to be, payable out of the annual proceeds of the land subject to it.

The only arguments which can be stated in support of the present law are: First, that by dividing the amount of rate payable by the proprietor in possession, the stimulus to give employment and lessen the pauperism of the estate would be diminished, and that an incumbrancer would be taxed who has no control over the estate and its management.

And, secondly, that his case should form no exception to that of other incumbrancers.

We cannot admit the cogency of these arguments. The first assumes that a proprietor in all cases re-

quires a money-stimulus for the proper management of his estate. Suppose this necessity not to exist—as in a vast number of cases we feel satisfied it does not—is it just to punish the benevolent landlord because there may be bad landlords upon whom it is necessary to place the screw tightly. Is it just to punish the hard-working, struggling landlord who does all in his power to make every one upon his property comfortable, and to burden him with a fixed impost, for rent of which he is the mere receiver, and never can be the beneficial owner, because there may be cases in which inhuman landlords may be induced to clear their estates—from a conviction of self interest, rendered more intense by legislative injustice? Above all, is it humane—when the death of each pauper is a positive gain to the proprietor—to give an increased interest to the unmerciful man to rid his estate of paupers, by imposing upon him, during their existence, the entire landlord's proportion of rate?

It is repugnant to common sense and common justice to allow one man who gives no return whatever for the income he derives from the estate to escape untaxed, and to impose the whole rate upon the hardworking, benevolent, resident proprietor, or the idle, avaricious absentee,—as the case may be,—in order to induce the latter class to lessen the pauperism upon their estates.

If there were no other reply to the first argument it would be sufficiently answered by the fact that the good and the bad proprietor are dealt with on the same principle, that neither the one who neglects, nor the other who fulfils every duty that devolves upon him, can ever shake off this burden. The proprietor in possession of the best managed estate in Ireland, who has reduced the poor-rate to its narrowest limits—the amount necessary for the support of the aged and impotent—must still pay a percentage upon an income which goes to another person.

The second branch of the argument is also unsustainable.

On grounds of public policy,—derived from the consideration of the present encumbered state of the landed property of this country,—it may have been considered inexpedient to tax a class of incumbrancers, who would, from the diminished income derivable from their security, so long as it remained outstanding, at once demand payment, and by selling for non-payment, add to the glut in the land-market. Measures sufficiently stringent for the gradual confiscation of encumbered properties were adopted without resorting to one that would cause the precipitate extinction of the rights of their owners. In the abstract it is unjust to tax the income derived from land as the sole fund for the support of pauperism, except that pauperism be altogether rural, more unjust to tax a portion of that income, and that portion the least able to bear it, but having regard to the particular circumstances of the period we can understand it being sound policy not to tax income derivable from redeemable incumbrances, except in common with every other species of income.

But the reasoning fails when we have to deal with *unredeemable* charges, their burden and their duration are alike determined; there can be no

injury inflicted by the sudden calling in of a rent-charge, the annual amount comprehends the liability of the proprietor, not like interest money, (the premium of forbearance,) the transfer of the land to a new proprietor will not divest it from the charge. Whilst thus great benefits can be conferred upon the proprietor, by taxing the rent-charger, no collateral injury can arise.

The change originally proposed in the law was just to the present proprietor, and it was politic in the event of a sale of his interest towards a future owner—who might be induced to purchase, from the conviction that he would have but his equitable proportion of rate to bear.

We very much regret that the House of Commons were obliged to acquiesce in the expunction of a clause which was calculated to remove one glaring anomaly in a poor law, where the pressure of liability is so unequally adjusted.

The manner in which the House of Lords dealt with the maximum clause has some justification, though, on the whole, we regret its loss.

The Premier refused to state from what sources the funds necessary, after payment of the maximum, were to be supplied, and whilst this important blank was left unfilled, we are not surprised at the erasure of the clause. If from the solvent unions, the imposition of this impost—which would be, in point of fact, a rate in aid—would be inconsistent with the plan of diminishing the area of electoral divisions, and individualising responsibility.

The loss of this clause is, however, more properly chargeable upon the Minister, than upon the House of Lords; and upon him also we charge a grave omission in not providing some remedy for the injustice under which tithe rent-charge owners labour by the operation of the poor law. No unbiassed mind can come to any other conclusion, than that it is grossly inequitable to impose a double deduction upon this species of property, more especially when its application is not for the benefit of the pauper, but in ease of the landlord. Now that the *ad valorem* scale of payment is, as between landlord and tenant, repealed, it was very simple, and certainly very just, to have extended the new principle to landlord and tithe owner—a moiety of rate to be deducted from each pound of rent-charge.

The great inconsistency in the same code is nowhere more strikingly shewn, than by exempting a lay life rent-charger altogether, and doubly taxing the clerical life rent-charger, nay, more than doubly, for he is charged on his gross income, whilst every other rate payer is assessed upon his net.

A dozen lay lords were sufficiently powerful to make the measure deficient, and where it was deficient, inequitable—and not a voice was raised from the bench of bishops for the insertion of a clause, which would have been as clearly just, as the other was unjust. The House of Commons acquiesced in the one instance—it is not too much to say they would have done so in the other.

We have shown what the act does not contain; its contents will form ample subject for another article.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

*Right Hon. T. B. C. Smith—June 28.**(Continued from p. 332.)*

1122. And that officer should be appointed by the Court, and be under the jurisdiction of the Court?—I should be very much disposed to make it a higher officer, appointed by the Government; a Master, or something of that sort; I should not like to see him a nominee of the Lord Chancellor; I think for the due discharge of what are called public duties a man ought to be independent.

1123. If the properties which he was to superintend were brought under the jurisdiction of the Court, would there not be some anomaly in his being independent of the Court?—I think not. The Masters are independent of the Lord Chancellor; he could not remove any of them; I mean that the Lord Chancellor should exercise no more control over such person than he could exercise over one of the Masters, or over myself; he might overrule one of our decisions, but he could not remove us from office.

1125. You would have the new officer to be appointed Master of Receivers, as we will term him, responsible and obedient to the Lord Chancellor?—Yes, just as much as a Master in Chancery is.

1130. This new Master, if he were appointed, would be in the position of a Master in Chancery, and removable only for misconduct?—Yes; but I have no doubt that both Houses of Parliament would have him removed, as a matter of course, if he were to think proper to dispute the power of the Lord Chancellor, or to act improperly.

1132. *Mr. R. B. Osborne.*] Sir Edward Sugden has hinted at something like a Master Receiver. Supposing the management of those estates were taken from the Court of Chancery, as they are at present managed, and concentrated under the control of one governing body, would you not give a power of appeal from that body?—I think so. Though I have said that the receiver should not be appointed by the Court of Chancery, still there should be a controul vested in the Lord Chancellor.

1134. Supposing the jurisdiction, as respects the present system of receivers, were taken from the Masters, would it not relieve the Masters of the Court of Chancery from a great deal of business?—It is very hard to anticipate the effects of any system of legislation. It was contemplated, and it was so stated in the House of Commons, that when the Encumbered Estates' Bill was passed, it would leave us much less to do; and there has hardly been an acre of land sold under it.

1137. But you would anticipate that there would be a diminution of business in your own court?—I have no doubt there would, to some extent: but on the other hand, this is to be kept in mind, that our business is increasing every day as to matters with which hitherto we have had very little to do; for example, in the present term I have had a petition under the Winding-up Stock Companies Act; I have had two petitions with reference to trustees investing money; and Acts of Parliament are passing from time to time giving summary jurisdiction

to the Court on petitions. I dispose of every petition presented to the Court of Chancery which is moved in court, except in lunacy and bankruptcy cases; therefore you are in that way getting into the court session after session new business.

1138. The legislation has a tendency to increase the business in Chancery?—Yes; if you will look back for the last 10 years, you will find Acts passed in almost every session, giving summary jurisdiction by petition to the Court of Chancery in various cases.

1139. *Sir J. Graham.*] Have you admitted a classification of minors' and lunatics' property on the one hand, and of judgment creditor's praying for receivers on the other?—I admit that there is a distinction, but I have not stated that the property of minors and lunatics is well managed; on the contrary, I can state that I do not think it is in many cases well managed, and I can give a remarkable instance of it. There is a minor a ward of the Court, who is an Irish Peer and the mismanagement of that very estate has been the subject of evidence so long ago as the Landlord and Tenant Commission. The state of that property is such that I apprehend it will be very difficult to have it well managed. An application was made to me under very painful circumstances last year to pay the expenses at Eton of this young nobleman. I thought it my duty, as I always do, whenever an *ex parte* application is made, (for I find it absolutely necessary from experience to do so,) to take the trouble of looking closely into all the circumstances of the case. I called for all the papers and took them home with me, and on investigating the case I found that the rents and profits of the estate were insufficient to keep down the interest of the encumbrances, and that there was not a single farthing forthcoming to pay the Eton expenses; and I was obliged to adopt the painful course, considering I had no right to be generous at the expense of the encumbrancers, to refuse the application.

1140. My wish, in calling your attention to the classification which I suggested, was with reference to the equitable considerations which guided the Court in allowing an outlay for improvements upon properties under those distinct classes?—The distinction between the two classes of cases of receivers in what may be called a creditors' suit, and receivers in minors' or lunatics' matters, is this: the Court of Chancery is considered as representing the minor or lunatic, those persons respectively being under a legal disability; and, representing the minor and lunatic, the Lord Chancellor standing in the position of landlord; and, standing in that position, he has a power which does not exist in the case of a receiver in a creditor's suit, and the power is accordingly not exercised in the latter case.

1141. When you speak of the power that the Lord Chancellor has, the power in both cases is limited by his discretion with a view to his equitable jurisdiction, it is not limited by statute?—No, there is no limitation by statute.

1142. Assuming that the estate of a minor or a lunatic is a solvent estate, if it were proved to the Court that a certain outlay would lead to an improvement in the fee-simple value, and even in the

life interest, the Court in the case of lunatics and minors, would not hesitate to order that outlay?—I apprehend not; but there are some general orders of the Court which relate to outlay. But the practical difficulty upon the subject is that the Court has no means of deciding the propriety or the impropriety of the outlay, unless the Court is put in motion by somebody. If, for example, the guardian of any estate of a minor that was well circumstanced were to apply to me for permission to lay out money on improvements, I should not hesitate for a moment. Take the case of Lord Powerscourt: if Lord Roden, who is the guardian, said that he wanted so many hundreds of pounds to expend upon draining, I should have no hesitation, either in referring it to the Master, or in making the order myself upon motion.

1144. In the case of minors, the Court stands *in loco parentis*, and it would order the outlay?—Exactly.

1145. In the case of creditors' estates under receivers there is a wide difference, and according to the established usage of the Court, based upon equitable principles, such an outlay would not be sanctioned by the Court?—No it would not.

1146. In reference to the interest of a creditor in possession of a judgment, and still more of a mortgagee backed by a judgment, you would hold that any outlay for the permanent improvement of the estate would be in fact an outlay of their money?—Yes.

1147. And without their consent being given, you would not think of permitting that outlay?—I would not do it, because sitting at the Rolls I feel bound to act upon what I have always understood to be the strict rule; that rule has been, without the consent of the creditor, or of the inheritor, not to sanction any outlay upon improvements.

1148. Sir Edward Sugden was asked this question in No. 552. "In the case you have put, of an estate held on behalf of creditors, would not the Chancellor feel himself at liberty to order such an outlay?"—And his answer was, "No; if the parties consented to it, he would do it, but not otherwise. "There must be a motion and notice to the parties?—Yes." "And considerable expence incurred?—Yes, because it would be a question as to the laying out of money." Then in question 555, he was asked, "And even when it came on for hearing, it would be doubtful whether it was within the limits of his jurisdiction?" And his answer was, "When I was in Ireland I was constantly forced to refuse to relieve tenants on encumbered estates, because I had no power." "But if you had the power, you would have exercised it?—I should have exercised it without the slightest difficulty." He goes on to say that he thinks some legislative interference necessary, to enable the Chancellor within certain limits to sanction an outlay even upon estates under receivers for creditors. Do you concur in that opinion?—I think that is an exceedingly difficult question, having regard to the different circumstances of different estates. I will take this case, which frequently occurs in practice. Supposing there is no surplus rental whatever; suppose that the rental of the estate is either insufficient to keep down the interest of the

encumbrancers, or only just sufficient to keep down the interest. Supposing an application were made for an outlay on drainage, of £300 or £400, the difficulty the Court would be placed in would be this: To allow such an outlay would be substantially making the property of the last encumbrancer bear the whole expense, for you must let the receiver lay out the money, and allow it in passing his account, in which case substantially it would be paid out of the property of the last encumbrancer. The effect of that outlay might be to leave the creditor and his family to starve. You are applying to improvement what may be the property of others, when there may be no available surplus to be applied to the improvement of the estate.

1149. On the whole, viewing the difficulties which you have just enumerated, you would not be disposed by legislation to enlarge the power of the Great Seal with reference to outlay on estates for creditors?—I should say it was desirable to give the power to the Court; but what I mean to say is, that it would be misleading the Committee and the public to suppose that it would be productive of any very beneficial results, because there are a great number of cases in which the Court could not justify the outlay proposed.

1155. *Mr. R. B. Osborne.*] Are there not cases in which, on public grounds, it is necessary, irrespective of the interest of the owner of the estate, or of the creditor, an expenditure should be made where both the owner and the creditor oppose it?—That is a difficult question. If you give authority to the Lord Chancellor to decide that question, you give him authority to take money out of another man's pocket for the purpose of improving an estate. I am under the impression that the object to be attained by the Legislature is to simplify the proceedings of the Court and the law of conveyancing, and thereby to reduce the number of cases in which the Court of Chancery should appoint receivers to collect the income of estates. The great object is to keep property out of the court, and not to impose a duty upon the Lord Chancellor which he cannot satisfactorily perform in the management of estates. If an estate could be sold rapidly under the Court, a receiver ought not to be appointed, except under special circumstances.

1156. Would it not be better for the estate if the owner was appointed by the Court as receiver?—I have no doubt of it; and I have expressed the opinion very frequently at the Rolls, that it was very desirable that the agent of the estate should be appointed the receiver: and I will mention one case in your county which came before me, in which I effected that object by the order I drew up.

1157. Which was opposed on petition?—Yes, it was. There was a Mr. Norris who presented a petition under the Sheriff's Act for a receiver over the estate of a noble Lord, and he having presented a petition, the course was adopted (which I thought under the circumstances was a very fit course to be adopted though it was rather a contrivance) of getting a friend of the noble Lord to file a bill with the view of preventing the attorney or some improper person being placed as receiver over his property. When the motion came on, on the part of the creditor,

there was a motion on the part of the friendly encumbrancer who had filed the bill, seeking in fact to get the carriage of the proceedings with a view of naming the receiver. You can have no idea of the struggle that was made in that case to get the carriage of the proceedings, although it was at the suit of a creditor who I believe has not the slightest chance of being paid a shilling; the solicitor by getting the appointment of the receiver would have put into his pocket some hundreds a-year in the shape of costs, and I defeated that by drawing up a special order, directing the Master in appointing a receiver to have regard to the person who was named being the fittest person for the office, without regard to the circumstance of the person proposing him having the carriage of the proceedings, and that led to Mr. Richard Pennefather being appointed receiver.

1158. You are aware that he was connected with the estate?—Yes, that was the reason I took these measures with a view to his being appointed.

1159. Are you aware that since he has had the receivership the estate has improved?—That was what I expected; my object was to have him appointed and I framed the order in such a way as to defeat the very pettifogging object of Mr. Norris and his solicitor to have the estate badly managed.

1161. Are you aware that there are improvements going on on that estate, through the appointment of Mr. Pennefather as receiver?—I did not hear that; but the advantage of having a proper receiver I can exemplify, by a case that came before me this term. An application was made to abate the rents upon that property; in general, when applications of that kind are made to me, I feel great difficulty in disposing of them; I cannot tell but that the receiver may be bribed to request me to abate the rents, when probably I ought not abate them. But when I saw the title of this estate in the paper, I stated that if Mr. Pennefather would write me a letter, stating what abatement he thought it would be right to make I would at once make the order.

1162. Are you not of opinion that if you could get men connected with properties as receivers, in a high class of life, and of high character, the whole system would be very much improved?—I think that the public is vitally interested in obtaining that result.

1163. *Sir J. Graham.*] Is it not within the purview of the Court, and within the power of the Court, to regulate the appointment of receivers?—I did so in that case, and in the case of another property, where the same circumstances occurred in another county. The gentleman who was agent of the estate was a gentleman of most respectable character; he had been agent for 30 years. I drew up a similar order in that case; I defeated the object of the petitioner, and I got that agent appointed receiver. But it rarely happens that the respondent or defendant comes forward to litigate the point; and the fact, as Master Murphy tells me, and which I believe to be so, is, that if Parliament were to call for a return of the parties who nominated the receivers, and whose names are I believe given in the Parliamentary return, in the vast majority of cases you would find that the receivers appointed were the nominees of

the plaintiff's or petitioner's solicitors; and when you find that to be so, you may infer that in nine cases out of ten, if not in 99 out of 100, the appointment is not a proper one.

1165. If Sir Edward Sugden's suggestion of a Receiver Master were adopted, and if an officer were appointed of high station and character, and it were his duty, in the absence of parties, to make inquiries before the selection of a receiver were made, would that obviate the evil?—It would be better than the present system; but it is quite plain, in my opinion, that you ought to have the receiver named by some person who has no object in view but to have a local agent resident in the district, who is to act independently of the solicitor and everybody in the cause. By what particular machinery you are to arrive at that result is a question of difficulty.

1166. You have rejected the solicitor's clerk and the agent of the solicitor, and you have stated the difficulty of arriving at the truth in appointing a receiver in the absence of parties; does it not appear to you that the great evil of the system, whatever rules the Court may adopt, arises from the circumstance of so large a quantity of encumbered property coming within the jurisdiction of the Court?—No doubt.

1167. Is that evil without remedy?—I do not know that it is. I am under the impression that you might simplify conveyancing so much, that, having also simplified the proceedings of the Court, you might sell property quickly in Chancery, provided always, that from the improved state of the country there were purchasers for it. You might in that case sell property within a year after the filing of the bill, and the Court would then be justified in refusing to appoint a receiver in any case, unless there would be danger to the property. For example, if it were a leasehold, and the property liable to be evicted for non-payment of rent, or the property was deficient; but in case the property would be ultimately sufficient to pay every creditor, I think the Court ought not to take possession of the property if they could sell it within any reasonable time.

1168. You have stated what alterations of the law you would recommend with reference to judgments, and you have given in a draft of a bill which touches a portion of the evils which now arise from the law of conveyancing; if famine should disappear, and purchasers could be found, by these legislative alterations do you think that the condition of Ireland would be as much improved as we could hope to see it by legislation?—I have already stated that that bill had only relation to such alterations in the law of conveyancing as occurred to me upon the cases that arose in the court; but it would require a totally independent and distinct measure to simplify the law of conveyancing generally, not only with reference to sales in the court, but sales out of the court.

1169. *Mr. R. Osborne.*] Have you seen the plan which I have submitted to the Committee for the purpose of simplifying proceedings?—I have read it over, but I cannot say that I am familiar with it.

1170. You are not able to give any decided opinion whether it would or would not effectually remedy the present evils?—I have not the slightest hesitation in saying that it would be an improvement

upon the present system; any system by which you would appoint independent receivers, whether they were nominated by the Government or by the Chancellor, or any person upon whom you would impose the performance of the duty, subject to public responsibility, whatever might be the details, would be an improvement.

1171. As far as you have read that plan you think it a great improvement upon the present system?—Yes, I do. I do not see how you could suggest anything worse than the present system.

1172. Any system would, in your opinion, be better than the present?—Yes.

1173. *Sir J. Graham.*] Does not the creation of new officers to a considerable extent, throughout the various counties of Ireland, unhappily open the door to a great deal of jobbing?—I have no hesitation in saying that the working of any system of this kind will depend upon the honest discharge of the duty by the persons in whom the patronage is vested. If it is vested in the Government, and it is made a means of political advancement to friends of the Government, it will fail. If the Lord Chancellor nominated persons without due regard to their qualifications, the measure would fail. Any measure of this kind must depend upon the honest discharge of public duty; but I do not suppose that there is a country gentleman of Ireland on the Committee who could not name at this moment, from recollection, three or four persons in every county, who it would be universally acknowledged by every gentleman in the county would discharge the duty in a satisfactory manner.

1174. Supposing the Executive Government were vested with the appointment of district receivers, would not the pressure upon the Government be excessive from each county to job the appointment?—That might be a reason for not giving it to the Government; but my opinion is that country gentlemen, acquainted with country duties, might be selected, and they would act under public responsibility, and I may say Parliamentary responsibility. There are persons in every county who might be found willing to take the office, and who would properly discharge the duties of it; but whether they would be the men selected by the persons in whom the patronage was vested is another question.

1175. Considering the present unhappy condition of Ireland, would not the competition for the office be extreme?—Yes; but on the other hand, from that very circumstance you might get gentlemen at present willing to take the office who formerly would not have accepted the office, and whose qualifications would stand higher than the qualifications of the persons selected would have been if the present unhappy state of affairs did not exist.

1176. *Mr. R. B. Osborne.*] You are of opinion that in adopting any system for the management of estates very much of the success of that system would depend upon the characters of the men who were appointed?—No doubt every thing would depend upon that; but if Colonel Dunne, or yourself or Sir William Somerville, were asked whether you could mention gentlemen in the counties in which you reside, you would have no difficulty in selecting persons who would be acknowledged by all as the best persons for executing the duties.

1177. *Sir J. Graham.*] Have you any security that those will be the gentlemen who will get the appointments?—No; but the success of the system will altogether depend upon it. The present evils arise from solicitors abusing their patronage, and the same evils would arise from a similar abuse of patronage under any system.

1180. *Chairman.*] Have you any objection to giving the Court the same power in creditors' receivers matters as they have in the case of minors?—I not only see no objection to it, but I should think on the whole it would be desirable; but I wish to guard myself against being understood to express an opinion that it could be carried to so great an extent as some persons would anticipate.

1181. The Court would be cautious in exercising the jurisdiction?—Yes.

1182. You are aware that it is proposed to make judgments for poor-rate a primary charge upon property?—I did not know that.

1185. Has your attention been called to the clause in the Sheriff's Act which gives the judgment creditor applying for a receiver the costs of the petition?—Yes, that is a mischievous clause. Although I observe that it purports upon the face of it not to be imperative upon the Court to allow those costs, yet practically, ever since the passing of Sir Michael O'Loughlin's Act, it has been the uniform practice, both of the Court of Exchequer and the Court of Chancery, to order those costs in priority; and therefore, though a single Judge may disapprove of that construction, or of the course adopted in carrying out the statute, it is too much to expect him to say, "I differ from all the Judges who have acted upon this construction." But I have not the slightest hesitation in saying that it is most desirable for the Legislature to alter that portion of the Act, and to let the costs be paid according to the priority of the demand. Any gentleman of the Committee who is desirous to know the mode in which the funds in these cases are distributed, and the rule of law applicable to their distribution, will find a most able judgment of Sir Edward Sugden upon the subject in the third volume of Jones and Latouch's Reports, in the case of *Abbott v. Stratton*. The rule, I may observe shortly to the Committee, is this: if a puisne creditor obtains an order for a receiver under Sir Michael O'Loughlin's Act, he is entitled (and that is reasonable, I consider,) to apply towards the payment of his puisne demand, all rents actually received before the order for extending the receiver; and thus, if a judgment creditor of the year 1848 had obtained an order for a receiver, and after six months a judgment creditor of the year 1847 extended the receiver, you would pay the puisne judgment creditor of 1848 so far as the rents actually realized by the receiver in the interval between his appointment and his extension. That is reasonable enough; but it has been carried further than that; although the receiver has not received one single fraction prior to the extending order, the costs of the puisne creditor are practically paid in priority. The language of Sir Michael O'Loughlin's Act would appear not to make it imperative. I will read the first words of the Act, which at first sight it would be said did not require alteration; the words of the 38th section are, "The Court shall have power, if it shall think fit, to direct

in any case that the costs incurred by the person at whose instance the receiver was first appointed, in procuring such appointment, be paid out of the funds collected by the receiver, without regard to the priority of the person on whose application such receiver was appointed." That would appear to be discretionary with the Court, which perhaps it is; but, as I have already said, practically it has been the course in both courts always to pay those costs in the first instance; and if that rule had not existed in the case that was mentioned by Mr. Osborne just now, Mr. Norris would never have presented his petition, if he had not been certain that when he got his order he would at all events get his costs. The solicitor knowing that at all events the costs will be paid him, multiplies to a great extent applications under the Sheriff's Act; but if he knew that the costs would be paid according to the priority of the demand, except as regards the rents received prior to the extending order, he would be very slow in making his application.

1188. *Sir J. Graham.*] Whenever there is a new tenant to be obtained, is it the invariable practice that he obtains his occupation by public auction at the highest bidding?—I believe it to be the invariable practice.

1191. Master Brooke states that there is a sum paid, however small the yearly rent, whether £5 or £10 of £5 *4s. 4d.* for the lease and the recognizance?—That is applicable to every case.

1192. Do you think that those recognizances work well, or that they afford greater security for the payment of the rent?—No, my opinion is against them, considering the expense. But I have to observe that there is a great deal of difficulty in that as in other cases, in the Lord Chancellor taking upon himself to alter the course of practice which has existed for 99 years. I have the original Order, which was made in the year 1750, requiring security; it is an order of Lord Chancellor Newport, and bears date the 29th of March, 1750. I cannot find any earlier Order; this is the Order: "The Lord Chancellor declares it for a general rule for the future, that in every case where a Master shall set lands pursuant to the Orders of this Court, that he do take security for the rent." And Lord Manners, by an Order of the 23rd of November, 1821, went further; that Order provides in these terms: "Whereas it hath been made known to me that in several instances where a tenant hath been declared under the Order of the Court, that the recognizance entered into by such tenant has not been duly filed in the proper office; now I, the Right honourable Thomas Lord Manners, Lord High Chancellor of Ireland, do declare it as a general rule, that in future the Masters shall not perfect any lease under a letting to a tenant, until the certificate of the clerk of the recognizances, that the recognizance of such tenant has been duly enrolled, shall be first produced." Sir Edward Sugden, in his General Orders, adopted the same principle. The 142d of Sir Edward Sugden's Orders, following up the view of Lord Chancellor Newport and of Lord Manners, is this: "That the Masters shall not perfect any lease under a letting made to a tenant, until the certificate of the clerk of the recognizances shall be first

produced, that the recognizance of such tenant has been duly enrolled." Upon the whole my opinion is, that it would be desirable to dispense with all those Orders.

1195. The burden upon an estate is very much increased by accumulated stamps?—Yes. My opinion, in considering the point is, that upon the whole it would be desirable to assimilate the case of tenants under the Court to that of other tenants; and to get rid of the expense, which though nominally paid by the tenant, may be considered very often as substantially paid by the estate; for you thereby deprive the tenant of money that is properly applicable to the payment of rent.

1200. Do you think the recognizance a security which it is desirable to uphold?—I should say that it would be desirable to do away with it.

1202. Have you ever known those recognizances put in suit?—Yes, I have; the recognizance is not a mere form; it is used as a mode of recovering rent.

1203. Is it of frequent occurrence that the recognizance is put in suit?—I should say not; at least I have not known of many cases of it.

1225. Is not the suit a peculiarly difficult one; is it not necessary to state the conditions of the lease?—No; a *scire facias* issues upon the recognizance, and it is heard upon the Petty Bag side of the Court of Chancery. Upon this *scire facias* it is open to the party to do what he very often does in suits upon recognizances; to employ some very clever special pleader, who puts in very special pleas. This terminates sometimes in a demurrer, and sometimes in a replication. And there is no doubt that in many cases before Sir Edward Sugden there were most technical objections raised.

1226. In fact, it is a suit peculiarly open to technical objections?—I consider that it so.

1227. Have you known many instances of money being recovered by suits on recognizances?—I cannot say that I have.

1228. Have you known one?—It would not come before me. I do not exercise jurisdiction on the Petty Bag side of the court; but, the way in which it comes before me is, by parties making an application at the Rolls to sue on the recognizance, the object being to save the expense of the proceeding. And when a party comes in that way there is an absolute order against the tenant, where an attachment has issued against him; but there is a conditional order against the sureties; but I cannot call to mind at this moment any particular case.

1229. In fact it is rather *in terrorem* than any practical benefit?—I should say that it has not been productive of much practical benefit.

1234. *Mr. Solicitor-general.*] The costs of such a proceeding I understand to be, including the costs of law, the costs of obtaining the order, the costs of the receiver and of perfecting the recognizance, and the costs of the tenants are not less than £40 or £50?—I do not think you should tot all those together; I do not know the exact sum, but if the Committee were desirous to know what the costs of appointing and extending a receiver were, I remember calling for bills of costs two or three times; I did so for my own information, and I can state generally that the cost of the appointment of a receiver I believe to be

from £25 to £27, and the cost of extending a receiver £9 or £10.

1235. That includes no law costs whatever?—No.

1236. Does it include the costs of the tenant's recognition?—I believe not; those are paid by the tenant himself.

1245. *Mr. R. B. Osborne.*] Recently small properties have come under the Court much more than formerly was the case?—There are a class of cases that are moved by junior counsel, and when at the bar I seldom moved them, and I cannot therefore give an answer to the question; but I have no hesitation in saying, that now the majority of cases in which I make orders for receivers upon judgments are small amounts. But one case came before me in the course of the present term, in which there was a debt for a large amount, £10,000 or £20,000. An application was made on behalf of a Scotch company who had lent the money and who had got a mortgage; and though there was not a shilling of interest due, though all the interest was paid up, there being an increased amount of interest payable in the event of the interest not being paid after a certain date, an application was made to me to appoint a receiver over the property, and I expressed a strong opinion as to the application being one which, if I had any discretion at all upon the subject, I should refuse, for I did not consider that it was intended in a judgment of that sort to raise £15,000 or £20,000 out of the rents and profits. But upon looking into the cases, I found that Sir Edward Sugden had, in *Abbott v. Stratton*, decided that the Court had no discretion, and I was therefore against my own feelings compelled to make that order, and a most oppressive one it was.

1246. Sir Edward Sugden said it was impossible for any country to prosper with any system existing such as the present system in Ireland, with so much property under the management of the Court; is that your opinion?—I entertain the strongest opinion that it is one of the greatest calamities of Ireland to have such a state of things existing.

1247. It is impossible for the Lord Chancellor himself, in consequence of the practice which has existed from prescription, to remedy that?—I think Sir Edward Sugden's orders are drawn up with the greatest care, and the greatest anxiety to manage the property as well as possible; and I am sure that the Committee, if they read those orders, must highly approve of them; and if they have been ineffectual in remedying the evil, I am under the impression that the Court of Chancery cannot manage property effectually under the present system.

1249. *Sir J. Graham.*] To return to the question of the limited power of leasing under the Court, do you think that it is susceptible of any improvement?—I entertain the opinion, that if you are not in a position by legislation to render the proceedings in the Court of Chancery so rapid as to get rid of the receiver in a reasonable period after the bill is filed, but you are to consider property as placed permanently under the Court for a number of years, there should be the power to make a lease for a definite period, irrespective of the termination of the cause, that is a husbandry lease for 21 years.

(To be continued.)

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TERMS OF SUBSCRIPTION.—(payable in advance).
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6 FLEET STREET, in the Parish of St. Andrew, and published at 15 COLLEGE GREEN, in same Parish, by EDWARD JOHNSON MILLIKEN, residing at the same place, all being in the County of DUUBLIN. City of Dublin. Saturday, September 1, 1860.

THE Irish Jurist

No. 45.—VOL. L.

SEPTEMBER 8, 1849.

PRICE {Per Annum, 4s 10s.
Single Number, 2s.

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DUBLIN, SEPTEMBER 8, 1849.

THE Legislature have passed "An Act to amend the Law concerning Judgments in Ireland." During its progress through the House of Commons it was altered three times, and is now so curtailed of its just proportions that no one familiar with its first appearance could recognize its present features. The English Solicitor-general cut off a limb *here*, and added a joint *there*, so hastily that it is not surprising that it should have been put together a little imperfectly.

What measure could survive the rapid changes it underwent, and yet retain a regular and distinctive character? The bill originally contemplated that no future judgments were to be a charge upon lands until lodged in the hands of the sheriff, and that no receivers were to be appointed by petition. The latter left judgments a charge in all cases from their entry, where the debt exceeds £150, and even under that sum in Courts of Equity when administering assets, and a receiver may, in all cases, be obtained where the debt exceeds the before-mentioned sum, and the judgment is a year old; and it is not a little doubtful whether a receiver cannot be obtained upon a judgment for even so small a sum as £10 after the death of the cognizor.

The history of the measure shews that it is the reflex of the opinion of the judges and Irish lawyers who were examined before the Poor Law and Receiver Committees, and that the Solicitor-general took up the subject as a matter of duty, quite ready to adopt the views of "gentlemen opposite." He appears, in fact, to have acted on the belief that the law of judgments in Ireland was pretty much the same as that in England, and that where it differed,—an assimilation would be desirable,—and where it was alike, a change.

The law of the two countries differed in the summary power to appoint receivers, and in the power of assignment at law; it coincided in making judgments charges upon lands from the time of their entry. The first bill placed the law of the two countries upon the same footing as to receivers, and the power of assignment, and varied it by making judgments in Ireland a charge only from the time of lodging the writ in the sheriff's hands.

These changes are based upon the evidence given by Dr. Longfield and Mr. Butt; the former observes, "I would have judgments placed in the same position as they were in formerly; that the judgment creditor should have the right of execution against all the property which the debtor had when he took out execution against him, but he should not have the right to disturb the possession of any purchaser of real and personal property from his debtor, and the judgment then would cease to be an incumbrance."

And Mr. Butt, in reply to the following question:—"What would you say if it were limited to the estates a man had at the time of obtaining judgment?"—I think that would be an improvement; but having thought a good deal upon that subject, I would be strongly of opinion that the best thing that could be done would be to abolish altogether the law, making judgments a charge upon landed property." And again—"I would abolish the law of making a judgment a charge upon land, as it now is, I would allow a landed proprietor to borrow money on judgment, under the penalty, if he did not repay it, of having his creditor take him in execution, or take his goods in execution, or take his land in execution; but I would not allow a judgment to subsist as an indefinite charge upon land."

This evidence was given in March, and the first judgment bill was laid on the table of the House

in June—an advanced period of the session; and whilst the Receiver Committee was sitting, it adopted the ideas, and carried out the views of the witnesses from whom we have quoted.

Thus judgments were to be no longer assignable, no longer a charge upon land from the time of entry, only from the time of taking it in execution. This was a bold change, and coming from the law officer of the Crown, indorsed with his name, that of Lord John Russell, and Sir William Somerville, should have been a well advised one.

The very day before its introduction—if we remember rightly—Sir Edward Sugden gave his evidence before the Receiver Committee; it was very masterly evidence, and much attention was naturally directed to it. Though fully alive to the evils, connected with the law of judgments, his knowledge of their magnitude made him cautious as to the remedy.

He is asked—"You have said that, whether wisely or not, we have gone too far in establishing the effect of judgments in both countries to recede. Having given that answer generally, what would you say to a revision of the law in Ireland, especially with respect to judgments being made assignable, and the effect of Sir Michael O'Loughlen's act more particularly?—I think it would not be advisable to take away the power of assigning judgments, though it may be open to abuse, because now judgments have become almost as universal as bills of exchange. I can imagine now a small tradesman getting a judgment for a mere household debt, and then assigning it to another person in order to avoid the odium of getting a receiver over his customer's property. I think that not at all desirable, but that is the custom of the country generally. It is very desirable, in my opinion, that the law of Ireland should be altered in this respect; it might, perhaps, be considered a strong measure to take away receivers upon petitions altogether; but I should have no hesitation, if I had the power, in very much limiting the operation of the Sheriffs' act, and the subsequent acts, and in placing judgments in Ireland more upon the footing on which they stand in England; for example, if I had the power, I should not hesitate to limit the amount of money for which a judgment should bind the property, so as to give a right to a receiver under those acts; that is, I would take some reasonable sum as a proper subject for a judgment and receiver, considering the expense attending such a proceeding; but as regards smaller sums, I would leave the creditor to his common law remedies, and to that credit upon which he no doubt relied when he furnished the matters in his trade. If that line were drawn, and another provision introduced into the law, that no judgment creditor should have a receiver until after a certain period from the time of his obtaining a judgment, I think the evil would be very much struck at, without alarming, which one would be very unwilling to do, the people in Ireland at the change in a law which they seem to be very much attached to."

These were Sir Edward Sugden's suggestions; he coincided also in the expediency of allowing the costs of appointing or extending a receiver, to

be paid in the priority of the judgment, and not to be the first charge on the fund.

The Master of the Rolls was examined on the 28th of June, and he is asked—"Would you prefer the government measure, which provides that judgments shall not be assignable, and that after the 31st December next, no judgment creditor shall be entitled to apply to the court for a receiver, or would you prefer Sir E. Sugden's proposition, that judgments should continue assignable, but that no judgment creditor should apply for a receiver until 12 months elapsed, and that a line should be drawn with reference to the amount; and that no receiver should be appointed for property under a certain amount, but that the law should remain unchanged with respect to all judgments above that amount?—It is a difficult question to answer what would be the comparative effect of the two plans; but if I were at liberty to give an indirect answer to the question, I would say that I should like to have a compound of both. I should be disposed to repeal the Act which authorises the assigning of judgments, and try for the present the modified remedy that is proposed by Sir Edward Sugden, of preventing any person from obtaining a receiver unless the judgment exceeded a certain amount."

The Solicitor-general must have thought this a most happy suggestion—a safe middle course; it enabled him to retain one of the original features of his bill, and retaining that he could afford to alter the rest, so as to harmonise with the views of Sir Edward Sugden. And, accordingly, on the 13th of July, he brought in an amended bill without a word of explanation; it adopted the £150 range, and he ultimately introduced the clause which gave the year of grace, and placed the costs of appointing a receiver in the same priority as the debt. Then at the fag-end of the session the bill was entirely changed, and sent up to the House of Lords where it had not time to be discussed; and so it passed.

That this is the true history of the measure, is obvious, and surely this hasty and feeble spirit of legislation by an English lawyer on an essentially Irish subject is not the spirit or the manner in which legislation should be conducted. However, the Irish Bar deserve that it should be so, when the practice is allowed to exist of entrusting Irish Government legislation to English Law-officers.

Of the measure itself we shall at present write but little; all the changes that we advocated have been effected, and but one that we opposed has been made—we preferred the former law to that which prohibits the legal assignment of judgments. With this exception its main features represent our views, but we asked for a little delay, that the measure might be duly considered, that it might accompany a change in the system of receivers, and that its blemishes—the necessary result of precipitancy—might be removed. We regret for the sake of the country that delay was not granted.

With a little more care the Act could have been rendered more explicit. In point of phraseology nothing can be more awkward than the second section.

The judgments to which the Act is applicable is nowhere defined, and are left to implication except

the following can be considered a definition: "And the judgments to which under this Act the provisions of the said Acts of the 6th of Wm. 4, and 4th of her Majesty, shall not extend or be applicable, are hereinafter referred to as judgments, subject to the provisions of this Act." Must it ever be that our glorious language becomes confused and inexplicit when applied to the wording of Acts of Parliament?

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

Right Hon. T. B. Smith.—June 28.

(Continued from p. 340.)

1250. And to be binding upon the purchaser or upon any other party?—Yes, because it would be open to the owner, if the Master chooses to let it at an under value, to come to the Court, and complain of the letting.

1251. You have pointed out already that it is not a fixed term of seven years, or during *lis pendens*, but that it is terminable whenever the estate is sold?—Yes; in consequence of that, questions have arisen in court, as to the right to what are called emblements. At common law, if a person holds for a term uncertain, determinable by the act of God, he is entitled to the crop. I remember arguing the case, and succeeding in establishing that that principle ought to be applied to a lease for seven years, pending the cause; and that if the purchaser went in when there was a crop standing, he ought to give the tenant the crop; and that has been acted upon.

1252. Would it be necessary by legislation to give the Court the power, or is it within the jurisdiction of the Court to grant longer leases?—I think it should be done by legislation. It is very difficult to draw the line, as to the power of the Lord Chancellor in making general orders; but when there is a complete change in the system, I think the Lord Chancellor has a right to the sanction of Parliament, and ought not to be subject to observations as to his introducing novelties never heard of before.

1254. Did not Sir Edward Sugden's new Rule of Court give the power of distress to the receiver upon five months' arrear of rent?—Yes, there is a general order upon that point.

1255. Has that order worked well or ill?—I do not see any objection to the order; it is the general custom in Ireland that the tenantry should pay their rent one half year within the other, and the object of fixing five months was a sort of recognition of that. A receiver cannot distrain until five months have elapsed, without the order of the Master; but the general order expressly provides that if he applies to the Master and shows any particular circumstances which will make it appear that he ought to distrain immediately, he may obtain power to distrain.

1256. We have been told that the five months' grace has allowed time for the midnight flight of the tenant?—If the receiver was to do his duty properly and was resident, he could give some hint to the Master, which would lead the Master to order an immediate distress.

1257. You would not recommend any alteration in the order in that respect?—No, I think it is sufficient as it stands.

1258. *Mr. R. B. Osborne.*] The receiver communicates with the attorney and he makes a statement of facts?—Yes, that is one of the objections of the present system; and if there were a Master of Receivers, one of the advantages to be derived from that would be, that the costs would be enormously decreased. If you had such an officer in Dublin, the business ought not to be done by attorneys, but by local receivers communicating with the head officer in Dublin; and if you had the intervention of attorneys it would be desirable to place them on salaries, by which you might diminish the expense thousands of pounds.

1259. *Sir. J. Graham.*] An objection has been urged against the law in Ireland with respect to not distraining growing crops; have you formed an opinion upon that subject?—I formed an opinion at the time the Bill was prepared.

1260. How has it worked?—I am against the system of distraining growing crops; I cannot say how it has worked, but at times there were very oppressive uses made of that power. It was very much the custom to place keepers on properties when the crop was getting ripe, and oppressive use was made of the power of distraining; upon the whole, I am disposed to think that the law was rightly altered.

1261. *Chairman.*] Do you think it desirable that all law proceedings should be taken in the name of the receiver, in order to get rid of all the difficulties about demises; in fact, that he should represent all parties in legal proceedings?—Yes, I see no objection to that.

1262. A great deal of difficulty now arises from that cause?—Yes.

William Tighe Hamilton, Esq.—June 29, 1849.

1263. *Chairman.*] What office do you hold in the Court of Exchequer in Ireland?—The office of Second Remembrancer.

1267. The Chief and Second Remembrancers discharge analogous duties on the equity side of the Exchequer to what the Masters do in the Court of Chancery?—Precisely; with this difference, that certain heads of business are done by the one and certain heads by the other, and not a certain quantity of all the different kinds by one, and a certain quantity of all the different kinds by the other, as in the Court of Chancery. What I mean is this, that the Chief Remembrancer disposes of all references in causes, and the Second Remembrancer disposes of all references in petition matters, audits the receivers' accounts, and taxes all costs; so that I have three heads of duties, and he has one; but of course the one head of business which he discharges is a far more important one than the three heads which I discharge.

1268. In your position of Second Remembrancer have you had ample opportunities of judging of the system of the management of estates under receivers?—I have; for I have audited all the receivers' accounts for the last five years, and done all acts necessary with respect to the management of the estates.

1269. The estates under the Court of Exchequer

are all cases of creditors' receivers?—All cases of creditors, except where a minor happens to be incidentally interested. There are some instances in which a minor is proceeded against where he has a joint interest with some one else.

1271. Can you give the Committee any idea of the whole amount of property with reference to the rental under the Court of Exchequer?—The only way in which I can arrive at that is by the Parliamentary Return made, I think, in 1847, of the amount in the Courts of Exchequer and Chancery.

1272. You can give nothing but what appears upon the Return?—Nothing more, except by estimate and my own observation of what goes on.

1273. Can you say about what the amount is?—I think by the return it was about £160,000. But there is a great number of accounts both in the Exchequer and in Chancery, more I think in the Exchequer than in Chancery, which have not hitherto been passed annually, and with regard to some of which there has been a very long lapse of time; for instance, I have within the last month passed several accounts which have been standing over for several years, and one which never had been audited for nine years.

1274. Receivers' accounts?—Receivers' accounts. The consequence of that is that the Parliamentary Return must be to a certain extent defective; but by the nearest estimate I can make out, allowing for that, I should say there was perhaps £180,000 a year in the Exchequer; and by a similar process of reasoning, founded upon the same Parliamentary Return, I think the quantity in Chancery is about £640,000.

1275. But you find it very difficult to ascertain the amount from those returns?—Very difficult; because some of the returns are very inaccurate.

1276. They only give those estates where the receiver has accounted?—Yes; those two together will make a total amount in the two courts of £800,000. Then from the enormous rate at which receivers have been latterly appointed and none discharged, I should say that it would be a very fair estimate to say, that the amount now under the two courts is a million.

1277. That is creditors' receivers?—That is creditors' receivers, as distinguished from lunatics and minors.

1279. Has the amount been increasing very rapidly of late?—It has. As an instance of that I may mention that it appears by the books that we keep in the Chief Remembrancer's office and in my office, that for the last five years, the average number of receivers appointed by the Chief Remembrancer in causes from the 1st of January to the 1st of June was 8; this year it has been 32. Then in matters which are in my department, I find that whereas I used for the last five years to appoint an average of 12, I have this year appointed 81.

1280. That is in judgment matters?—In judgment matters.

1282. Are they generally judgments above £100 or under?—I should say decidedly the average are under £100.

1283. Is there any means, in appointing receivers in those small cases, of testing the fitness of the person to be a receiver?—Very little. It appears to

me that taking the rental of the property in the two courts at a million, that amounts as nearly as possible to one-nineteenth of the whole country. I have taken some pains to ascertain that, in order to show the enormous extent of country which is subject to receivers.

(To be continued.)

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 8s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 6, FLEET STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, September 3, 1860.

THE Irish Jurist

No. 46.—VOL. I.

SEPTEMBER 15, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, SEPTEMBER 15, 1849.

Our columns of last week and this contain the first parts of a Digest of all the cases reported in our Irish Courts of Law since the commencement of the *Irish Law Reports*. It has been a work of very considerable labour, but, being so very desirable, we trust that it will prove acceptable to our professional brethren.

The multiplication of cases, without any attempt at their classification, is a source of great labour to the industrious lawyer, and not calculated to be useful, except they be susceptible of arrangement. One circumstance that has much impeded our progress, has arisen from the difficulty of finding a proper heading under which to place cases of very difficult definition. We have, however, we hope, reduced chaos into order; and will present to the Irish Bar a work, which has not been attempted since Mr. Archer's Digest. Next year we shall give a Digest of all our reported cases in Courts of Equity; and thus, having brought down our compilation to the period of publication, each volume will contain the Digest of the cases reported in Ireland during the then current year; and we shall then have more than redeemed the promise which we made to our readers, in our first number, of presenting them with an Index of the cases of each year.

We cannot refuse admission to the following letter—We are by no means so enamoured of our jury system as our correspondent appears to suppose; we should, however, suggest to him, that he should study a little more minutely the details of the

French and Scotch systems before he pronounces so unhesitatingly in their favour. It is a singular feature in our criminal jurisprudence, that in all questions of fact, the verdict of a jury is irreversible, though the right to the possession of a single acre of land may be untested frequently; but, when once the verdict of guilty has been recorded, there is no appeal. Does not this circumstance afford a powerful argument against any change in our present system—and prove that the evidence should be so clear, as to convince even the most obtuse, of the guilt of the accused? The individual sufferings which our correspondent has endured, we regret for his sake, and we quite agree with him that it is a barbarous notion to starve a jury into a verdict: on this point, a change is very desirable. The instances of misconduct in English juries, to which he refers, he is probably not aware are punishable. Juries should not be starved; and they should, if guilty of misconduct, be punished. So long as the great bulk of the people of England acquiesce in requiring unanimity, we think the existing law should be suffered to remain.

To the Editor of the Irish Jurist.

SIR,

Though I am no lawyer,—your courtesy will, perhaps, allow me the privilege of occupying a page or two in the *Irish Jurist*, when I inform you that I have had no little experience in some of the details of law, and more especially in the working of our jury system. It has been my misfortune to have been locked up in cold winter nights, on three or four occasions, and to have been frequently associated with men whose avowed partizanship, or obstinacy in unintentional error, has baffled the ends of justice, and occasioned extreme annoyance to those of the jury who have formed contrary judgments.

Assuming, Sir, that you will permit one of your lay readers to address to you a few observations on a point which involves no legal technicalities, or intricate embarrassments, and only relates to a matter which unprofessional men like myself may be supposed to understand, and in which they have a personal concern, I shall, as briefly as possible, state my point. It is this:—

Does the English law, which requires the entire unanimity of juries in giving verdicts, effect the objects of justice so surely as the jury laws of Scotland or of France? I think, Sir, that it does not.

Perhaps it may not be superfluous for me to assume in *limine* that I am not an advocate for hazardous or crotchety innovations; our judicial system has worked admirably in its grand movements; the main pivots upon which it revolves are perfect, and the aphorism—*Nolumus leges Angliæ mutari*—is revered by me, but with qualification as to details; these in innumerable instances, require remodification. Prejudice alone can blind thinking men, so that they cannot perceive that the ever progressive state of society requires continued modification of the laws which are to regulate its concordant movements. Dare I hint to you, Sir, the heretical insinuation—as you may indignantly deem it—that the working of that great fundamental law of the British constitution, trial by jury, is not perfect in its organization; that it wants a little oiling, and a little screwing, to make it move more effectively? What! you will possibly exclaim, Touch the *palladium* under which we have maintained our liberty for nine centuries.

Bear with me a moment. I am still smarting in imagination from the long wearisome sittings I have undergone in jury rooms; craving from the hunger I have endured; suffering—sympathetically—from the nausea, the misery of sleeplessness, the cold, noise, senseless babbling, and angry disputation I have suffered during an imprisonment of twenty-four hours, and all this without the satisfaction of recording an honest verdict, though eleven out of twelve of the jury were decidedly agreed in opinion!

This is not an extreme case. The records of Irish trials furnish several instances in which justice has been frustrated by the determination of one juror—unencumbered by conscience, or, it may be, without understanding—who will not permit a just verdict to be returned. There have been jurors without regard for the moral obligation of an oath, and there will be such.

It may be said, that though cases occur in Ireland in which jurors occasionally forswear themselves, or delude themselves through some quackery of conscience, and illegitimate compromise between a correct judgment on the one side and the tendencies of party on the other, no such abuse of the jury system occurs in England. This I deny to be fact. I know that the trial by jury is not unfrequently nullified in England by the pig-headedness of a single juror—rarely indeed from political or sectarian influences, but from that deficiency of intellect and obliquity of moral perception by which jurymen, like other men, are sometimes distinguished. I know that a minority of three or four out of twelve have persuaded the majority to concur in a verdict contrary to their own opinions, in order to avoid the tedium

of a *lock-up*, or the fancied discredit of an absolute disagreement. I can vouch for the fact that verdicts in England have been returned by a jury who have allowed them to be decided by *the toss-up* of a shilling. I would put it to the calm deliberation of any person familiar with the management of juries in cases of a party nature, whether the grand consideration be not, “Who are on the jury?” “A. B. C. are good men and true, but D. would rather chew the leather of his boots for luncheon, dinner, and supper during a week than find the traverser guilty.”

Now, Sir, I respectfully urge that no ground should be left for such observations; and I say farther that society ought not to be satisfied with a system which involves at least the possibility of *manœuvring* in order to select the individuals who are to compose a jury. Such manœuvring arises from the law which requires unanimity; where there is manœuvring the fountain of justice is corrupted. No society ought to be content with the results of trial by jury unless all men who are legally and morally eligible to act as jurors be called to discharge their function according to the exact order of their names on the lists, without any selection whatever, but subject to challenge. At present, even the most upright and impartial sheriff will be an object of confidence to one party, and of suspicion to the other, where the issue of the trial materially affects the interests, or agitates the passions of the antagonist sides.

But why, it may be said, should a change be necessary now in the jury system, when we have, in the classes from which jurors are usually chosen, more independence of mind than was to be found in former times, when our forefathers were satisfied with the system? I might, perhaps reply, that the modern spirit of independence has become, in many instances, egotistical obstinacy, or an independence of the opinion of judge or brother jurors. A juror feels that no judge can compel him to agree with his fellows in a verdict; there is now no Jeffries nor Scroggs to imprison him for contumacy, or to gratify his rancour or malignity, or subserve the purposes of an arbitrary sovereign; there is no rod *in terrorem* over him—he is free to think and act as he chooses; he enjoys real liberty, and though he cannot stifle the expression of public opinion if he be known wilfully to frustrate the ends of justice by his perverseness, or want of honesty or of courage, he may snap his fingers at the judge's charge, his fellow-jurors, and the public, and say *sic volo* with sovereign contempt for them all. But does this independence exist in fact? Are jurors never slaves to influence on the one hand, nor to fear on the other? Have the terms pig-headed, perverse, obstinate, boot-eater, become obsolete? Are our jurors so far advanced in intellect, that a modification of the jury laws, which might have been desirable in more uneducated and arbitrary ages is not essential now? Methinks they order these things better in France and in Scotland. In neither country is unanimity required. The assassin, murderer, or slanderer, does not there evade the penalty of his crime because a dissentient voice may cry out in his favour, even though his guilt may be clear as the noon day.

I have not the life of Sir Samuel Romilly within

my reach, but I think he was favourable to the French jury system. If I be correct in my recollection, I have no mean authority on my side.

From our experience of human nature, it is too much to expect that twelve men will agree in opinion even on any ordinary point—how much less reasonable is it to expect their unanimity in cases of a complicated character, and in which various collateral interests may be involved. Is it not wiser to calculate for and provide against the probabilities of diversity of opinion among thinking and free men? I would remind you of the wise reflection of the Emperor Charles V., after his long experience of the complicated workings of the human mind, and the various springs by which it is influenced—"It is not wonderful that men cannot be induced to think and act in harmony together, when I cannot get even these two watches to keep the same time precisely." If the catalogue could be placed before us, of those criminals who have been let loose upon society from want of unanimity among the juries before whom they were tried, and if a table could also be laid before us, showing the precautions taken (unavoidably in some cases under the existing system) by sheriffs to exclude men whose single voices would have rendered trials nugatory, I feel satisfied that the modification of the jury law, to which I have solicited your attention, would not be considered undesirable.

I have the honour to be,

Your obedient Servant,

M. D.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Tighe Hamilton, Esq.—June 29.

(Continued from p. 344.)

1284. *Sir J. Graham.*] Is that one-nineteenth of the area or one-nineteenth of the rental?—One-nineteenth of the area. The way I make it out is this: the modern poor-law valuation is 13 millions; but that is not the sum to be compared with a million of rental, otherwise it would be one-thirtieth of the whole country. What is called the old valuation of Ireland is generally considered 20 millions, and that is a valuation taken at the same time and under the same circumstances under which these rents which constitute this rental under the Court of Chancery were fixed; therefore the million rental, as it exists now, is to be compared with the twenty millions. Then inasmuch as demesne lands, for which receivers are seldom appointed, and lands for which fines have been paid for leases, must be deducted from that, so as to make the comparison a fair one, and which we may take at about one million, the receiver rental would make about one-nineteenth of the whole country.

1285. *Chairman.*] Have you any notion of the number of tenants under the Court?—I could not say as to the million of rental, but I can give it to the Committee as nearly as possible from 300 estates, which I have examined, and then by the rule of three one might make a very near approximation to the whole.

1286. Will you state what that calculation is?—There are 9,442 upon a rental of £159,000. Then it must be determined by the rule of three, how many will be upon a million rental.

1287. You have already mentioned that you have no very satisfactory means of testing the fitness of those persons to be receivers. How does that difficulty arise?—In the first place, when it is referred to me to appoint a receiver, I have no possible means of knowing whether the individual proposed is a proper person or not, for this reason, that perhaps he lives in the county of Kerry, and he is the only person proposed. If one says to the parties, "There is a very good receiver on such and such an estate near," the answer which is invariably given to me is, that such a person will not now undertake a receivership, such is the disadvantageous position in which a receiver is placed; and it becomes impossible in that way to have any selection.

1288. Do you think that that difficulty arises from the impossibility of getting proper persons to take those small receiverships, or does it arise from your want of power to ascertain who are proper persons?—No; I think it arises more from the difficulty of getting a proper person, than the want of power supposing he existed, because we certainly have the power of appointing whomever we think fittest.

1289. In the case of receivers appointed over large properties have you the means of obtaining fit persons and of ascertaining their fitness?—I do not think more so. It is a matter which, in fact, is very much left to the nomination of the parties interested.

1291. What power would you require for the purpose of satisfactorily discharging that duty?—I do not think I should require any additional power if all the rules and regulations with respect to the management of estates and the mode of accounting were of an unexceptionable character, because I think in that case there would be a great number of perfectly competent persons willing to undertake the receivership, and one would have a choice, instead of being confined to the party most interested often in exhausting the estate.

1292. In what way would you suppose that the evil with regard to the difficulty of getting proper persons to be receivers would be most effectually met?—I see no mode of doing it, except by having certain fixed ascertained persons as standing receivers, who should be authorised to act in every case where a receiver was to be appointed.

1293. In whom would you vest the selection of those ascertained persons?—I should vest it unquestionably in the Chancellor.

1294. Supposing you could get fixed ascertained persons selected by the Chancellor to discharge the duty under that system, why could not they be had now in the case of large estates? I think there is a very strong feeling growing out of the risks and liabilities to which receivers are subject, and that till something is done to make the system more regular and more satisfactory few persons will undertake receivership.

1295. Is not it in the power of the Court, by arranging the matter of the liability of receivers, so to adjust its rules with regard to receivers as to get rid of the objection?—It is such an immense subject

and ramifies into so many directions, and into other subjects upon which legislation would be necessary, that I do not think any Chancellor could carry out the sweeping reform that is necessary, except with the sanction and under the direction of the Legislature.

1296. What specific interference on the part of the Legislature do you consider would be proper and necessary in order to effect the reform that is required?—With respect to the receivers themselves I should say that there ought to be a power in the Chancellor to consolidate the existing receiverships into districts, so that ultimately without doing any violence to vested rights and the interests of parties more or less dependant upon their receiverships for their income and support, you might approximate in a very few years to the still more perfect system of having a receiver for every county, or part of a county, as an efficient public officer.

1297. Is not there great difficulty in this way, that causes now in the Court may be passing out of it, and that the estates under the Court are constantly varying; is not there therefore great difficulty in appointing a permanent officer of that kind?—All experience is against a great deal of shifting, because when once an estate goes into the Court of Chancery and a receiver is appointed over it, it very slowly leaves it. But that consideration belongs to every system of receivers.

1298. Do you think it is right to provide for the continuance of that system by having a permanent staff under the supposition that the estates are to remain under the Court of Chancery?—Clearly so, because there will always be a large quantity under the Court.

1302. Do you think that there might be substantial improvements made in the mode of receivers accounting?—I think nothing can be worse than the present system of receivers accounting; they are under no constant controul. The account is a mere legal transaction, which is only brought into court by a summons; and if the parties, for any particular motive, do not choose to call the matter on, it might stand over for years upon years. In addition to the case which I mentioned just now of a nine years' account, it is a common thing to have an account of three, four or five years. If the parties are interested in keeping the thing back, it may go on for a great length of years longer.

1303. Do you think that it would be desirable that the receiver should be obliged from time to time to deposit in some neighbouring bank the monies as he got them?—I think it would be a very essential part of a better system that he should send in monthly, to whomsoever was the head of the department, an abstract of all his proceedings; and that the amount he had received should be lodged monthly, or perhaps quarterly, as might be thought best.

1304. Supposing he was obliged to deposit the money from time to time as he received it, and to give an abstract monthly or quarterly, and that at certain intervals he should be obliged to give his report upon the condition of the estate under his management, and that when he was passing his general account with the officer it should be verified by affidavit, do you think those would be great improvements?—I think those would be great improvements

upon the present system, but I should rather look at a more official system of accounting; for instance, the system of accounting that is practised in the Excise and the Customs, and wherever the revenue is received, which is done by a very simple official process not by the present cumbrous and expensive machinery of a court of justice.

(To be continued.)

IN CHANCERY.

Robert Malcomson, and
Robert Shaw, Plaintiffs.
Richard Burgess Labarte, (a minor),
Elizabeth Usher Labarte, and Anne
Elizabeth Labarte, Amelia Usher
Labarte, Edward Usher Labarte,
and Beverly Usher Labarte, (minors),
by the said Elizabeth Usher
Labarte, Defendants.

PURSUANT to the
order of her Majesty's
Court of Chancery made in this case, bearing
the 29th day of July, 1848, the
plaintiffs do hereby require the
defendants to come in before me, at my Chambers in the
City of Dublin, at the house of
Messrs. G. & J. O'Connell, at the
perjury, do so, and to pay
the costs of this order.

ing Debts, Charges, and Incumbrances affecting all the said
Lands of Ballywilliam, in the County of Cork, and Thunders-
wise Ballythomas, Caracloagh, otherwise Ballycough, Lough
and Kuckanenafrin, otherwise Moss Hill, and the Western
lea, situate in the County of Waterford, the plaintiff in this
mentioned, to come in before me, at my Chambers in the
Dublin, on Monday the first day of October next, and stand to
the same, otherwise they will be precluded the benefit of said order.
Dated this 8th day of September, 1848.

For MASTER MURPHY, 2 LIT.

Matthew Anderson, Solicitor for the Plaintiffs, No. 2, Inn Quay, Dublin.

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COLLEGE GREEN, in the same Parish, by EDWARD JOHNSON
MILLIKEN, residing at the same place, all being in the County of
City of Dublin. Saturday, September 15, 1848.

Irish Jurist

Vol. I.

SEPTEMBER 22, 1849.

Price {Per Annum, 21 10s.
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		Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W.G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, SEPTEMBER 22, 1849.

considering the Encumbered Estates Act two imts suggest themselves as subjects for consideration.

The first connected with its policy.

The second with the practical working of the measure; what it proposes to effect, and how?

its policy, though a very legitimate subject for passion, ceases to be of practical importance to lawyer further than as a key to the meaning of Legislature.

Whilst the measure was passing through both Houses of Parliament we freely dis- ed that policy; we expressed ourselves as not fied of the expediency of establishing a new trial at a great expense to the country, and which, signed to act on principles of equity, must be Court of Chancery in other hands; and that we ld have preferred the adaptation of that court be emergencies of the country rather than the tution of a new one invested with powers of the t arbitrary nature, and established on the assump- that the Irish Court of Chancery was inadequate

the management of the real property of Ireland.

it court has been well abused, and we have our- es not failed to point out reforms which were esary for its renovation, and for the public d, more especially with reference to the manage- nt of estates under its controul; but we knew that ad within itself the power of expansion and mo- cation, and that with little assistance from the

Legislature it was perfectly adaptable to all national

property exigencies. We considered it unwise

ing an organised, ancient, and, generally speak-

efficient tribunal into disrepute by its being

erannuated or superseded. We cannot omit the

defence lately made for it by one of its former

distinguished heads—Sir Edward Sugden—

on the occasion of giving his evidence before the Receiver Committee.

“I believe there is a great misapprehension about the Irish Court of Chancery. I believe the Irish Court of Chancery to be as capable of administering justice speedily as any court that ever existed. When I left Ireland you could have a case in Chancery decided more quickly than you could have an action at law tried; the court waited for the causes, not the causes for the court. No unnecessary references were made to the Master, but every point that could be, was disposed of at the hearing. Judgment was never delayed.”

But whatever may have been our predilections, they did not render us insensible to the reasons and motives which actuated the framers of the act now under consideration. The introduction of a new tribunal had not only the charm of novelty, but the more important charm that it had no popular prejudices to encounter; there were no ancient reminiscences of Chancery tediousness, delay, and expense to overcome. A new tribunal, which charged no fees, except those incurred for actual outlay, which had no arrear of business to clear off, and but a single duty to perform, and which could confer a Parliamentary title, possessed considerable attractions to buyer and seller. We do not, therefore, wonder at the experiment, which, if it failed, was not productive of the mischief of disturbing a settled court practice for an emergency which it was to be hoped would pass away, and if successful was capable of being happily blended with the established tribunals of the country. We are sufficiently creatures of circumstances to accommodate ourselves to the change, and to consider the act fairly and impartially.

We are quite willing to believe that patronage, though possibly a small item in the scale, was not a determining point in favour of a new court.

When honourable motives are just as likely, if not more so than unworthy ones, to have influenced the decision, we invariably reject the idea that it has been caused by the latter; and we subscribe to the truth of the celebrated remark of the great Condé, "These blackguards attribute to us the motives which would have influenced them were they placed in our circumstances."

We are quite willing to concede that the measure was passed in its present shape for worthier purposes than the appointment of three Commissioners; one of those appointments shall be mentioned before the conclusion of this article.

Nor can we forget that the former act, the working of which was placed under the management of the Court of Chancery, proved a failure; but this arose from intrinsic and extrinsic causes. It was at first a very lame dog, and the general orders did not help it over the stile.

The national policy of the measure is summed up with sufficient clearness in the preamble, "that it is expedient that further facilities should be given for the sale and transfer of incumbered estates in Ireland." In that expediency we acquiesce, and turn to the measure to see to what extent those facilities are afforded.

The emancipation of estates from embarrassment is designed to be complete; the incumbrance, by section 19, must affect the inheritance, or a term of not less than fifty years, and in the latter case, have been created by the owner of an estate of inheritance; the object of the Legislature being that the entire interest may be sold.

No incumbrancer of a tenant for life can apply under the act for the sale of the life-interest, nor for the sale of an estate *pur autre vie*, where there is no covenant for perpetual renewal.

Where the life-interest is severed from the inheritance, the purchaser of the former—an estate of such limited duration—has no permanent interest to improve; and, the object of the act being the acquisition of an entirely new race of proprietary—if that cannot be obtained, its powers are not allowed to be called into operation at the instance of a life incumbrancer, who must therefore still resort to a Court of Equity. This limitation will operate to some considerable extent, but with its exception any owner from the tenant in fee to the tenant by the courtesy, and any incumbrancer from the mortgagee in fee to the annuitant (whose annuity has been allowed to fall in arrear, and for the arrears of which a Court of Equity would direct a sale) may apply and obtain an order for a sale, except in cases where the owner shall be enabled to shew that no receiver nor incumbrancer is in possession of the land, and that the interest of the incumbrances and amount of the annual charges do not exceed one half of the net yearly income; the decision of the Commissioners to be final on these points, which in truth, involve no more than questions of fact. This clause was inserted at the instance of the House of Lords.

No one who has read the former measure, and the present, can fail to be struck with the remarkable absence of detail in the one before us. It is comparatively easy to state general principles, and to confer arbitrary powers, but extremely difficult

to work out the details by which the former are to be carried into actual operation, and to impose exact limits upon the holders of powers, when the words by which they are conferred are of the largest possible signification.

In the extinct act, the directions which the Court of Chancery was to pursue, were elaborately, though sometimes not very clearly stated; in the former one the Commissioners are left an almost unlimited discretion. By sections 10, 15, and 51, they may bind and loose, they may make and unmake, they may cancel and re-enact, they may alter, they may vary, they are tied by no precedent, they are bound by no rule, save during the continuance of a general order, which they have power to rescind, substituting another in its place, subject to sanction by the Privy Council; and we believe that tribunal, partly composed of Peers, Soldiers, and Commissioners of National Education, will not interpose an active interference. Nay, so unlimited are the powers of the new Commissioners, that where there are no general orders, or they are inapplicable, (inapplicable!!) they can act according to their own discretion, and their judgments are final, unless they are pleased to allow an appeal from their own decisions. They are not subject to a Court of Equity, nor to a Court of Common Law, to writ of injunction, nor to writ of mandamus; the Court of Chancery is their vassal, in their own sphere they are omnipotent, and that sphere comprehends all the incumbered estates of inheritance in Ireland.

We trembled when we came to the words, "at the discretion of the Commissioners;" the words of Lord Camden rushed to our memory—"The discretion of a judge is the law of tyrants; it is always unknown, it is different in different men, it is capricious and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable."

The temper of the laws of England is retrograding; the appellate jurisdiction is year by year becoming restricted; judges are more frequently than of old vested with final power; the rights of person and of property are less jealously guarded by us than by our forefathers; and we regret this, because we know no check more effective in making judges do their duty, and no greater safeguard for the public, than the suitor's right of appeal or *double justice*.

We select the present instance to state our opinion, both because the finality of the decisions of the Commissioners is a leading feature of the Act, and because we can do so without offence. From the temper of those of the Commissioners whom we know, we feel satisfied that in their hands there will be no abuse of power. Our dislike is to the principle; we have no dread of the hands to whom the power has in this instance been confided.

The most cursory perusal of the Act proves the very large powers with which the Commissioners are entrusted, we do not say, if ably exercised, unwisely entrusted. We should have wished a right of appeal to a properly constituted tribunal, but as the spirit of the Act is so arbitrary, we venture to suggest to them, in order that everything may be

in character, to observe as much latitude as possible in their general orders, and as they are unrestricted themselves, to leave the suitors tolerably free also.

The general orders under the late Act imposed so many restrictions, and so much preliminary trouble, which did not devolve upon a plaintiff in a Court of Chancery, that no incumbrancer would resort to it when he had the option of filing a foreclosure bill; the Commissioners should remember that the incumbrancer still has that option, and that they should in some degree invite suitors. The Act has done much to insure the acceptance of the invitation; it gives the Commissioners many advantages which the Court of Chancery does not possess; their court is open to all comers both owner and incumbrancer—the Court of Chancery to the latter only—without the payment of office fees, and although the Commissioners are empowered to make such orders as to costs as they shall see fit, yet the costs are the first charge upon the purchase-money. See section 30.

This provision renders it tolerably certain that the Act will be operative. The construction given to the Sheriff's Act as to the priority of the costs of appointing a receiver, induced many a puisne claimant to present his petition; so here where the costs are tolerably safe, and no undertaking to redeem prior incumbrancers required, we predict that, except the general orders paralyse the effect of the section, applications will be numerous, and that the rooting out of incumbered proprietors will be effected.

We cannot conclude these observations without adverting to a letter which appeared in this journal from one of our correspondents, which deprecated the appointment of Mr. Hargreave: the communication has excited considerable public attention, and been much quoted and commented upon. We enter fully into the national and professional views of the writer; but we can assure Mr. Hargreave that our objection to him is grounded on no personal cause, and on no narrow spirit of exclusiveness, but simply because we believe his nomination to be an injustice to the Irish Bar, and the re-establishment of a system which we had hoped was struck down for ever. There should either be reciprocity of appointments between the two Bars, or the preserves of each should be strictly guarded. Either the leading men of the Irish Bar should be eligible to English judicial appointments, or, if not, neither should the leading men of the English Bar be eligible to Irish. We should prefer investing the Government with the power of selecting the best men of both countries for the judicial offices of both, that so out of the wider range they might secure the best men for the best places. But this practice has never been even professed, and never acted upon. English offices are closed upon us with the most jealous exclusiveness, and the opposite practice is now carried to such an extreme, that a very junior member of the English Bar is placed in a very responsible judicial office over the heads of some of the oldest and most deserving members of our body.

We do not censure Mr. Hargreave for taking the appointment—its emoluments to him are probably not as considerable as those derived from the lucrative branch of the profession to which he had devoted himself—it was an advancement which it would have

been absurd in him to have rejected, but we think Her Majesty's Government could have selected a gentleman of our own Bar more suited to the office from professional standing, and a knowledge of the peculiarities of the laws of this country, whose appointment would have carried more weight with the public, and given no shock to professional opinion, whilst they could in England or in the colonies have discovered a more permanent place for Mr. Hargreave as a reward for his services in the preparation of the Act—if in fact it be attributable to his pen, report has ascribed the merits of it to another person,—or for those other qualities which entitle him to judicial eminence.

We can scarcely conceive a greater contumely to the members of the Irish Bar than the exaltation over their heads of an English barrister, not yet of five years standing, and whose practice—being exclusively confined to conveyancing—has never placed him in the position of addressing a court of justice.

We are almost weary of endeavouring to infuse a degree of public spirit into the Irish Bar. When the Huguenot leader, Montgomery, was condemned to death, and informed that his children were degraded to the condition of villainage, his observation was truly noble; "If they have not the virtue of nobles to raise themselves again, I consent to their degradation." We paraphrase the sentence, "If our Bar have not the virtue to raise itself, we consent to its degradation;" when once it loses that high place in public estimation which it used to hold, the shorter its Decline and the sooner its Fall the better.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Tighe Hamilton, Esq.—June 29.

(Continued from p. 348.)

1816. Have you turned your attention much to what might be the best remedy for some of these acknowledged evils?—I have; I have considered it very much, having to do with a great many different receivers and other persons who are very much interested in the subject. Perhaps the Committee would wish me to hand in a sketch of the heads of a Bill which I drew up a short time ago.

(The witness handed in the following Bill.)

HEADS of a BILL to provide for the BETTER MANAGEMENT of ESTATES under the Court of Chancery, and to establish a Uniform System of Equity Jurisdiction in Ireland.

I. The jurisdiction of the equity side of the Court of Exchequer to cease, and all equity proceedings now pending in the said Court to be transferred to the Court of Chancery and continued there, as was done in England in 1841. See 5 Vict., c. 5.

II. The Government to appoint a fifth Master in the Court of Chancery at once.

III. The Government, on recommendation of the Lord Chancellor and Lords of the Treasury, to have power to authorise the appointment of a sixth Master hereafter, in case it shall be found necessary.

IV. All the Masters, clerks and other officers in the Court of Chancery now paid by fees, to be hereafter paid by fixed salaries, and the fees to be collected by means of stamps.

V. The Lord Chancellor to have power to make orders that such matters as are now disposed of by the Master of

the Rolls in Ireland, but by the Masters in England, shall be disposed of by the Masters in Ireland.

VI. The Lord Chancellor to assign to one of the Masters the exclusive duty of superintending the management of all estates subject to receivers in the said Court, and who shall be styled the "Auditor-general of Receivers' Accounts."

VII. The Lord Chancellor and Lords of the Treasury to have power to authorise the appointment of such further clerk or clerks as may be found necessary in the office of the Auditor-general for a very effective system of book entries and other official management.

VIII. The Lords of the Treasury to fix the salaries of such clerks, payable out of the Consolidated Fund.

IX. The poundage of five per cent. now allowed to receivers to be paid in to the Accountant-general's credit as a fund for the following purposes:

- (1.) The Lord Chancellor to fix such amount of said sum as he shall see fit to be paid to each receiver, either by way of salary, or of allowance proportioned to his receipts.
- (2.) The Lord Chancellor out of said sum to allow payment to the sessional Crown solicitors for conducting all legal proceedings directed to be taken by the receivers at quarter sessions, &c.
- (3.) The Lord Chancellor out of said sum to allow payment of such salaries and other expenses as he shall see fit for two or more surveyors, who shall be at the disposal of the Auditor-general, to visit the estates and report their opinion upon all special applications requiring local observation.

X. All the general regulations to be followed by the Auditor-general to be subject to the approval of the Lord Chancellor.

XI. Any party who objects to any proceeding authorised by the Auditor-general to be at liberty to bring the same before the Lord Chancellor, by motion, who shall make such order in the matter as he may see fit.

XII. Subject to the above approval and controul, the Auditor-general to have full power.

- (1.) To entertain all applications from head landlord for permission to proceed for recovery of head-rents, together with such other matters connected with the management of said estates as may be from time to time referred to him specially by the Lord Chancellor or Master of the Rolls.
- (2.) To sanction such outlay in repairs, improvements, or other reproductive works as he may think advisable, considering the interest of the parties.
- (3.) To grant such leases for terms not exceeding 21 years or take such surrenders of leases as the proprietor could himself, according to his estate, take or grant.
- (4.) To make such abatements of rents, or reduction of arrears, as he may think advisable.
- (5.) To make such regulations as he thinks fit as to the form of receivers accounts, and the time of accounting.
- (6.) To do all such other acts as a Master of the Court of Chancery is now by law authorised to do in respect to estates subject to receivers.

XIII. The Auditor-general to have full power to make special orders for all purposes of this Act, either absolute in the first instance, or conditional, to show cause before himself within such time or upon such notice as he may fix in each case; such orders to have the same force as the like orders now made by the Court.

XIV. The Auditor-general to exercise all such powers, either of his own motion; or upon the application of the receiver, or of any of the parties interested, and whether all or any of the parties consent or not.

XV. No fees to be paid to any of the officers of the Court in respect to the lodgment of money, when ordered by the Auditor-general to be brought in for that purpose.

XVI. The Auditor-general to allow receivers only such reasonable costs in respect to the passing of their accounts, and all other matters done by them, as he shall think fit, either generally or by special order in each case.

XVII. The Auditor-general to appoint no individual as a receiver, when any other qualified person who has been already appointed a receiver in the same county is willing to

undertake such receivership, but to endeavour, as far as possible, to consolidate the receiverships in the hands of one or more individuals in each county or other district, and shall give their whole time to the discharge of the duties, and who shall reside in the district.

(To be continued.)

IN CHANCERY.

Executors of Price, and others, Plaintiffs, }
Hall and others, Defendants. }
In this cause, bearing date the 1st day of June, 1840, I hereby certify that persons claiming to be creditors of Nicholas Price, late of the County of Down, Esquire, deceased, the testator in the pleading in cause named, to come in before me at my Chambers on the 1st day of the City of Dublin, on or before the First day of October next, and their respective demands, otherwise they will be precluded from all under the said decree.

Dated this 30th day of July, 1840.

E. LITTLE.

William Nevill Wallace, Solicitor for the plaintiffs,
30, North Great George's Street, Dublin.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 1, FLEET STREET, in the Parish of St. Andrew, and published by E. J. MILLIKEN, in the same Parish, by EDWARD JOHNSON, MILLIKEN, residing at the same place, all being in the County of City of Dublin. Saturday, September 22, 1840.

THE Irish Jurist

No. 48.—VOL. I.

SEPTEMBER 29, 1849.

Price { Per Annum, £1 10s.
Single Number, 9d.

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		Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W. G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, SEPTEMBER 29, 1849.

LORD BROUGHAM has written to Sir James Graham a letter on the recent changes in the law of Bankruptcy, and he has stated what is a matter of sincere congratulation, that the Commissioners who have laboured for sixteen years, will be prepared next session to lay two bills before Parliament, in which our whole criminal law will be digested and codified. His Lordship observes—

“Since 1843, only two circumstances have occurred, which it is necessary to mention, touching the labours of the Commissioners. I presented in 1844 a bill for enacting a Digest of the Criminal Law, founded upon their valuable report. Lord Lyndhurst (then Chancellor) highly approved of the bill; but considering the great importance of the subject—considering also that from the nature of the thing, the work must be mainly executed out of Parliament, and required only to be adopted or sanctioned by the Legislature, he referred it to another Commission—that is, to the same Commissioners, with others added, to revise their labours. Accordingly a further report was made in 1847, and the Digest having now received a very full consideration, I again brought in a bill founded upon it, which in 1848 was referred to a select Committee of the Lords. As chairman of that Committee I addressed letters to all the judges of the three kingdoms, requesting their observations upon the Digest, submitting it to them, together with copies of all the reports upon which it had been founded. Waiting for the answers of these learned persons, I postponed to the next session all further proceedings with the bill. Again I presented it at the very beginning of the session just ended; again it was referred to the same select Committee, and again we anxiously expected the answers of the

judges. The session has, however, passed away, without any answer whatever from any of the English judges, though valuable suggestions have been communicated from those of the other two kingdoms. I conclude from this circumstance, that the judges of England are, generally speaking, satisfied with the Digest, and have no corrections to offer which they deem of sufficient importance to call for the consideration of the Lords. Meanwhile the far more arduous task has been performed by the learned Commissioners, of digesting into one body the whole law of procedure in criminal cases. This work, equally important and difficult, consists of 12 chapters, 47 sections, 1,180 articles. I have examined it with an admiration which I believe will be shared by every lawyer who studies it. Coupled with the former Digest of Crimes and Punishments, it gives us a complete code of the Criminal Law, and enables the Legislature of this country to escape the grave censure of not furnishing to the people the means of knowing what those laws are, which it commands them, under the heaviest penalties, to obey.”

His Lordship then details minutely the proceedings taken for the codification of the Bankrupt Act, of which he had the charge last session—the assiduity and pains taken with the measure by the gentleman (Mr. Miller) who prepared it—by the learned judges of the Bankrupt Court, to whom it had been submitted—by the Select Committee of the Lords—and by the writer himself; and deprecates very urgently the changes made by the Committee of the Commons. The pith of his Lordship's observations being, that in matters of this kind, where the subject has been considered and treated by competent persons—skilled workmen in the law—the act, the product of their skill, should, in its main features, be allowed to pass through Parliament untouched.

This is a startling doctrine, and requires rather stronger proofs than his Lordship has adduced for our acquiescence in it.

Great deference, undoubtedly, should be paid to the opinions of those who have bestowed their time, talents, and labour upon the particular subject submitted to them; but that the House of Commons should be the register of the edicts of the Lords, or the Lords of the Commons, is neither a very constitutional theory, nor a very advisable practice, whether the proposed edicts be on questions exclusively relating to the administration of the law, or subjects of general policy.

We hope to return to the consideration of his Lordship's letter on a future occasion.

—♦—

To the Editor of the Irish Jurist.

SIR,

Perhaps you will add to the amount of obligation that you have already conferred on me, in admitting my last letter into your columns, by giving insertion to another on a different subject.

It appears to me that the maxim "No man should be compelled to criminate himself," is pushed to an extreme that is reprehensible.

I have long been of this opinion, and my recent perusal of the course of practice pursued at some of our state trials which took place immediately before the Revolution of 1688, and for a short period after it, while the law was in a state of transition, and, therefore, unsettled, has confirmed me in my previous impression. We know that in cases of suspected treason, more particularly, the iniquitous practice of questioning prisoners, even by torture, for the purpose of extracting from them testimony against themselves, was no unusual occurrence. A declaration, published by order of Lord Burleigh, in the reign of Elizabeth, set forth that torture, in order to obtain confession from persons under confinement, was applied "in as *charitable* (!) a manner as such a thing might be."

This was the apology which that distinguished man offered for a cruel and barbarous usage, that was not abolished in the times of the Tudors. That torture was ever charitably inflicted will not be credited in these days, even on the authority of Lord Burleigh. It would be absurd to conceive that a fiendish act, essentially cruel and unjust—because the extremity of pain, "and the instant and almost irresistible desire of relief, may draw from the sufferer false accusations of himself or others"—could have been charitably or tenderly applied.

When it became obsolete, or its exercise very infrequent, the torture was transferred from the body to the mind, and a prisoner was cajoled or menaced to acknowledge his guilt.

Cases are recorded in which an Attorney General and a Chief Justice importunately advised prisoners arraigned for treason to confess their guilt, under threats of severer consequences if they did not. This was, after all, but another mode of administering torture. Neither the iron boot nor the thumb-screw was applied to a limb, but the mental organs were agonized.

A very flagrant violation of judicial power related in the case of Sir Nicholas Throckmorton, when under trial for treason, in the reign of Elizabeth. The Crown lawyer, Sergeant Sturges, addressed him thus:—"Therefore, Throckmorton, since this matter is so manifest, and the evidence so apparent, I would advise you to confess your fault, and submit yourself to the Queen's mercy." "How say you?" asked Chief Justice Bromley. "Will you confess the matter, and it will be better for you?"

In the succeeding reign, when Garnet was on his trial for aiding in the Gunpowder Plot, he was pressed by interrogatories from the bench, even in the presence of King James, to confess his crime, or, more correctly, to criminate himself, through the contradictory statements which those questions led him to make.

It appears from Philipp's State Trials, that some years after the Revolution, instances occurred in which both the judge and the Crown lawyer endeavoured to obtain from the prisoner, by examination, evidence to convict him. This practice became at length totally discontinued. But the opposite extreme of a usage, which, in humble judgment, only became dangerous from abuse, has led to results, fatal, in frequent instances to the cause of justice. I have reprobated the practice of cajoling or menacing a prisoner to confess his guilt, and I now venture to condemn the opposite extreme.

I find, among my papers, a memorandum which I took some years ago from a passage in the life of Sir Samuel Romilly, which supports my view of the subject under present inquiry. That distinguished lawyer had been, I think, considering the French system of examining prisoners in criminal cases, a system so entirely opposed to ours, yet one which, I would say, works effectively for the punishment of evil doers and the prevention of increasing crime. He observes: "It should not, however, if the great object of all trials be to discover the truth, to punish the guilty, and to afford security to the innocent, that the examination of the accused is the most important and indispensable part of every trial." He was an advocate then for the principle of putting interrogatories to the accused, though he condemned the latitude which judges occasionally exercised in putting subtle and perplexing questions, to shew their own skill, and confound the accused person under examination. Of this abuse of the privilege of questioning a prisoner, the trial of *Mahomed La-farge* is an instance. The limits of the *juste examen*, which I consider necessary for the discovery of truth, were shamefully exceeded in the case of that criminal.

"When a contest of ingenuity arises between the court and defendant, the temper and impartiality of a judge are placed in too much hazard when he becomes the antagonist of the prisoner."

I venture, however, to maintain, that the jealous avoidance, by the magistrate, of every thing likely to lead a prisoner to give evidence against himself, even though he were willing to tell the truth, is false in principle, and injurious to the interests of society.

1. It is false in principle.—If I refer to the morality of the Bible, which I assume to be an indestructible element in our legislation, I see that *lying*, directly, or indirectly, is a grievous offence against God, and that the *liar*, and murderer, are placed in the same category of sin. Is not *that*, then, a false principle, which leads a judge to caution a prisoner against pleading guilty to a crime, which, from compunction of mind, or any other motive, he voluntarily acknowledges? If I consider the morality of that judicial practice, which sanctions the judge to recommend a prisoner, who has entered a truthful plea of guilty, in presence of a crowded court, who, with the jury, have heard the avowal, to withdraw that plea, and substitute for it an undoubted lie, I discern at once the falsity of the principle under which the judge, influenced by tender feeling, leads the prisoner to record that lie—yet, not a lie which the recording angel, with a tear, blots out. Lying in self defence is not indictable by our human laws, and erring man is thus encouraged to declare, from his open lips, that he is a liar, and the truth is not in him.

2. It is injurious to the interests of society.—By not interrogating a prisoner, we discard one of the most important means of eliciting truth, and thereby inflict a deep social injury. Allow me to refer to a familiar passage in Paley's *Moral and Political Philosophy*—"A maxim which deserves similar examination is this:—'That it is better that ten guilty persons escape, than that one innocent man should suffer.' If by saying it is *better*, it be meant that it is more for the public advantage, the proposition, I think, cannot be maintained. The security of civil life, which is essential to the value and enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment. The misfortune of an individual, (for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by no evil intention,) cannot be placed in competition with this object—I do not contend that the life or safety of the meanest subject ought in any case to be knowingly sacrificed: no principle of judicature, no end of punishment can ever require that.

"But when certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested; courts of justice should not be deterred from the application of these rules by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence, may be considered as falling for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden."

I believe that we repudiate a very effective mode of promoting the ends of justice, and of reaching "those crimes with which the public are infested," and of dissociating "the innocent from the guilty," by the rejection of the French system, of interrogating a prisoner—in order to afford the

important means of comparing his written depositions with his verbal testimony when afterwards interrogated. A man falsely charged with a crime, alleged to have been committed on a certain day, and in a certain place, is usually eager to answer any questions on the subject, expecting that his answers will establish his innocence; and a guilty man will evade interrogatories, fearing that his contradictions and lies, should be exposed by his inconsistent and conflicting answers. TRUTH, and JUSTICE, will not suffer from interrogating accused persons—and individual guilt will be more easily proved by it.

The inconsistencies and involuntary admissions of a criminal, are often the only means of arriving at the truth.

Circumstances, indeed, may be ingeniously imagined—and cases may have occurred in which the questioning of innocent persons, accused of a specific crime, may have led to their conviction of it. But such, extraordinary and very improbable cases—which must assume that both judge and jury are deceived by false impressions, are such as, according to the argument of Paley, ought not to be admitted to operate in opposition to rules, the general effect and tendency of which is to promote and preserve the welfare of the community.

I hope that the period is not remote, when that strong prejudice, which prevents Englishmen from appreciating the excellence of laws, or institutions, which prevail in other countries, will diminish; when what is really *good* in those laws and institutions will be adapted to our social system—and England will adopt the Continental practice, of interrogating a prisoner—with modifications suited to our free constitution, and no longer persevere in the present system, which is repugnant to common sense, and favourable to crime.

M. D.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Tighe Hamilton, Esq.—June 29.

(Continued from p. 352.)

XVIII. But the Lord Chancellor to have power from time to time, according as circumstances may admit, to remove existing receivers and to appoint such persons as he shall see fit to be the receivers for such districts as he shall assign to them.

XIX. The Auditor-general to decide on the amount of security to be given by receivers, and to investigate the solvency of all sureties; and the recognizances to be entered into before him.

XX. (1.) The whole legal estate of owner to rest in the receiver on his appointment, so far as that all legal proceedings brought in his name may have the same effect as if brought in the name of such owner.

(2.) The tenants of the estates to be obliged forthwith to sign a deed of the form in the schedule to this Act, acknowledging that they hold under the receiver in the same manner as they had previously held under the owner.

(3.) Any tenant refusing to sign such deed, or to produce to the receiver the lease or instrument under which he holds, or to disclose the amount of his rent or arrears, to be deemed as but a tenant at will, and liable to be proceeded against as such on a quarter's notice to quit.

(4.) The receiver to be a competent witness in all proceedings.

XXI. A tenant whose rent is less than £50. not to be at the expense of a lease but the present fees to be abolished, and the other costs and stamps to be paid by the estate.

XXII. No tenant to be required to enter into recognizances in future.

Epitome of the measure.

I. All receiverships to be collected under one head.

II. That head to have same power to manage or improve as an owner.

III. Receivers to be gradually consolidated, with a view to their being district public officers.

IV. The receiver to have same powers to recover rent or possession as an owner.

V. The tenants not to be subject to greater hardships than they would be under the owner..

VI. The system of accounting not to be as at present, a mere annual legal transaction conducted by attorneys, but a continuous official one, carried on either with the receiver in person or through the medium of clerks. Abstract of accounts to be furnished, and balances lodged at least quarterly.

VII. A variety of acts now done by the Master of the Rolls to be done by the Auditor-general, as being matters more for office inquiry than judicial decision, so as to save the great expense of proceedings in the Court.

1925. *Chairman.*] Is the abolition of the equity side of the Court of Exchequer a necessary part of the plan which you propose to remedy the evil?—I think it is, in this way; that I do not see how you can have a system for supervising estates, which should represent two Courts; I do not see how you can have two uniform systems, one existing in one Court and the other in the other. I do not think you can have one man representing two Courts, inasmuch as two Courts would probably take two different views upon questions that would arise upon the management of estates and other important questions. Therefore that question appears to me naturally to connect itself with the subject in this way, that I do not think you can have a proper system till you get all the estates under one head.

1926. *Mr. R. B. Osborne.*] What reason have you to suppose that one court would be a better means of managing estates than the other?—I have no reason to think that one court would be better than the other; but the far larger quantity certainly exists in the Court of Chancery, and that being the court of highest character in the country, and having the largest quantity of estates under it, I should say is the proper head.

1927. When you say that it is the "Court of the highest character in the country," do you mean with reference to its knowledge of agriculture?—No, but as to its power of carrying out any particular system I think you must depend entirely upon other means for agricultural knowledge.

(To be continued.)

IN CHANCEBY, IRELAND.

Robert Edward Gibbins,

Plaintiff,

The Right Honorable Henry John Reuben, Earl of Portarlington, and others,

Defendants.

WHEREAS it has been represented to me, that several of the Creditors on the Estates of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, have neglected or omitted to come in and file charges on foot of their respective demands and incumbrances, pursuant to the decree of the 9th day of February, 1847, and that the time limited by and for the said purpose has expired, and that it is expedient to extend said period: Now I require all Creditors and Legatees of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleadings named, and also all persons having Charges or Incumbrances affecting the real and freehold Estates of the said late Earl of Portarlington, to come in before me at my Chambers on the Inns Quay, in the city of Dublin, on or before Tuesday, the 20th day of November next, and proceed to prove and claim the same, otherwise they will be precluded the benefit of said Decree.

Dated this 30th day of June, 1849.
John Warnock, Plaintiff's Solicitor,
30, North Great George's Street, Dublin.

E. LITTON.

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All communications for the IRISH JURIST are to be sent, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET STREET, in the Parish of St. Andrew, and published at 15 COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, September 29, 1849.

THE Irish Jurist

No. 49.—Vol. I.

OCTOBER 6, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

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DUBLIN, OCTOBER 6, 1849.

WE return to the consideration of Lord Brougham's very remarkable letter, which demonstrates the absolute necessity for some improved machinery in the manufacture of Acts of Parliament. Nothing can be worse than the present want of system, and of a superintending power. Can anything be conceived more disgraceful, for the Legislature of an enlightened community, than the following narrative, and the facts stated in it, disclose.

"When I presented my first bill, digesting the criminal law, Lord Lyndhurst at once said, 'as this is a digest, nothing can be done with it in Parliament; we are wholly incapable of revision in such a matter; therefore let us, for security sake, refer it to another commission to revise and improve it.' This course, pointed out by the never failing sagacity of that manly understanding, was taken; and we submitted the amended draft to all the judges, and to the profession at large. Of their suggestions we shall gladly avail ourselves. But if after receiving this ultimate consideration, a Committee of the House of Commons, not satisfied with what has satisfied the Lords, and the Bench, and the profession, undertakes to go through each of the codes minutely, and weigh every word of above 2,000 articles, we require no gift of prophecy to let us foresee that such a labour will have no end, and if it ever be terminated, would only mar the work of abler men more calmly considering the subject. Every sciolist who belonged to the profession, but had never practised in any of its walks." "Whatever worthy citizen had an attorney at his elbow to suggest criticisms, objections, and improvements—whatever new-made senator felt the desire of private distinction more than the value of public time—all would

fasten on points of discussion so numerous, that no appetite but must find some one suited to its taste. And if ever the revision was brought to a close, the learned authors of the code would assuredly never recognise their own work."

And again—"Our laws are prepared by individuals, or by boards in connexion with the government; but there is no communication between those parties from whom those different bills proceed. Hence, there is no guarantee whatever against the most manifest inconsistencies in their various provisions. But again, each party has one particular object in view, and his bill is framed to obtain that object. Hence, an almost entire disregard, not only of general principles, but of former statutory provisions. It is evidently impossible that bills so prepared can be at all safe to pass. But the evil stops not here. After any one is introduced, it undergoes alterations, first in one house, alterations made wholly without regard to the portions left unchanged; then in the other house, new changes are made, without any regard to the proceedings in the former; of course, I speak only of many instances; for such want of precaution to avoid error cannot prevail in all the alterations made. But, whoever has attended to the manner in which bills are first framed, and then altered during their passage through Parliament, must be aware what gross blunders are committed; and that such blunders are inevitable so long as the work is prepared by various unconnected parties, without superintendence. Thus it has often been said, that the scissors of the draftsman make many a clause, and so does the pen of the amender. Hence, nothing is more common (as lawyers who answer cases well know) than to find one section of a statute referring to something as aforesaid, when nothing of the kind was said before; but the section had been cut off a

former Act, in which there had been an antecedent, which was not taken. Thus far the scissors; but so too the pen. I was astonished to find my patent bill of 1835 in one or two places made wholly insensible when it was returned from the Commons; and how? by the members then introducing new matter wholly at variance with the Act, which they left unchanged. But though much embarrassment was seen to arise in courts of law and equity from this blunder, I was forced to submit on pain of losing the bill. In 1834 I was compelled to alter a clause sent up from the Commons, which would have suspended all the criminal justice of the country from the next October sessions. The Commons were angry at their blunder being detected, and threw out the bill, depriving the country of a very valuable measure, for such it was all, except that erroneous portion.

"Of the havoc made by careless drawing, one instance, I admit an extreme one, is sometimes cited in that notable feat of the legislative-scissors, which awarded one moiety of a penalty, namely transportation or whipping, to the person suing for the same; and another to his Majesty, his heirs and successors. If it be said that there is sufficient security against the discrepancies, or the oversights of the draftsman in the discussions of the two houses, I would answer, first, by referring to the innumerable clauses which come yearly before those bodies. I take the first year's statutes that come to my hand, those of 1833, and I find them to contain 2,600 sections, besides somewhere from 90 to 100 printed pages of schedules; to say nothing of 195 private or local Acts, with their hundred or thousands of sections, or schedules; and this before the railway fever broke out. After that calamity, we saw in one session 400 or 500 Acts, with 13,000, or 14,000 clauses.

"The impossibility of due attention being paid to each clause, in each bill, is quite apparent.

"I would for further answer refer to the undeniable fact, that they who have the care of any bill are only occupied with having its main provisions carried, and take little heed to its details. I would, thirdly, refer to the fact, staring us in the face, that the draft of the bill is, generally speaking, to be found in the Act, with its sins of omission, and commission, increased by the errors which creep in during its progress, of this I have given instances."

Though we do not concur in the entire of his lordship's ideas, we can perfectly understand his letter deprecatory of interference, by a Committee of the House of Commons, with a code, the product of years of learned labour. He has proved his case thus far, that there should be a permanent staff for the careful preparation and revision of all bills submitted or passed through the house, to preserve consistency of plan, and to prevent the insertion of contradictory clauses, and all formal errors; but we cannot coincide in the view, that any measure, be it ever so well and skilfully prepared, should be laid on the table of either house with an understanding that it should not be altered. This would amount to the creation of an *imperium in imperio*, a law-making body more potent than either of the recognised branches of the Legislature.

As his Lordship approaches the fulfilment of one of the leading objects of his life, we can understand his anxiety, that it may not be marred by the untimely interference of an unskilled or hypercritical Commons Committee.

Our observations only go to the extent that the suggesting power of that body should remain; we do not advocate its unseasonable interposition.

Lord Brougham's efforts, as a law reformer, have been long sustained, earnest and persevering; and we hope he will live to see them thoroughly successful. In one of his greatest speeches, he animated the House of Commons to the amendment of our laws, by the most masterly eloquence. "You have it in your power to hand down your name to all time, illustrated by deeds of higher fame, of more useful import, than ever were accomplished within these walls. You saw him, conqueror of Germany, subduer of Italy, terror of the North—count all his matchless victories poor. Saw him despise the fickleness of fortune, whilst, in despite of her, he could pronounce his memorable boast—I shall go down to posterity with the code in my hand."

We should rejoice that his Lordship would be enabled to use a similar boast, *that* would in truth be a just subject for self gratulation. His eccentricities, his errors would be forgotten—the recollection of his wonderful abilities alone would live, enhanced by the enduring fame of an accomplishment of the mightiest and most useful character.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Tighe Hamilton, Esq.—June 29.

(Continued from p. 356.)

1928. When you use the term "of the highest character in the country," do not you understand that this Committee is now sitting in consequence of the Court of Chancery having failed in the management of those estates?—Yes, I do; I do not mean high character, in the ordinary sense of the term character, but that it is the highest court in point of legal jurisdiction.

1929. *Chairman.*] Supposing that you abolished the equity side of the Exchequer, how would you propose the equity business then to be done?—There is very little done now in the Court of Exchequer compared with what there used to be. My general idea is this, that you should collect all estates under one head, and then give that head precisely the same powers in all respects for the management of the estates, as the owners would have; that you should place under that head a body of receivers fully as well qualified for the purpose as the private agents of owners; that you should place that receiver in precisely the same position for all purposes of recovering rents, and all purposes of managing the estate, that the private agent is in, and that you should place the tenants in precisely the same position as they would be in under a private-owner, and in fact, relieve them from the very great hardships to which they are now subject, and which lead to the demoralization of the tenantry over a very great extent of country; and, lastly, that you should adopt

such a system of accounting under that head, as will resemble as nearly as possible the system that private owners for their own purposes have adopted.

1330. The first thing would be to get a fit class of persons as receivers?—Yes.

1331. The second thing would be to get proper superintendence of those receivers?—Precisely. I ought to state here that the present system is literally nothing more nor less than a machine for the collection of rent, and a machine, if I might use that figure, wholly uncontrolled by a proper "governor." I can illustrate that by putting in some interesting returns made out from the first 150 accounts which I passed this year in the Court of Exchequer, and the first 150 which were passed in the Court of Chancery, and I have taken the instance of four rather well-managed estates under private owners, to show a comparison of the amount of rental, arrears and receipts, and the amount expended in improvements.

1332. With regard to obtaining a fit class of persons to be receivers, you have said that by properly regulating the liabilities and duties of the office you conceive that a competition could be produced amongst a respectable class of men for it. Then with regard to the superintendence of those persons do you conceive that the Masters of the Court of Chancery and the Remembrancers of the Court of Exchequer are not suitable persons to superintend the proceedings of receivers?—I do not think, generally speaking, that a legal education is the one best suited to a person who has to manage estates; I should say not. At the same time I believe that some of the persons who have filled the offices of Remembrancer and Masters in Chancery have been eminently suited for the duty.

1333. Is not it absolutely necessary that there should be a paramount controul over the management of the estates by a legal tribunal?—I think decidedly so.

1337. Then any new instrumentality for that purpose should be under the jurisdiction of the equity courts?—I think so, for this reason, that the Court has to deal with the corpus of the estate or with the rights of creditors, and therefore I think there would be inconvenience in separating the management of the estate from the tribunal that is to decide upon the thing itself.

1338. Then what necessity would there be for abolishing altogether the equity jurisdiction of the Court of Exchequer?—I do not see any other means of bringing all the estates under one tribunal except that.

1339. You mean under the control of a court of equity?—Precisely; under one Court, in order that you may have uniformity of system.

1346. *Chairman.*] Are not you aware of the extreme diligence of the Master of the Rolls, and the large amount of business which he does as an equity Judge?—Clearly; I think he is the hardest worked Judge in the Four Courts.

1347. Do you conceive that it would be just towards him to impose additional duties upon him besides what are imposed already?—No, quite the contrary; I think he ought to have his duties lightened, if possible.

1348. Do you think that the abolition of the equity side of the Court of Exchequer would lighten his

duties?—I think it would if it were part and parcel of a better measure for receivers, and the English practice of references were adopted.

1349. In what way?—He would be relieved altogether of an immense mass of business which he now has to dispose of connected with receivers' accounts, arising in a great measure from the viciousness of the system; for instance, he has to entertain all applications for renewals and for permission to eject. Those are applications which ought to be made to the Auditor-general. He has also to entertain all applications from tenants for references to the Masters for abatements of their rents, and in fact, every other matter which concerns the management of estates must first go to the Master of the Rolls, and then go into the Master's office; and it strikes me that by adopting the system which I have suggested a very considerable portion of that business would cease, and great expense to the suitors be saved.

1350. In whom would you vest the power of deciding those questions?—I would vest it in whatever Master was appointed Auditor-general of the receivers' accounts, or in whatever other person was appointed for similar duties.

1351. Would the head of this new Court be a legal person?—He would be a Master of the Court, and therefore legal.

1352. You were understood to say, that you thought that legal persons were not competent to discharge those duties?—I said that I did not think that a legal education, as such, necessarily produced the best persons for the discharge of those duties. But I think that there would always be one of the five Masters who would add to his legal knowledge the other necessary qualifications.

1353. You were understood to say that one ground of the transfer of jurisdiction was, that the Masters of the Court of Chancery, or the Remembrancers of the Court of Exchequer, were not suitable persons to control the management of estates?—What I mean is this, there are no less than five independent individuals, under two different Courts, managing these estates, every one of whom will naturally take a different view, and manage in a different mode; therefore I would connect them all under one head, and I would give to that one head all the duties to discharge which are now done conjointly between the Master of the Rolls and the Masters in Chancery and the Remembrancers.

1354. In the Court of Exchequer, where the duties are more concentrated in two officers, are the estates under them better managed than the estates under the Masters in Chancery?—No: I think there is a very great similarity between them.

1355. *Mr. R. B. Osborns.*] They are similarly badly managed?—Similarly badly managed.

1356. Does that arise from the unsuitableness of the officers, or to what do you ascribe it?—I ascribe it entirely, not to the unsuitableness of the officers, because I am one of the officers myself, but to the system.

1357. *Chairman.*] Supposing one of those officers were the head of this new Board which you propose to establish, do you think he could work it well?—I think he could.

1358. Then why cannot he now as an officer of the Court, the Court merely controlling the rights

of creditors and generally superintending the whole, supposing the system to be so improved as to work in the way which you desire?—I think he could do so if you gave him proper powers, but at present you might as well expect a man to run steadily in a sack.

1859. Then it would remedy the mischief if he, as an officer of the Court, had sufficient powers for carrying out an efficient system of management?—No doubt; and then the only inconvenience which would exist would be the having one officer in one court managing perhaps better or perhaps worse than the analogous officer in the other court.

1860. It would appear to you desirable, as a general proposition, to concentrate the duties of superintendence as much as possible in one person, that person being amenable to the general equitable control of the Court as guarding the rights of creditors?—Clearly.

1874. With reference to getting a better class of persons to act as receivers, you are in favour of abolishing the remedy by receivers on small judgments?—I think decidedly so.

1875. Have you considered the plan in the Government Bill for altering the law of judgments?—No, I have not seen it yet. The grounds upon which I entertain my opinion are, the very small rental over which receivers are by these means appointed, and the ruin which necessarily follows to the parties. I have frequently, since the commencement of this year, extended the time for three years for passing the accounts of receivers, on the ground that they were as low as £12 or £14, and that the estate would not bear the cost of the annual expenditure of £6 for passing the account. I passed the other day two accounts; in the one the rental was £19, the costs of appointing the receiver were £28, and the costs of passing the account were £6; in the other the rental was £20, the costs of appointing a receiver were £29, and the costs of passing the account were £6.

1877. It is in your opinion more desirable to endeavour to improve the system of receivers, or to abolish the remedy by receivers on judgment and to go back to the old law?—The old law is said to have been almost as bad as the new one, but if a very perfect system of receivers could be adopted, nearly as perfect which it might be, I think as a system of private management, I think that would take away a great deal of the objection to appointing receivers for large sums.

1878. Would it in your opinion be more easy to improve the remedy under the existing law, or the remedy under the old law?—I am very little conversant with the old law, so that I cannot say how far I think it could be improved, but I certainly think that the new law could be very much improved.

1879. Supposing it were improved to any reasonable extent, such as you have suggested, so as to get the system of receivers into a better condition, that would take away a great many of the objections to the system?—It would take away a great many of the objections, so far as regards the question of public policy, as to the condition of the tenantry of the country, but it is quite another question as to the relation between the debtor and the creditor.

IN CHANCERY.

PURSUANT to the Decree in this cause, bearing date the 14th day of June, 1849, I require all persons having Charges or Incumbrances affecting the Lands of DRUMQUINN, situate in the County of Clare, being the property of the said defendant, John O'Donnell, in the pleadings in this cause mentioned, to come in before me at my Chambers on the 1st day of November next, in the City of Dublin, on or before the First day of November next, and proceed to prove the same, otherwise they will be precluded from the benefit of said Decree.

Dated this 8th day of September, 1849.

For MASTER HENN, E. LITTOX.

Michael Cullinan, Solicitor for Plaintiff,
No. 66, Capel Street, Dublin.

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All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, as the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, October 6, 1849.

THE Irish Jurist

No. 50.—VOL. I.

OCTOBER 13, 1849.

PRICE {Per Annum, \$1 10s.
Single Number, 6d.

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows :—

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DUBLIN, OCTOBER 13, 1849.

AMID the varied changes required in the real property law of this country, there is no branch of it which calls for greater revision, than that which is supposed to regulate the relation between landlord and tenant.

It is defective in two vital particulars; the landlord has no protection against the fraudulent tenant, and the improving tenant has no security for his improvements.

The want of the first protection, has led to a frightful system of fraud and illegal combination.

The whole code, though enacted by landlords, is, in some particulars, very unfavourable to themselves, and leaves them often at the mercy of the knavish occupier. Take, for instance, the law as it affects the assignees of leases. They can discharge themselves from all future liability by assignment over. We are aware that this is doubted, but it has been established by such inveterate usage as to be now considered settled. Suppose rent, reserved by lease, to fall due on the 29th of September, on the 28th the assignee assigns to a pauper—a beggar in the streets—then leaves the premises, and pays no rent for the half year, minus one day, he has been in occupation. He has broken no covenant in the lease; he was out of possession before the rent became due; by no action founded on the lease can that rent be recovered, and that lease being still subsisting, can an action for use and occupation be maintained? This, we believe, has never been tried; and except the *bona fides* of the assignment could, as to the half year which has elapsed, be treated as fraudulent—with a view to prospective discharge from liability it has been held not fraudulent—we know not how that form of action could be maintained.

Nor is it easy to determine how the same instrument can be considered fraudulent for one purpose, and *bonâ fide* for another. It was executed the 28th of September, with a prospective view to discharge the liability of the gale day of the 29th, as well as every subsequent one. But the mischief ends not here, if the assignee be merciful, he will send the key to the landlord, if not, he places his pauper assignee in possession, and the landlord must allow that man to remain another half year in occupation of a dilapidating house, before an ejectment can be brought for its recovery—the expense of which he must bear.

Surely this is a great evil, which admits of easy remedy. It may be answered, that the original lessee always continues liable; but after a lapse of years, and change of parties, this liability can rarely be enforced.

There is a considerable practical inconvenience likewise resulting from the rule of law, that the action of ejectment will not lie where there is no reversion. It will be found not an unfrequent case, that the lessor, having allowed more than a year's rent to accrue, finds that he would be non-suited at the trial, if he brought his ejectment; not because the rent is not due, nor that the legal and moral liability is not complete, but because his lessee holds for the same years or lives as himself, and he is obliged to remit that rent, and pay that tenant a handsome premium to get rid of him. Surely this evil is susceptible of easy remedy.

The legislation, of a few years since, attempted to remove the grievances, to which tenants were said to be exposed, and the right to distrain growing crops was taken away. It had probably often been vexatiously exercised, but its removal has been fraught with the most pernicious consequences, and the recent conduct of Irish tenants has produced the painful conviction, that no power of

enforcing an honest obligation can with safety be withdrawn from the landlord.

That power in the hands of a judicious proprietor was most useful, more by way of check to the tenant than for practical enforcement. It is necessary, in a country like ours, that the former should have the most stringent and summary powers for the recovery of his rent, and of his premises, if that be unpaid; and, simultaneously with the investment of those powers upon him, should be passed a law giving the tenant the most ample security for money expended in lasting improvements.

The want of such a law before the agricultural interest had received its late shock, retarded the prosperity of the country. It was not reasonable to suppose that men of capital would expend money on a fleeting possession, and it was not just that the permanent product of their labours should altogether become the property of the landlord.

In England the same law would be quite unnecessary, for there the landlord leases highly improved premises, with an excellent habitation, in the most perfect order, for a short term. In Ireland a tenant takes possession of lands out of heart, and either without a dwelling, or with one not much better than a pig-stye, and if he improve the land, and build a substantial house at his own expense, at the termination of his lease he is at the mercy of his landlord as to increased rent or eviction.

This circumstance prevented the outlay of capital by skilled agriculturists possessed of capital, and except the Legislature interpose, the evil cannot be generally removed in a country where the leasing powers of the proprietors are so restricted by family settlements. In an agricultural community it is a matter for grave observation that all our land relations are so imperfect. There is no subject of greater practical importance for the future well-being of this country than that of landlord and tenant. If our anticipations be correct the deeply incumbered properties of the West must be sold; the buyers will, in many instances, for the sake of self-preservation, be the pious creditors, whose capital will have been sunk in their own incumbrance, or exhausted in paying off the prior ones. They will not have means to do more than purchase the soil—the raw material—a good tenant farmer class will be required to manufacture the fabric. This preceding observation, though written relatively to one class of purchasers, admits of general application. It will not be within the grasp of the fee proprietors to improve and to build upon every farm on their properties. They must call in aid another race of men, and to them they must give reasonable inducements. There is no greater motive for human action than that which is derived from the assurance that the labourer shall reap the fruit of his labours, and that another shall not reap what he has sown.

A well-prepared digest of the law of landlord and tenant is an essential. We trust that Mr. Napier will not allow another session to pass without the devotion of his abilities and energies to this most useful undertaking, in which he can command the cordial co-operation of every well-thinking man in the community. Nor is it one of great labour or difficulty, it only requires the present materials to

be consolidated, and, in some particulars, obviously just, improved.

We have instanced Mr. Napier, as he has expressed his intention of, patiently and prudently following up the necessary reforms in our law. He has certainly the right of selecting the order in which he will proceed, but we would venture to suggest to him, that the reform and consolidation that we have suggested, demand his most immediate attention.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Tighe Hamilton, Esq.—Jan 29.

(Continued from p. 360.)

1380. With regard to the case of judgments for small sums, does not it appear almost necessary to abolish the remedy by a receiver for small judgments?—I think so. For instance, I think a case as this is a monstrous hardship. The other day I appointed a receiver under order of the Court for a debt of £10, over an estate of £400 a year. That was under the Tithe Rent charge Act.

1385. Can you state what you think are the leading evils of this system as bearing upon the tenant with the tenantry?—I think the first evil to which the tenants are subject is the cost of their leases. I think that a very great hardship. A tenant to a private owner generally pays about £2 for his lease, but a tenant under the Court cannot get his lease for less than £6 10s.

1389. What is the next grievance of which you think that the tenants under the Court have to complain?—The next grievance is that they cannot get a lease for a fixed term. I think that it is a great hardship to the tenant that the longest lease he can get is seven years, which may determine to-morrow, and if his rent is £10 he must pay £6 10s. for the lease.

1392. Do you think the system of bidding for land a judicious one?—I think nothing can be worse; so much so, that in my office for the last two or three years I have discouraged it as much as I possibly can; and my practice is almost invariably now to direct the receiver to go amongst the tenantry, to circulate handbills in the neighbourhood, and to get into local communication with the parties likely to take; and then he sends up to me proposals from different tenants, and I hear his opinion upon these, as nearly as possible in the way in which a private owner would, through his agent; and I decide upon the most eligible party, without any reference whatever to the comparative amount that he proposes, but entirely with reference to his eligibility as a tenant and the intrinsic value of the farm. Then another hardship connected with the mode of letting, which I think is a very great one, is that the tenant is obliged to incur the expense of a recognizance, which is either perfectly futile, or if it is not futile is likely to be very injurious to those who are inadvertently drawn in.

1394. Does the recognizance in fact operate as substantial security?—I think not. Then there is this further hardship, that when the tenancy is de-

terminated, as it may be in a few months after it commences, by a sale, the unfortunate tenant has to go to the expense of getting that recognizance vacated, which he cannot do for less than £5 or £6.

1397. *Chairman.*] There is a natural indisposition in the Court where there has been a long established practice, without some legislative sanction to alter it?—No doubt. Another very great grievance to which the tenants under the Court are subject is the want of help when they get into difficulties; if a tenant gets embarrassed in any way it is a very fair thing that the landlord should help him, but we have no power whatever to do that; and therefore when once the Court comes over a tenant, he is put in a position that he would not be in under a private landlord. I think that forms a very important item in his grievances.

1415. *Mr. R. B. Osborne.*] Is there any other hardship upon the tenants?—I think the next mode in which the tenants suffer is by the way in which they are harrassed by some receivers. There is nothing more common now than for the receiver, the moment his account is passed, to rush to the tenantry, and take every possible means to collect the rent, in order to use this rent till thirteen months or a longer period, if he is not called upon, has elapsed; so that in that way, the very form of accounting acts to harrass the tenantry.

1444. *Chairman.*] With regard to legal proceedings against the tenantry, do you think that the character of the proceedings usually adopted to recover the arrears of rent is satisfactory?—I think they are most unsatisfactory.

1446. Supposing it were certified by the officer that so much rent is in arrear, and that were really ascertained, can you see any advantage, either to the estate or to the tenant, in allowing the process of ejectment to be gone through, or an action, or any of those proceedings?—None whatever in the present form of those proceedings; I think it is the greatest possible advantage.

1447. Then if you were improving the system, do not you think that it might be very materially improved by allowing proper steps to be taken in a summary way as soon as you have ascertained the state of the rent account?—No question about it.

1448. And that would do away in many cases with the necessity of ejectments and distresses, and the consequent expense to all parties?—Clearly; I think that the difficulties which exist in the way of ejectment now are most demoralizing to the tenants: in fact it enables them to set the receiver at defiance, and to set an example of defiance in the neighbourhood, and that sometimes is an evil of the greatest magnitude.

1449. Do you think that the opportunity which they have of postponing the discharge of their liabilities and baffling the receiver by protracted litigation, is injurious in every point of view?—No question about it.

1456. *Mr. R. B. Osborne.*] In your Court is there any inquiry as to the qualification of a person proposed to be a receiver?—There is a verbal inquiry which is rather a negative one, whether he possesses certain qualities which unfit him for receiver; for instance, whether he is an attorney connected with

the cause; whether he is an attorney's clerk; whether he is a public-house keeper. That is according to the rule of both Courts, indicating the very low description of persons that are liable to be appointed receiver, when it is necessary to follow such a rule.

1457. That rule was made by Sir Edward Sugden, was it not?—I think it is a rule of practice rather than a written rule.

1458. Are you aware that Sir Edward Sugden laid down certain rules by which no attorney in the cause, nor attorney's clerk, could be appointed a receiver?—Yes; I only spoke of public-house keepers.

1465. Can you give me any idea what the costs of a receiver are to the estate?—His poundage is five per cent.; by an analysis of the 150 accounts passed before me, I find that the legal expenses for the recovery of rents come to about 12 per cent. upon the sum received.

1467. Would you think that 15 per cent. was too high to put it at, as the costs of the receiver?—In the case of certain estates I should say it would be a great deal more than that; in the general run of estates which have come from the hands of distressed landlords, I should say that 15 per cent. was a low average for poundage and costs.

1488. You have put in the heads of a bill; would the effect of that bill be to abolish the equity side of the Court of Exchequer, and to save the public expense?—It would save the public £15,400 a year, taking from that whatever might be necessary for the new establishment in Chancery, which would not exceed £3,500.

1493. But if the estates now cost 15 per cent. for managing, would it not be possible to have a plan which would be self-supporting without charging those expenses upon the Consolidated Fund?—I think so; but where you have establishments for all legal proceedings charged upon the State, it would be departing from that practice to charge these particular expenses upon the owners of the property which is so unfortunate as to be brought into the Court, and which already contributes largely to the State by stamps upon the proceedings.

1497. Would it not be possible to do the whole under the Court for seven per cent?—I think not, because part of the system which I should strongly recommend would require a large staff of clerks and surveyors, who should be at the disposal of the Auditor-general, to go into the country, and to be as it were his eyes, to inspect the estates and report personally to him upon every question of improvement or every other matter. I think that would swallow up a very large part of the maximum poundage.

1504. But in your opinion nothing can be worse than the present state of the management of property under the Court of Chancery?—Nothing can be worse.

William Macartney M'Cay, Esq., June 29, 1849.

1523. *Mr. R. B. Osborne.*] Will you state your profession?—I am a solicitor.

1524. Are you acquainted with the management of landed property in Ireland?—Yes; I have been

whether it would be giving the Act a retroactive operation, to hold that it extends to releases made before it passed."

The learned writer has so studiously guarded himself in the expression of his opinion, that it is difficult to determine to which side it inclines; he states the doubt, and leaves it unsolved; we, however, conjecture, that he is of opinion that the Act extends to releases prior and subsequent to its passing, because he considers it "questionable whether such a construction would be giving it a retroactive operation," and affirms, that "there is nothing in the expressions used in the enacting clause, to prevent it extending to releases executed before the passing of the Act."

We entertain so sincere a respect for the soundness of his judgment, that we arrive at a different conclusion, with considerable distrust of our own, and, as we differ from what we assume to be his opinion, we hope we have misinterpreted it; but we cannot read the whole preamble of the clause without doing violence to the English language, or feeling impressed with the idea that it relates alone to future releases. It speaks of a judgment affecting lands in Ireland, and the owner of it, being willing to release a portion of such lands, evidently referring to a future act by him, and where it speaks of retaining its validity it uses the words, "which it is intended should remain subject to such judgment." In the whole preamble there is not a single word referable to the past, whilst every expression relates to the present or the future. And the enacting clause appears to us studiously confined to future releases; the future "shall," is the operative word. Unaffected by the Statute, the question is one of extreme nicety, and we shall look forward to its ultimate decision with interest.

One of the judges of the Court of Common Pleas was, we presume, absent during the argument, at least he did not sign the certificate, and the other members of the Court adopted the ancient practice—better honoured in the breach than the observance—of returning their certificate without assigning their reasons for the conclusions to which they had arrived. When difficult questions are thus submitted to Courts of Law it would be extremely satisfactory to learn as well the judgment as the process of reasoning which led to it. And the wholesome practice, introduced by Lord Mansfield, and sanctioned by subsequent general usage, of giving the grounds of his opinion, would appear to exist as strongly now as when that ornament of our profession, by a series of masterly decisions, delivered in the most perspicuous and elegant language, laid the foundation of our commercial code. And if the remark be generally true, it would appear peculiarly applicable to cases sent by reason of their difficulty by the head of one court for the advice and assistance of the collective wisdom of another. And yet in these instances alone our Courts of Law rest satisfied with an answer to the questions submitted to their consideration, leaving to conjecture and in mystery the arguments and reasons which led to their opinion.

The present state of the law of judgments in Ireland is extremely unsatisfactory, even as amended

by the hasty legislation of the past session, which has disturbed, without settling it.

An historical sketch of the rise and progress of this mode of assurance, of its effect upon the landed and commercial interests of the country, together with a statement of the changes which have been lately made, of the different incidents attaching to the different species of judgments, and a collection of the cases bearing upon each would, we should think, be very acceptable at the present moment.

It would certainly, to the lawyer who has leisure to consider the subject, and somewhat of a philosophical turn of mind, be a subject of considerable interest, as well as of considerable practical benefit to himself in the pursuit of his profession, and, if treated worthily, conducive to his future fame.

The Irish lawyer, who desires literary distinction by the publication of law works has, unfortunately, to earn it at his own expense, the present depressed state of the profession and of law publishing rendering the authorship of any legal work of pretension unremunerative.

HOUSE OF COMMONS.

RECEIVER COMMITTEE.

William Macartney M'Cay Esq.—June 29.

(Continued from p. 364.)

1534. That includes minors and all?—It does. It may be necessary to explain that it is with great difficulty we arrive at anything like certainty upon this point, for there is no means patent to the public or to the profession of knowing the exact amount of property under either of those courts. Even with the assistance of the return laid before Parliament, we can only approximate to it. The paper which I hold in my hand is an abstract of the return of the Court of Exchequer, which gives a rental of £155,402 a year, but that sum, I think, is much under the true amount, because it professes to give only those receivers who have passed their accounts. The Court of Chancery gives a return for each of the years, 1844, 1845, 1846, 1847, of those receivers only who have passed accounts in those years. Now the Committee are aware that the rule of accounting is, that when a receiver is first appointed he has 15 months to account, and that for each subsequent account he has 13 months. But the Committee are probably not aware of another rule of the Court, that if the period for accounting happens to fall in the month of August, the time for accounting is extended, without any application to the Master, to November, I think the 10th of November, so that in the case of a newly appointed receiver whose time for accounting would expire in August, it virtually gives him 18 months, and in the case of an old receiver it virtually gives him 16 months to account, besides which the time for accounting is frequently extended by the Master, so that in those four years it is not likely that any receiver has accounted more than three times. And taking that as an average, there will appear a gross rental under the Court of Chancery of £903,883 in 1847, which, added to that in the Court of Exchequer, makes £1,059,285. That would be the result supposing that there was the same number of receivers

in 1844 as in the other years; but that was not the case, for many new receivers were appointed in each of the following years, some of whom had only accounted twice, and some only once, up to the date of the return; and it must also be taken into consideration that this return could not give an account of any receivers who have been appointed since October 1846, for their time for accounting would not expire in 1847. Therefore, for these reasons, I add one-fourth and say, that in 1847 there was at the very least £1,500,000. a year. Now Master Brooke has told the Committee, that in his office the average amount of rental over which he appoints receivers is £3,000. to £4,000 a week. Taking it at £3,000. a week, it will amount in his office to £120,000. a year for the 40 weeks he sits. For the four Masters that would be £480,000. in 1848, and taking the half of that sum for the three terms gone by in 1849, it would make a total exceeding two millions of rental.

1535. Assuming that there is now that amount of rental under the Court, what is your opinion of the cost per cent. at present paid for the management of that property?—As nearly as I can estimate it, I would say that it cannot be under 15 per cent.

1536. How much would that amount to per annum, on the gross rental you have named?—Fifteen per cent. upon two millions is £300,000.

1537. Do you mean to tell the Committee that £300,000. a year is now spent upon the management of these estates?—I do not think so, because the whole rental is not collected. I never knew the rental of an estate under the Court of Chancery fully collected. Mr. Henry Darley, an officer of the Rolls Court, stated, as the result of his experience in the Rolls Court for many years, that no estate in the Court of Chancery ever yielded more than two-thirds, and in a great many cases not more than one-half the sum it would yield to the owner of the estate if under his own management.

1538. Then what sum would you say is probably now being spent on the management of these estates?—Taking as the average that two-thirds of the rental is received, 15 per cent. upon that would be £200,000.

1539. You say that 15 per cent. is the present cost of management?—How do you calculate that 15 per cent.?—There is the receiver's poundage, 5 per cent. Then the receiver's costs come to about 5 per cent. I came to that conclusion from a great number of large estates which appear to be managed in the most economical way as to costs. The great majority are small estates, which in proportion are much the more expensive. Therefore taking one with another, I arrive at the conclusion that 5 per cent. covers the receiver's costs, I estimate the whole cost at 15 per cent. at least, including the plaintiff's and owner's costs, in relation to the management of the estate by the receiver, the passing of his account, and applications to Court.

1540. Have you known numerous instances where it exceeded 15 per cent.?—Many; many where it has exceeded the rent of the estate.

1546. Is it your opinion that a more direct mode of communicating with and directing a receiver would be desirable?—I should say it would be most desirable.

1548. Do you think the present system of accounting a good one?—Not at all; it is cumbrous, unsatisfactory, and expensive.

1554. Do you think the proceeding by attachment against tenants is an efficacious remedy?—I should think quite the contrary, except in cases where the tenant is a solvent person; it is difficult and tedious to arrive at an actual attachment, and in very few cases is it operative.

1556. How has the law which prevents the growing crop being distrained affected the receiver?—It is one of his difficulties. I believe it is very generally the practice for fraudulent tenants to assemble their neighbours by moonlight and cut and carry off the crop before sunrise.

1558. From what you have stated, does not it appear that the receiver, to save himself, most frequently put the estate to the expense of statement of facts?—Certainly; if a receiver wishes to keep himself harmless, he must be almost reckless as to expense. If the Master directs ejectments, the estate pays for those ejectments.

1559. Can you state to what extent in your opinion the property of Ireland is charged with incumbrances?—With respect to judgments it is very difficult to ascertain that, for although there is a registry of judgments, a great many are registered and re-registered over and over again; but as to mortgages, I find that in the ten years ending the 31st of December 1847, the number of mortgages registered in Ireland was upwards of 7,000, representing a principal sum of about £17,000,000, in ten years, and in the same time there were registered jointures and annuities which affected rentals of estates to the amount of half a million per annum. For that class of encumbrances alone it would take a million and a half of rental to pay the interest upon them; that is, for mortgages and annuities, without taking into account judgments that are not collateral with mortgages.

1560. Have you examined the returns furnished by the Courts of Chancery and Equity Exchequer as to the properties under their receivers, and can you state what is the general class of properties under receivers?—Generally a small class of properties.

1561. What proportion of them are under £1,000 a year?—About three-fourths in value are under £1,000. a year.

1563. *Mr. R. B. Osborne.*] Does that apply to both Courts of Equity?—There is a slight difference between them. In the Court of Chancery, five-sixths of the whole are under £1,000. a year, and in the Court of Exchequer, three-fourths of the whole in value.

1565. *Chairman.*] From your experience, do you suppose that those very small cases are cases of judgments?—I would suppose so. In the Court of Chancery I classified 1,000 estates, the accounts for which were passed in the year 1847 and the latter part of the year 1848. [The number of estates and accounts passed in 1847 did not amount to 1,000; they amounted to about 800.] Of those 1,000 estates 812 were under £1,000 a year, and 178 above £1,000 a year, of the 812 estates, 626 were under £500 a year, and 186 above £500. a year. Then of the 626 under £500 a year, 117 did not amount to £300 a year, 170 did not amount

to £200. a year, and 164 did not amount to £100. a year. I found that in the latter class there were many as low as £30. or £20. a year, and some as low as £15. a year. The 178 estates above £1,000, a year are thus classed; 118 under £2,000, 31 under £3,000, 12 under £4,000, 8 under £5,000, 15 above £5,000, of which some are as large as £24,000, a year.

1576. Is it considered the duty of the receiver in creditors' suits, to look to the good cultivation of the land, or to see that the tenants observe the covenants in their leases?—Theoretically it may be, but not in practice.

1582. Do you consider the system of letting by the Court and the tenure to be injurious to the estate?—Most injurious; it is calculated to prevent a tenant improving his land; he is not certain even of seven years' tenancy; if the cause terminates his tenancy terminates; no tenant would be likely to expend money in improving the land.

1583. Did you ever know of a tenant on a seven years' lease, under the Court, to lay out money in improving his holding?—I know of but one instance, and in that case the effect was that the tenant took the land again; it was a rent exceeding £300. a year and he had to pay £80. a year increased rent, from competition.

1587. What alteration do you think ought to be made in the mode of managing those estates?—I would say that the object should be to bring the management of them as nearly as possible to the manner in which a private gentleman would insist upon his agent managing his estate.

1588. Do you think that there ought to be a power of expending part of the rents in improving the property?—Decidedly; there should be a power to do that which a wise landlord would do for his own estate; the word "improvement," I think, scarcely conveys an idea of what we mean in Ireland by improvement; it requires a sum to be expended upon land to prevent it from getting worse, to keep it from deteriorating; we should rather call it "maintaining;" you may go on improving land to any extent, but there is a sum which is really necessary to be expended in maintaining and to keep the land in heart; and that class of expenditure I think the receiver should have the power to make, such as draining; very often a large tract of land is covered with water, and deepening the bed of a river, which would cost but a few pounds to do it, would carry off the water; very often tenants are put to serious inconveniences by having very bad roads through the lands; that class of improvement ought to be done; it would give employment to the people, and would stimulate their industry; I have heard gentlemen talk about the right to spend creditors' money in such things; I do not take that view of it; if you do not give some employment upon the estates in Ireland you will increase the poor-rates upon those estates, and those poor-rates will become the first charge upon the estate; so that the creditor is injured in that way.

1597. *Mr. R. B. Osborne.*] You were the person who principally drew up the suggestions which are embodied in this paper before the Committee?—Yes.

IN CHANCERY.

Henry Cavendish Johnston,
The Rev. Samuel Henry Mason,
Eliza Ada Mason, and others,
Plaintiffs,
Defendants.

PURSUANT to the Decree made in this cause, bearing date the 14th day of June, 1849, I hereby require all persons having Charges and Incumbrances affecting the Estate of the said Defendant, Samuel Henry Mason, and Eliza Ada Mason, in all that and those certain LANDS and HOUSES situate in North Circular Street, Dame Street, and Camden Street, in the City and County of Dublin, to come in and prove the same before me, on or before the 1st day of November next, otherwise they will be precluded the benefit of the said Decree.

Dated this 13th day of September, 1849.

W. BROOKS

Thomas Picton Reede, Plaintiff's Solicitor,
15, St. Andrew Street.

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TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 15, FLEET-STREET, in the Parish of St. Andrew, and published at COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, October 20, 1849.

THE Irish Jurist

No. 52.—VOL. I.

OCTOBER 27, 1849.

PRICE {Per Annum, £1 10s.
Single Number, 6d.

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DUBLIN, OCTOBER 27, 1849.

We give in a Supplement to this Number the Act for the Sale of Incumbered Estates, together with the General Orders published on the 18th instant; and we purpose to offer such observations on both from time to time, as may suggest themselves to us as useful. We should have given the Orders last week, but no authentic copy had been then published.

We shall also give rapid and carefully prepared reports of the cases decided by the Commissioners. In this Number we shall only touch upon the general character of the measure in its complete form, one of the boldest experiments short of an entirely new code of real property, ever attempted.

That it will be very generally tried, the nature of the measure itself, and the depressed and incumbered circumstances of the landed proprietors leave little room to doubt.

And yet, before taking the plunge, the owner or incumbrancer should consider, because—another new feature in legislation—once taken, there is no receding; by the 48th general order, which is as binding upon the suitor as a statute, “no petition shall be withdrawn or dismissed without the leave of the Commissioners.”

The seller is offered these advantages, that whenever an incumbrance affects the inheritance, the property can be sold, and an indefeasible title given to the purchaser; that the costs of the judicial sale are certainly so much less than they would have been under a decree of a Court of Equity, by the saving of office fees, and probably very much less by the diminished number and length of the pleadings—if indeed, the proceedings under the new court can be called pleadings; and the further boon is proffered, that those costs shall form the first charge upon the fund.

It has been apprehended that the Act will drop still-born for want of purchasers, but unquestionably the inducement to buy under this tribunal is the greatest ever yet offered.

Certainty of title, and no expense of investigating it. If there were no glut in the market, it is plain that sales under this court should bring higher sums than those made by private contract or by the established Equity tribunals. The purchaser bids for the estate, and deducts comparatively nothing from the purchase-money, on the score of costs of title. If, then, the supply could be regulated, so as not to deluge the market, so far as the Act is concerned, it confers a benefit upon the owner who may anticipate a surplus—if, indeed, there be any such owner now in Ireland—and if not upon him, upon the pious creditor, and that in two ways—diminishing the cost of bringing the article to sale, and enhancing its value when brought.

One of the gravest objections urged to the measure was, that the interests of creditors and of remainder-men would not be sufficiently protected, and that in the desire to give “currency to land,” the rights of those who had claims upon it would be sacrificed.

Unquestionably the powers conferred upon the Commissioners are very arbitrary, and in a former article we ventured to suggest that, in order to preserve uniformity of design, they would act prudently by leaving the suitor as unshackled in his mode of operation as possible. The general orders carry out our views on this point; they are numerous, but they relate principally to matters of form and of routine. That which prescribes the mode of proceeding is the 5th order, and directs “that proceedings shall be commenced by petition, to be addressed and framed according to the forms to be approved of by the Commissioners, and every such

petition shall be signed by the petitioner or his attorney, and shall be accompanied by an affidavit, verifying the material facts therein."

Further than by reference to the forms, there is no direction as to what searches should be made, and although the forms prescribe that the incumbrancers shall be specified, it would appear that they need not necessarily have notice of the proceedings, until an absolute order for the sale has been pronounced.

Nor do we observe any machinery provided for the protection of the rights of persons under disability, except in those cases in which, by the 46th general order, the Commissioners shall appoint a person to act in the nature of a guardian, or next friend, and this will be in those instances in which they conceive such an appointment to be necessary. There is no definition of what those cases are. The course of proceeding, we presume, will be, that one of the Commissioners will peruse the petition, and read the title in the same way as any counsel at the Bar, and having ascertained the incumbrances appearing upon the abstract, and the parties entitled to the life estate and inheritance in the lands, will direct notice to be served upon them, and if there be no cause shewn by any of the parties served, an absolute order for a sale will then be pronounced. This is our conjecture; the frame of the orders as we shall point out hereafter, does not lead us to any certain conclusion of our correctness. This course imposes considerable labour and considerable responsibility upon the Commissioners. When we use the word "responsibility," we apply it in a moral not a legal sense; on them will depend the protection of absent parties, and they will require to peruse the title with as keen a scrutiny, as if retained at the Bar by a purchaser.

The rule *caveat emptor* made purchasers lynx-eyed in the investigation of title, now that the court warrants title, they have no object in probing it, nor in seeing that every party, who by possibility could have an interest in the lands has had notice and is bound; by this removal of personal risk, the *onus* is shifted completely from them, and the responsibility is made official, with this remarkable difference to the incumbrancer, that if overlooked, he is absolutely, so far as the lands are concerned—and the money will soon follow the lands—without remedy.

The old principle gave greater chances to the creditor, the new one may be—we do not say it is—better adapted to a political emergency.

A perusal of the rules shews us that the Commissioners—in a manner very praiseworthy to themselves—have promulgated none to diminish their own labours. On the contrary, they might have prepared rules which might have materially lightened them; for instance, they might, with slight modification, have adopted the 138th general order of the Court of Chancery, requiring the opinion of counsel to be obtained that the title is good, or could be made so, by the removal of the defects indicated. The statement in the forms does, however, impose an honorable responsibility on counsel in this respect.

The Act is, in fact, an experiment in more ways than one; the transfer of the real property of the

country is proposed to be accomplished in a great measure, by the personal labour of the judges in chamber, and without the assistance of counsel.

This was a suggestion originally given, we think, by Lord Langdale, in his evidence before the Real Property Commissioners, the expense formerly borne by the suitor, is transferred to a pull at the Exchequer. We shall allow no selfish professional views to prejudice or condemn the experiment. We are but entering upon it, and we trust that, in any event, the country may be benefitted, but we confess the general orders leave us still rather in the dark as to the proceedings of the Commissioners.

Thus the 8th general order provides that in cases in which a conditional order for a sale shall be made the names or general description of the parties to be served therewith must be stated; and the 23rd general order, and those which follow it, and which relate to the distribution of the purchase-money, lead to the inference that for the first time the incumbrancers on the estate will have notice of the sale, for it is not until an absolute order for a sale shall have been pronounced that advertisements are to be issued for creditors, and that the Commissioners "shall direct what further information shall be procured respecting the title of all parties to the premises, and to the incumbrances affecting the same, and what searches or further searches should be made in relation thereto."

The Commissioners have given themselves a wide latitude in their proceedings, no one order need resemble its predecessor, but each be made *pro re nata*, as in an action on the case at law a new writ for each new case. An incumbrancer would certainly be a little surprised to find that an absolute order had been pronounced for the sale of the property on which he had lent his money, and no opportunity given to remonstrate, and shew cause against the sale, if any. We do not suppose this can be the intention of the Commissioners, but we regret that their orders are not a little more explicit upon the point.

We this week close our extracts from the evidence given before the Committees of the House of Commons by legal men on those questions which related to the most important changes proposed in the law of Ireland.

HOUSE OF COMMONS.

POOR LAW COMMITTEE.

(Continued from p. 316.)

William Neilson Hancock, Esq.—May 18, 1849.

9955. *Mr. Bright.*] What is your profession?—

I am a practising barrister, of five years' standing.

9956. Do you hold any situation in the University of Dublin at this time?—Yes; I have been for the last three years Archbishop Whately's professor of political economy.

9997. Is it your opinion that the principle of what is called a Parliamentary title might be extended to sales of land without the intervention of commissioners; you heard what Mr. Lawson said upon that point?—I entertain a very similar view to what

Mr. Lawson has expressed upon that point; and that is, that if the registry of deeds and the registry of judgments be put in a proper state on the plan that I have considered, and which is very similar to what Mr. Lawson has mentioned, then, after due notice to all parties on the register, a person having a power of sale, may sell at a public sale, and the purchaser, on paying the money either to the party selling, or, in case any of the encumbrancers give notice, lodging the money in court, should get a Parliamentary title. It would be in fact applying the doctrine of what is called market overt to land. With regard to chattel property, if it is sold in public market, the purchaser acquires a title to the property by its being so sold, and I propose to establish periodical land sales, which should be deemed market overt with regard to land, and then that the principle which applies to chattel property should extend to the sale of land.

9998. Do you think that by that means you would obviate the danger of collusive sales, by which encumbrancers would be liable to be defrauded?—I think so, for this simple reason; that if an estate were sold after due advertisement, and due notice, in public market, with a Parliamentary title, I think it would be sold for its full market value. If the money arising from that sale be placed in court no encumbrancer can be defrauded, because he has a fund which is the full market value of the land which was his security.

9999. But when you consider how many persons do not see placards, and know nothing of notices, do you not think that there would be a great liability of parties who had an interest in land being dispossessed of it, and the money, instead of going to them, being expended in such a manner as perhaps they could not discover?—That could not happen, for this reason; that the name of every party having an interest in the land, or having an encumbrance affecting a particular portion of the land, with his residence, would be entered in the registry, and when a sale was intended notice must be given three months, or perhaps six months previously to every one of those parties, that a sale was to take place of the land on a particular day; they would have full notice, and if they thought that the land was going too cheap they could buy it themselves.

10018. *Mr. Bright.*] Do you think it desirable to substitute some simple form of charging land for the various methods of mortgages, recognizances, and crown bonds?—Yes; I think it would be well to have some simple plan, that instead of different methods of charging land there would be one method. There is one point with regard to judgments upon which I would make an observation; I believe that the Commissioners of Her Majesty's Treasury have power under the Act of last Session to consolidate the registry of judgments with the registry of deeds; these are now separate offices, and I would suggest that the two offices of registry should be consolidated.

10023. Suppose the law with regard to judgments and similar charges to remain unaltered, can you suggest any improvement in the law with regard to the registration of judgments?—Yes. At present the memorandum of the judgment is required to contain the name or title of the cause or matter

in which the same has been made or pronounced, the names, and the usual or last place of abode, and title, trade, or profession of the plaintiff, if there be any such, and of the defendant or person whose estate is intended to be affected by the judgment, the court in which the judgment or rule has been pronounced, the date, and the debt, damages, and monies thereby recovered or ordered to be paid. I would suggest that the office for registration of judgments should be consolidated with the office for the registration of deeds. I believe the Lords of the Treasury have power, under the Act of last Session, to effect this consolidation. I would suggest that the memorandum of every future judgment or similar charge be required to contain the names of the townlands and the numbers of the tenements less than townlands, both taken from the Ordnance Survey, with the numbers of the Ordnance sheets, and the interest, freehold or leasehold, or sub-leasehold of any degree in such townlands or tenements on which such judgment is intended to be a charge; that such memorandum be registered as well against the name of the defendant or person whose estate is intended to be affected as it is at present, as also against the townlands and tenements named therein; that the residence of the plaintiff be registered under the townlands and tenements to be charged; that every notice sent to such plaintiff, at such residence, be sufficiently served on him, and that the plaintiff may, on change of residence, apply to the registrar and have his new residence entered; that in case the defendant or person whose estate is to be affected by any judgment should become entitled to any lands not mentioned in the memorandum first registered, the plaintiff may present a further memorandum, mentioning such lands, and have the judgment registered against them.

10024. Do you apprehend that a proper system of registry would have much effect in diminishing the costs of Chancery suits for sales of land?—Yes; there is a great deal of delay and expense when a Chancery suit is instituted in inquiring who are the parties entitled to incumbrances, and what are the amounts of their incumbrances. This would be disclosed in the first instance in one page of the registry with regard to any portion of the land, a copy of which would give the information which is now only obtained after a great deal of trouble in the Court of Chancery.

10025. Would not an improved registry, such as you recommend, be objected to on the ground that it would disclose private affairs?—Yes, it might; but I think that could be entirely obviated upon the plan suggested by the Real Property Commissioners in England, which was to have the names and residences public, but to have the amount and other particulars of the judgment kept in the same book, but private, so as not to be disclosed unless to persons having authority from parties interested in the subject to inspect them; that other persons should not inspect the amount or the nature of the charge; that they should merely know the names and residences of the parties entitled to notice; that is all the public requires to know for the purposes of notice; and then when the Court of Chancery required the amount to be known, or parties themselves wished

to disclose the amount, it could be disclosed in a very simple manner.

10026. With regard to the registry of deeds, have you any observation to make. You have heard the evidence which has been given by Dr. Longfield and Mr. Lawson; is there anything with regard to that point which you would wish to state to the Committee?—With regard to that, I would suggest, that the memorial of the deed be required to contain the names, not only of the parties to the deed, but of all parties taking any estate or interest under it on which judgments can attach, and of all trustees and other parties who in consequence of the deed should receive notice of any sale of the land, that the memorial be required to contain the residences of all such persons, in the same manner as each memorandum of a judgment or similar charge is required to contain such residences now. That parties be enabled to record a change of residence, and that notice at the registered residence be conclusive on all parties for the purposes of a sale. That the memorial be required to contain the names of the townlands and numbers of the tenements less than townlands, both taken from the Ordnance Survey, with the numbers of the Ordnance sheets, and the interest, whether freehold or leasehold, or sub-leasehold of any degree, in such townlands or tenements to be affected, by registering such memorial, and that no other description of the lands to be affected be required. That such memorial be registered as well against the name of every grantor in such deed, as also against the townlands and tenements named therein, and in a separate index against the grantees taking any estate or interest on which judgments can attach. I propose this last, namely, having a separate index, because, as judgments are to be required to register their judgments against particular portions of land, I think it only fair to afford them the facility of ascertaining what lands parties are entitled to on which a judgment can attach.

10049. *Mr. Bright.* I asked you whether there was not land in Ireland held under patent, with reversion to the Crown?—Yes; I believe that that is an impediment to the transfer of land peculiar to Ireland; I am not aware that it exists to anything like the same extent in England: some of the grants from the Crown in particular counties, and made at particular periods, contain reversions on the failure of issue, or of male issue. In almost every investigation of title it is necessary to search the original patent of the grant from the Crown, to see whether it is in this way or not. Now, the suggestion which I would make on this subject is, that the Commissioners of Woods and Forests be required to register against the townlands or tenements affected by such reversions the existence of such reversions, so that in every case where it was not registered there would be no occasion to search to see whether such reversion existed or not. I think then that the Commissioners of Woods and Forests should institute an inquiry into the value of such reversions, and having inquired carefully into that, should proceed to sell them under their power of sale and exchange, and that the parties under limited interests should be enabled to charge the inheritance for the purpose of buying up such reversions.

IN CHANCERY.

Henry Cavendish Johnston, Plaintiff,
The Rev. Samuel Henry Mason,
Eliza Ada Mason, and others, Defendants.
Pursuant to the Decree made in this case, bearing date the 14th day of June, 1849, I hereby require all persons having Charges and Incumbrances affecting the Estate of the said Defendant, Samuel Henry Mason, and Eliza Ada Mason, in all that and those certain LANDS and HOUSES situate in North Circular Street, Dame Street, and Camden Street, in the City and County of Dublin, to come in and prove the same before me, on or before the 1st day of November next, otherwise they will be precluded the benefit of said Decree.

Dated this 13th day of September, 1849.

W. BROOK.

Thomas Ficton Reede, Plaintiff's Solicitor,
15, St. Andrew Street

IN CHANCERY, IRELAND.

Robert Edward Gibbings, Plaintiff,
The Right Honorable Henry John Reuben, Earl of Portarlington, and others, Defendants.
WHEREAS it has been represented to me, the undersigned, of the Creditors on the Estate of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleading, that have neglected or omitted to come in and file charges on said Estate, in respect of the respective demands and incumbrances, pursuant to the decree of the day of February, 1847, and that the time limited by and for the said purpose has expired, and that it is expedient to extend said period: I do require all Creditors and Legatees of the late Right Honorable John, Earl of Portarlington, deceased, the Testator in the pleading, and also all persons having Charges or Incumbrances affecting the said Estate, to come in and prove the same before me, on or before the 1st day of November next, at my Chambers on the Inns Quay, in the City of Dublin, on or before Tuesday, the 30th day of November next, and proceed to prove and claim the same, otherwise they will be precluded the benefit of said Decree.

Dated this 30th day of June, 1849.

E. LITTON.

John Warnock, Plaintiff's Solicitor,
30, North Great George's Street, Dublin.

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Orders for the IRISH JURIST left with E. J. MILLIKEN, at COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 45, FLEET STREET, in the Parish of St. Andrew, and published at COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, October 27, 1849.

Supplement to The Irish Jurist.

No. 52.—VOL. I.

OCTOBER 27, 1849.

PRICE {Subscribers, 6d.
Non-Subscribers, 1s.

COURT OF COMMISSIONERS FOR THE SALE OF INCUMBERED ESTATES.

October 24, 1849.

The Right Hon. **BARON RICHARDS** (Chief Commissioner) said—This being the first public sitting of the Court for the Sale and Transfer of Incumbered Estates in Ireland, as established under the Act of Parliament passed in the Sessions holden in the 12th and 13th years of the reign of her Majesty Queen Victoria, it may be right briefly to call attention to some matters connected with the establishment of this Court, and with the course of procedure which it is our intention to have adopted for the purpose of carrying out the provisions of the Statute. The Act of Parliament, from whence all our jurisdiction is derived, appears to have received the Royal assent on the 28th of July, 1849, and, shortly after that time, Dr. Longfield, Mr. Hargreave, and myself, had the honour to be appointed Commissioners by her Majesty, pursuant to the 1st section of the Act; and with all convenient speed, afterwards, we, the Commissioners, assembled together, and proceeded to frame a code of rules for regulating the course of procedure under the Act, and for securing the due execution of the powers vested in us, and giving effect to the provisions and objects of the Act. These rules we were enabled to lay before her Majesty's Privy Council in Ireland, for their approbation or amendment, on the 18th September, 1849. Some of these rules that right hon. and learned body were pleased to strike out altogether, and to alter others; and on the 17th of October, 1849, the Privy Council were pleased finally to dispose of the matter, and to express their approbation of the rules as so altered by them, and immediately afterwards the rules, as so altered, were, as I understand, enrolled in the High Court of Chancery, as required by the 10th section of the Statute, and that being done we have thought it right to name this day, being the earliest that we could well appoint, for the opening of our Court. I may mention that certain of the rules which we have laid before the Privy Council, relative to matters of form merely, and to the mode of commencing and continuing proceedings in our Court, and though we felt that we had sufficient authority of ourselves, under the 9th section of the Act, to frame rules and regulations of that description, without requiring the approbation of the Privy Council, we thought it would be more satisfactory that the entire of the proposed plan and framework of our court should be laid before the Council, rather than a mere fractional portion of our intended practice, leaving it, however, to that learned body to deal with the rules generally in whatever way they might, in their wisdom, think

proper; and accordingly the Privy Council, considering it unnecessary that their approbation should be required in respect to matters which fell within our own authority, under the 9th section of the Act, did, as I understand, strike out all those rules which appeared to them to partake of that character. But they, no doubt, also varied other rules, which we submitted to them, in many important particulars. I mention these matters chiefly to account for our having introduced into a separate code, and upon our own authority alone, certain of those forms and directions which, if the matter were unexplained, it might be supposed the Privy Council had dissented from; but that is not the case. We are quite aware that, wherever the Privy Council varied or expunged any of the rules submitted to them, except upon the grounds that I have mentioned, we had no authority to retain those rules so disapproved of, nor have we any disposition to assume the authority of running counter in any respect to the judgment of that learned body. With regard to the rules themselves, it would be taking up time unnecessarily if I were to attempt here to state them either in detail or otherwise; all persons who are desirous of making themselves acquainted with the subject, would do well to study attentively both sets of rules and forms—I mean those approved of by the Privy Council and those emanating from ourselves, and propounded upon our own authority. We have endeavoured to make all those rules as plain and as clear as we could, and those that have been framed under the 10th section of the act having in their present state, received the sanction of such distinguished personages as presided at the Council Board, I should hope they will not be found very difficult to be understood. But, considering the novelty of the subject, we think it right to invite those who intend practising in the Court to communicate freely with us, in case of any difficulty arising in their minds in regard to any of those rules. Such communication, however, must be made in public, and at the sitting of the Court, and not in any other manner, or at any other time. Having said this much upon the subject of our general rules and orders, I would next observe that although we (the Commissioners) are now perfectly ready and most anxious on our parts, to proceed with the business of our Court, yet I do not well see, how we can advance a step, until some fit and proper place shall be provided and prepared for us in which to hold our sittings, and more especially a place in which the office business of our Court can be carried on, and where the pleadings and documents connected with the business of our Court can be deposited, and safely kept, and filed, and registered. It is not to be expected that our secretary can keep all those pleadings and documents

about his person, or even in his own domicile; and I would not think it right that valuable papers and muniments of title and deeds should be lodged with our officer, until he shall have a safe and convenient place in which to deposit them. I trust, however, that ere long we shall be provided with all necessary accommodation for the purpose of carrying on the business of our Court; indeed I have every reason to believe that his Excellency the Lord Lieutenant, and the government, are most anxious to second our efforts to obtain that accommodation with as little delay as possible. But until this accommodation shall be obtained, I greatly fear that the business of the court must be very much impeded. I do not feel that it is within my province to touch upon the general policy of this measure, except to say, that nothing shall be wanting on the part of the Commissioners to carry out, as far as in them lies, the great object which the Legislature had in view in enacting this law, and we hope and trust that public expectation may not be disappointed. Upon the subject of sales before us, I would wish to call particular attention to our sixteenth rule; and chiefly because that rule establishes a practice essentially variant from the practice of every other Court of Equity both in England and Ireland. By that rule we have concluded ourselves from opening any sale by reason of an advance in the bidding merely. Many persons, I dare say, will disapprove of the principle of that rule, but we do not expect to please all parties, we can only say that the principle of that rule engaged our most earnest and anxious consideration; and, upon the deepest reflection, we arrive at the conclusion that the practice of opening sales from time to time, by reason of an advance in the biddings, was calculated to damp very much the ardour of *bonâ fide* purchasers, to delay the final completion of the sale and winding up of the cause; and, in fact, more or less to damage all parties interested in the case. It is essential, however, that this most important alteration in the mode of procedure, in respect to the sales of property, should be very generally known, and we trust it will obtain universal publicity; on the other hand, to guard against a collusive or fraudulent attempt to have property knocked down at a gross undervalue, we have reserved to ourselves a power by the fifteenth rule, to adjourn the sale of any lot if, in our opinion, the highest price offered is clearly inadequate. This is a power which, I apprehend, we shall very seldom have occasion to exercise, and, most likely, never shall exercise, except where we have reason to suspect something in the nature of fraud or contrivance in the case. It is right, however, that we should have such a power, to be used or not as the circumstances of the case may appear to render necessary. Indeed I have heard it said by some, and I have read something of the same kind also, that unless we are prepared to sacrifice all property brought into our Court we shall not be able to effect sales. I don't know whether it is expected that I should enter at any length into that subject. But I presume it is not, and, for myself, I must confess I have no disposition to prophecy one way or other on that point. All I shall therefore say is, that I see no well-founded reason why persons desirous of investing capital in a profitable

manner should refrain from doing so in the purchase of land in Ireland, and especially in the purchase of land to be sold under our Court; for, first, they will have a clear and indefeasible title not depending upon the preservation of any ancient deeds or charters, or on the accuracy of searches, or on the opinions of counsel; but deriving its validity from the statute under which we are acting; and secondly, they will have a clear possession, free from all claims of tenancy, save those subject to which the property is expressly sold; but chiefly the purchaser under our Court will obtain the benefit of his contract at once, and not be delayed, as is sometimes the case, for years, not knowing, up almost to the latest moment, whether his purchase is to be on or off. As to the objection I have here made against purchasing in Ireland, arising out of the present state of this country, I shall only observe that if we reflect upon the calamitous events of the last four years, it is not surprising that the state of society in Ireland should be, to a certain extent at least, disorganised. We have had by the awful visitation of Providence, I may say four successive years of partial famine, accompanied with pestilence and wretchedness unparalleled; and it has been our fate during the same time, to have had a code of laws to work out which, even in better times, could not fail in their commencement to press severely upon many—I mean the poor-law acts. But this state of things is not, I trust, to last for ever; and I confess I have strong hope and expectation that, ere long, we shall see Ireland emerging from her present condition, and rising into a more elevated and healthy state, both morally and physically, than we have ever yet known her to enjoy. With regard to the frauds attempted by tenants on their landlords in carrying away their crops and stock to avoid payment of their lawful debts and engagements, I have every confidence that such a state of things will not have continuance; and that contracts between landlords and tenants will be observed with the same fidelity in Ireland as elsewhere. But however fraught with matter for observation the present state of Ireland may be, it is not for me to enter upon that wide field; there are far more competent persons engaged in considering what is best to be done for the improvement and amelioration of our country, and I shall not, therefore, be tempted to pursue this subject.

SECOND SITTING.—October 25, 1849.

THE Right Hon. BARON RICHARDS, Chief Commissioner, said:—That a doubt had been suggested to the Court on the construction of the 5th general order, requiring the petitioner to be accompanied by an affidavit verifying the material facts therein; and the question is, whether it is necessary to re-state in the affidavit the facts and other matter in the petition. We consider it to be a sufficient compliance, if the petitioner state that he has read the facts, &c., and that they are true. It might so happen that he might be scrupulous of swearing to his belief of the truth of every fact; it is sufficient if he does so, as to the material facts. In a case where the incumbency originally affected the whole property, and the latter has become divided, it will not be, in the first instance, necessary, perhaps, to have separate peti-

tions; one will, at first, be sufficient, and further directions, if necessary, can be given on the granting the conditional order for a sale. Objections have been made to our scale of fees. We do not profess to include therein every item that may be charged; we have framed them as a guide to our officer in his taxation of costs. We wish to make the fees remunerative in proportion to the trouble and expense incurred, and shall be glad to have, on this subject, any suggestions emanating from the respectable body of solicitors. When the proceedings here are after Decree we do not think that it is necessary that the Decree annexed to the petition should be attested by the officer; an attested copy is but a compared copy, and if the affidavit state that it is in every respect similar, the actual signature of the officer will be unnecessary. As to any difficulties that may arise, we shall be ever accessible and willing to answer any questions on the rules and directions, if arising out of or relating to a petition before us. With regard to the construction of the Act parties must rely upon themselves, or consult counsel. If any such questions should arise in a case before us we will then answer them as best we can. The course of proceeding we intend to adopt will necessarily cause much of our business to be done in the office. When the petition is lodged, the Commissioners, or one of them, will read and consider it in his chamber, and then make such order thereon as he may think proper, either order a sale, or direct notices to be served, and on whom, or require such further information as he may deem necessary.

LIST OF OFFICERS APPOINTED BY THE COMMISSIONERS.

Stephen W. Flanagan, Esq., Barrister-at-Law, Secretary.
 Henry Carey, Esq., Barrister-at-Law, Clerk and Examiner.
 Robert King Piers, Esq., Solicitor, Notice Clerk.
 Richard Augustine Fitzgerald, Esq., Solicitor, General Clerk.
 Andrew Armstrong, Esq., Solicitor, Clerk and Accountant.

CAP. LXXVII.

AN ACT FURTHER TO FACILITATE THE SALE AND TRANSFER OF INCUMBERED ESTATES IN IRELAND.

28th July, 1849.

WHEREAS it is expedient that further facilities should be given for the sale and transfer of Incumbered Estates in Ireland. Be it enacted, therefore, by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for Her Majesty, by warrant or warrants under the Royal Sign Manual, to appoint any number of persons not exceeding three to be Commissioners under this act during Her Majesty's pleasure, and upon every vacancy in the office of any such Commissioner in like manner to appoint some other person to such office, and the said persons so to be from time to time appointed shall be Commissioners for the execution of this act, and shall be styled "The Commissioners for sale of Incumbered Estates in Ireland."

2. And be it enacted, that the Commissioners shall cause to be made a Seal for their Commission, and shall cause to

be sealed therewith all orders, conveyances, and other instruments made by or proceeding from the Commissioners in pursuance of this act; and all such orders, conveyances, and other instruments, or copies thereof, purporting to be sealed with the seal of the Commissioners, shall be received in evidence without any further proof thereof.

3. And be it enacted, that all acts, matters, and things which the Commissioners are by any of the provisions of this act required or authorized to do or execute shall and may be done and executed by any two of such Commissioners.

4. And be it enacted, that it shall be lawful for the Commissioners, from time to time, (with the consent in every case of the Commissioners of Her Majesty's treasury,) to appoint a secretary, and such clerks, messengers, and officers as they shall deem necessary for the purposes of this act, and to remove such secretary, clerks, messengers, and officers, or any of them.

5. And be it enacted, that no Commissioner, secretary, or other officer to be appointed as aforesaid shall hold his office for a longer period than five years next after the day of the passing of this act, and thenceforth until the end of the then next session of Parliament.

6. And be it enacted, that it shall be lawful for the Commissioners of Her Majesty's Treasury to direct a salary not exceeding three thousand pounds by the year to be paid to one of the said Commissioners, and a salary not exceeding two thousand pounds by the year to each of the other Commissioners for the time being appointed under this act; and the salaries of the Secretary, Clerks, Messengers, and other Officers to be appointed under this act shall be from time to time regulated by the Commissioners of Her Majesty's Treasury; and the salaries of such Commissioners, Secretary, Clerks, Messengers, and Officers as aforesaid, and all other incidental expenses of carrying this act into execution not herein otherwise provided for, shall be paid out of such monies as shall be provided by Parliament.

7. And be it enacted, that no Commissioner appointed under this act shall during his continuance in such office be capable of being elected or of sitting as a member of the House of Commons.

8. And be it enacted, that every Commissioner appointed under this act shall, before he enters upon the execution of his office, take the following oath before one of the Justices of the Court of Queen's Bench or Common Pleas, or one of the Barons of the Court of Exchequer, in Ireland; (that is to say,)

"I A. B. do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and judgment, fulfil all the powers and duties of a Commissioner under an act passed in the twelfth year of the reign of Queen Victoria, intituled [*here set forth the title of this act*]."

And the appointment of every such Commissioner, with the time when, and the name of the Justice or Baron before whom he shall have taken the said oath, shall be forthwith published in the *Dublin Gazette*.

9. And be it enacted, that the Commissioners shall frame, and cause to be printed, and circulated or promulgated, as they shall see occasion, forms of application and directions indicating the particulars of the information to be furnished to the Commissioners, on application to them under this act, with reference to title, incumbrances, and the circumstances of the land, and such other information as in the judgment of the Commissioners may assist them in forming an opinion on such application, and also such other forms and directions as the Commissioners may deem requisite or expedient for facilitating proceedings under this act.

10. And be it enacted, that the Commissioners shall from time to time make such general rules as they may think best adapted for regulating the course of procedure under this act, and for securing the prompt and due distribution and payment of the monies received upon sales under this act amongst or for the benefit of the persons entitled thereto, and for the protection in respect of such monies of the interests of persons under disability and of future interests, and generally for securing the due execution of the powers vested in the Commissioners under this act, and giving effect to the provisions and objects of this act; but no fees

or sums shall, under any such general rule or otherwise, be payable to any officers or persons appointed under this act, upon or in respect of any proceedings under this act, save, in respect of any copy or extract of or from any order, document, or proceeding actually required and taken by any party, such sum, not exceeding three halfpence for every ninety words, as shall be paid for the making of such copy or extract, and the Commissioners shall authorize to be charged to such party for the same: provided that every such general rule shall be laid before Her Majesty's Privy Council of *Ireland*, and it shall be lawful for such Privy Council, by order signed by six of the said Privy Council, to confirm or disallow any such rule, or to alter or amend, and confirm with alteration or amendment, any such rule, or to remit any such rule to the Commissioners for further consideration; and every such general rule (when the same shall have been confirmed by order of the said Privy Council) shall be enrolled in the High Court of Chancery in *Ireland*, and when so enrolled shall be binding on the Commissioners in the exercise of their powers, and shall be of the same force and effect as if the same had been enacted by authority of Parliament: provided always, that any rules so confirmed and enrolled as aforesaid may from time to time be rescinded, amended, or altered as occasion may require by other rules made by the Commissioners and confirmed and enrolled in like manner.

11. And be it enacted, that all such general rules as shall be made and confirmed as aforesaid shall be laid before both Houses of Parliament within one calendar month from the confirmation thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one calendar month from the commencement of the then next session of Parliament.

12. And be it enacted, that it shall be lawful for the Commissioners by summons under their seal to require the attendance before them, at a time and place to be mentioned in such summons, of all such persons as they shall think fit to examine in relation to any question or matter depending before them, and to require all such persons to produce before them all deeds, books, papers, documents, and writings relating to such question or matter, and to examine upon oath, or, in the case of persons allowed to make affirmation or declaration in lieu of an oath, upon affirmation or declaration (as the case may require), all persons who shall attend under such summons, and all persons who shall voluntarily attend before them as witnesses; and it shall be lawful for any of the Commissioners to administer such oath, affirmation, or declaration; and every person required by such summons to attend before the Commissioners, who, without reasonable cause, to be allowed by the Commissioners, shall fail to appear according to the tenor of such summons, or shall refuse to be sworn or to make affirmation or declaration (as the case may be), or shall not make answer to all such questions as shall be lawfully put to him by the Commissioners, or shall refuse or fail to produce before the Commissioners any such deed, book, paper, document, or writing, being in or under his custody, possession or power, as shall be lawfully required to be produced by him before the Commissioners, shall for such default of appearance, refusal to be sworn or to make affirmation or declaration, or for not answering any such question as aforesaid, or not producing such deed, book, paper, document, or writing, incur and be liable to all such penalties, prosecutions, actions, and suits as a person might incur or be liable to for failing to appear, or refusing to be sworn or to give evidence in any suit or matter depending in the High Court of Chancery in *Ireland*, and the Commissioners shall have the like powers, jurisdiction, and authority, for enforcing the attendance of persons summoned as aforesaid for punishing persons failing to appear, or refusing to be sworn or to make affirmation or declaration or to give evidence, or guilty of contempt, and generally for enforcing all orders made by the Commissioners under any of the powers or authorities vested in them under this act, and otherwise in relation to the matters to be inquired into and done by them under this act, as are by law vested in the High Court of Chancery in *Ireland* for such purposes in relation to any suit or matter depending in such court.

13. Provided always, and be it enacted, that the Commissioners may, where they think fit, receive in evidence affidavits; and such affidavits may be made before any person empowered to take affidavits which may be received in evidence in the Court of Chancery in *Ireland*, or, where they think fit, the Commissioners may by order under their seal appoint and authorize any person to take affidavits, or to examine any witness or witnesses who shall attend before such person to be examined, in *Ireland* or elsewhere, in relation to any application to or matter pending before the Commissioners, and to administer oaths, affirmations, or declarations for the purposes of such examination.

14. And be it enacted, that every order made by the Commissioners under this act, a copy whereof shall be certified under their seal to the High Court of Chancery in *England*, may be enrolled in like manner and enforced by the like process as an order for payment or for accounting for money made by the High Court of Chancery in *Ireland*, a copy whereof is exemplified and certified to the said Court of Chancery in *England* under the great seal of *Ireland*, may be enrolled and enforced under an act passed in the forty-first year of King George the Third, intitled *An Act for the more speedy and effectual Recovery of Debts due to His Majesty, his heirs and successors, in right of the crown of the United Kingdom of Great Britain and Ireland, and for the better administration of justice within the same*.

15. And be it enacted, that the Commissioners shall be a Court of Record, and shall have all the powers, authority, and jurisdiction of a Court of Equity in *Ireland* for the investigation of title, and for ascertaining and allowing incumbrances and charges and the amounts due thereon, and settling the priority of such charges and incumbrances respectively, and the rights of owners and others, and generally for ascertaining, declaring, and allowing the rights of persons in any land or lease in respect of which application may be made under this act, or in the money to arise from sales under this act, and shall have the like authority and jurisdiction for enforcing, rescinding, or varying any contract for sale made under this act, and in other matters incident to or consequent on a sale under this act, as are vested in a Court of Equity in relation to a sale under the direction of such court, but their procedure shall be according to such general rules as aforesaid, or, where the general rules shall be inapplicable, at the discretion of the Commissioners; and the Commissioners shall have power, in relation to any matter or question before them, to send cases for the opinion of a Court of Law, and to direct issues of fact to be tried by a jury; and, subject to any such general rules as aforesaid, the Commissioners may refer to any one of such Commissioners any such inquiries and matters as they may think fit, and such one Commissioner shall, for all the purposes of this act, have in relation to all such inquiries and matters as shall be so referred to him the like powers, authorities, and jurisdiction as the Commissioners or any two of them would have under this act.

16. And be it enacted, that where land in *Ireland*, or a lease in perpetuity, or any lease for a term whereof not less than sixty years shall be unexpired at the time of such application as hereinafter mentioned, or any church or college lease, of land in *Ireland*, shall be subject to any incumbrance, it shall be lawful for the owner of such land or lease, within three years from the passing of this act, to apply to the Commissioners for a sale of such land or lease under the provisions of this act.

17. And be it enacted, that where any land in *Ireland*, or any such lease as aforesaid of land in *Ireland*, shall be subject to any incumbrance, it shall be lawful for any incumbrancer on such land or lease, within three years from the passing of this act, to apply to the Commissioners for a sale under the provisions of this act of the whole or part (as in the judgment of the Commissioners may appear necessary) of such land or lease, for the purpose of discharging the incumbrances thereon.

18. And be it enacted, that where application for a sale of any land or lease has been dismissed with costs by a competent tribunal, no application by the same party for a sale of such land or lease, or any part thereof, shall be entertained by the Commissioners, unless it is shown that such costs have been paid.

19. Provided always, and be it enacted, that for the purpose of authorising an application for a sale under this act the land shall not be deemed subject to an incumbrance where the same shall not effect the inheritance, unless such incumbrance shall affect a term of not less than fifty years absolute unexpired, or a greater estate in such land, and shall have been created by the owner of an estate of inheritance, or by a person who, but for an act which is void against or postponed at law or in equity to such incumbrance, would be the owner of an estate of inheritance, but an incumbrance charged under a power created by the owner of an estate of inheritance shall be deemed to have been created by such owner; and such lease in perpetuity or other lease as aforesaid shall not be deemed subject to an incumbrance where the same shall affect a derivative estate or interest only, or less than the whole estate created or agreed to be created by such lease in perpetuity or other lease as aforesaid, unless such incumbrance shall have been created by the owner or person entitled to the whole estate created or agreed to be created by such lease in perpetuity or other lease as aforesaid, or by a person who, but for an act which is void against or postponed at law or in equity to such incumbrance, would be such owner or so entitled, but any incumbrance charged under a power created by the owner or person entitled to such whole estate as aforesaid shall be deemed to have been created by such owner or person so entitled.

20. And be it enacted, that when any incumbrance shall be subject to any limitations of estate or interest, or shall be held upon any trust, the Commissioners may proceed and act upon an application or consent under this act made or given in respect of such incumbrance by the first person entitled to the income of such incumbrance, or by any trustee thereof, or other person whose estate or interest in the incumbrance appears to the Commissioners sufficient to enable him properly to apply or consent in respect of the interests of the parties interested in the incumbrance.

21. And be it enacted, that if upon any application for a sale under this act, or upon any information or evidence which may be required by and produced to the Commissioners in relation to the matter of such application, it shall appear to the Commissioners that a sale of the land or lease to which the application may relate, or any part thereof, may be found to be expedient, they shall direct notices to be given to such persons and in such manner as they think fit, and shall, where any parties interested in the land or lease apply to them for that purpose, hear such parties, by themselves, their counsel or agents, and shall, so far only as may be necessary to enable them to determine whether under all the circumstances it is expedient that a sale of all or any part of the land or lease should be made, investigate the title and the incumbrances affecting the land or lease, and the state and circumstances of the land, or of the land comprised in the lease, and, if it shall in their opinion be expedient that such a sale should be made, may, at their discretion, make an order for the sale of all or any part of such land or lease.

22. Provided always, and be it enacted, that the Commissioners shall not make an order for sale of any land or lease, or any part thereof, upon application by an incumbrancer on such land or lease, in case it be shown to the satisfaction of the Commissioners, by the owner of such land or lease, that no part of such land or lease is subject to any receiver or in the possession of any incumbrancer, and that the amount of the yearly interest on the incumbrances and other yearly payments (if any) in respect of charges payable out of the income of such land or lease, and the other lands or leases (if any) subject to the incumbrance of such incumbrancer, do not exceed one half of the net yearly income (after the payment of all tithe rent-charge, such part of the county cess and poor's rate as is payable by the owner, and all crows, quit, and head rent,) of such land or lease, or of all the lands or leases so subject: provided always, that the decision of the said Commissioners thereupon shall in all cases be final and conclusive to all intents and purposes whatsoever.

23. And be it enacted, that where a sale shall be made under this act the Commissioners shall, where and so far as

they may deem necessary for the purposes of such sale, ascertain the tenancies of the occupying tenants, and of any leasees or under-leasees whose tenancies, leases, or under-leases affect the land or lease, or part thereof, to be sold, and may give such notices and make or cause to be made such inquiries as they shall think necessary for ascertaining and securing the rights of such tenants, leasees, or under-leasees as aforesaid; and all occupying tenants, and all persons being or claiming to be leasees or under leasees, as aforesaid, shall, at such times and places as the Commissioners may by their notices require, produce all leases, under-leases, and agreements in writing under which such tenants or persons occupy or claim to hold, if such leases, under-leases, or agreements, or counter parts thereof, be in their possession or power, and where they occupy or claim to hold under leases, under-leases, or agreements in writing not in their possession or power, or under parol agreements or lettings, they shall deliver, at such times and places as aforesaid, particulars of the terms and conditions upon and subject to which they occupy or claim to hold; and the sale shall be made subject to the tenancies, leases, or under-leases, ascertained as aforesaid, and subject to which the owner or incumbrancer, applying for a sale under this act shall be owner or incumbrancer, and such other of the tenancies, leases, and under-leases, ascertained as aforesaid, as shall appear to the Commissioners to have been granted *bonâ fide* by the owner or person in possession or in receipt of the rents and profits, and subject to which it shall appear to the Commissioners the sale should be made, save such (if any) of such respective tenancies, leases, and under-leases as, with consent as herein-after mentioned, shall be included in such sale, and, where the Commissioners think fit, be made subject to any leases, under-leases, or tenancies, according to any general description or subject to any condition concerning any leases, under leases, or tenancies the nature of which shall not have been ascertained or shall be disputed; and when the Commissioners shall think fit, such sale may be made subject to any annual charge affecting the land or lease, or part thereof, sold, or to any such apportioned part of such annual charge as the Commissioners may think fit should remain charged thereon; and where such land or lease, or part thereof, is subject to any incumbrance under the terms of which the incumbrancer cannot be required to accept payment of the principal money before the expiration of a term of years unexpired, such sale may, if the Commissioners think fit, be made subject to such incumbrance.

24. And be it enacted, that where the Commissioners make an order for sale, the land or lease, or part thereof, to which such order shall relate shall be sold, by or under the control and direction of the Commissioners, by public sale or private contract, together or in lots or parcels at such time and place and generally in such manner as the Commissioners think fit; and the conveyance or assignment of the land or lease, or part thereof, shall be made by the Commissioners under their seal, and shall be signed by two of the Commissioners, and the execution by any other party of such conveyance or assignment shall be unnecessary; and such conveyance or assignment shall express or refer to the tenancies, leases, and under-leases (if any), and charge (if any), subject to which the sale is made, and may be in the form contained in the schedule to this act, or to the like effect, with such limitation of uses and other additions or variations as, with the approval of the Commissioners, the purchaser may direct.

25. And it be enacted, that the purchase money in every case shall be paid into the bank of *Ireland*, to an account to be there opened in the name of the Commissioners and to the credit in each case of the estate sold, or as the Commissioners by general rule or special order shall direct; and on the notification by the said bank to the Commissioners of the receipt of the money, a certificate by the Commissioners of such payment shall be endorsed on or written at the foot of the conveyance or assignment; and on such payment into the bank the purchaser shall be discharged from all liability in respect of the application of the money so paid, and such certificate of the Commissioners shall be evidence of such payment.

26. Provided always, and be it enacted, that it shall be lawful for any incumbrancer on or person otherwise interested in any land or lease, or part thereof, (other than the incumbrancer or owner upon whose application the sale has been ordered,) to bid at any public sale, and to become the purchaser at any public sale or by private contract, in like manner as any person not interested therein might bid and become the purchaser; and by leave of the Commissioners, it shall be lawful for the incumbrancer, or owner on whose application the sale has been ordered to bid and become the purchaser; and where an incumbrancer on any land or lease, or part thereof, shall be the purchaser of such land or lease, or part thereof, the Commissioners may, where they think fit, authorize such purchaser to retain out of the purchase money the amount which might have been ordered to be paid thereout in respect of such incumbrance in case the whole purchase money had been paid into the bank of *Ireland*, under this act, or such sum on account of such amount as the Commissioners may think fit, and to pay the residue only of the purchase money into the said bank; and where at the time of authorizing such retainer, as aforesaid the Commissioners shall not finally have ascertained and determined the priority and rights of such purchaser in respect of his incumbrance, and the amount which he would be entitled to be paid in respect thereof out of the purchase money, such retainer shall be without prejudice to the power of the Commissioners to require such purchaser to pay into the said bank the whole or any part of the amount so retained which ought to be so paid by him; and the Commissioners shall withhold their certificate of payment herein-before mentioned until they shall be satisfied that the full purchase money, less the amount which such purchaser would be entitled to be paid in respect of his incumbrance, has been paid into the said bank.

27. And be it enacted, that every such conveyance, executed as aforesaid by the Commissioners upon the sale of land, shall be effectual to pass the fee simple and inheritance of the land thereby expressed to be conveyed, subject to such tenancies, leases, and under-leases as shall be expressed or referred to therein as aforesaid, but, save as aforesaid and as herein-after provided, discharged from all former and other estates, rights, titles, charges, and incumbrances, whatsoever of Her Majesty, her heirs and successors, and of all other persons whomsoever; and every such conveyance or assignment, executed by the Commissioners upon the sale of a lease in perpetuity or other lease, shall be effectual to pass the estate created or agreed to be created by such lease and then remaining unexpired, subject to the rent and covenants annexed to the reversion expectant on the determination of such lease, and to such tenancies, leases and under-leases as shall be expressed or referred to in such conveyance or assignment, but, save as aforesaid and as herein-after provided, discharged from all rights, titles, charges, and incumbrances, whatsoever affecting the leasehold estate or interest: provided that where any land or lease, or part thereof, shall be sold and conveyed or assigned subject to any annual charge or apportioned part thereof, such annual charge or such apportioned part thereof only (as the case may be) shall remain and be charged on and payable out of such land or lease, or part thereof, as in the conveyance or assignment shall be expressed.

28. Provided always, and be it enacted, that any such conveyance or assignment as aforesaid shall not prejudice or affect any right of common, or any right of way or other easement, or any rent charge in lieu of tithes, crown rent, or quit rent, charged upon or issuing out of any land, or any charge made by virtue of an act passed in the sixth year of Her Majesty intitled *An Act to promote the Drainage of lands and improvement of Navigation and water power in connexion with such Drainage*, in Ireland, and the acts amending the same, or by virtue of an act passed in the tenth year of Her Majesty, intitled *An Act to facilitate the improvement of landed property* in Ireland, save where the Commissioners shall think fit to redeem the crown rents or quit rents, or to pay off or redeem the charges under the said acts or either of them under the power herein-after contained, and shall express in such conveyance or assignment that the land conveyed or assigned thereby is so conveyed or assigned discharged of all

crown rents or quit rents, or charges under the said acts or either of them, as the case may be, and in such case such land shall be so discharged accordingly.

29. And it be enacted, that the Commissioners shall have power to order the delivery to the purchaser, or as he shall direct, of all leases or counterparts of leases and agreements, and other evidences of the tenancies subject to which the sale shall be made, affecting the land or lease, or part thereof, sold, and shall, on the application of any purchaser, issue an order to the sheriff, to put such purchaser in possession of all lands not in the occupation of lessees, under-lessees, or tenants subject to whose leases, under-leases, or tenancies the sale shall have been made, and who shall have attorned to such purchaser within a time to be limited in such order, and such order shall be executed by the sheriff in like manner as a writ for the delivery of possession.

30. And it be enacted, that the Commissioners shall, out of the purchase money to be received on the sale of any land or lease, or part thereof, under this act, allow and pay such costs of and consequential on the application for the order for the sale as they shall think fit, and the expenses of and incidental to the sale; and the surplus of such purchase money, after payment of such costs and expenses, shall, under the order of the Commissioners, be applied in or towards payment or satisfaction of the incumbrances or charges which affected such land or lease, or part thereof, according to their priorities, and shall, subject as aforesaid, be paid to the owner previously to the sale of such land or lease, where such owner was absolutely entitled thereto, or, where not so entitled, be laid out in the purchase of land which shall be limited and settled to the same uses, upon the same trusts, for the same purposes, and in the same manner as the land or lease, or part thereof, sold, stood, settled or limited to, or such of them as shall be then subsisting or capable of taking effect; and until such money can be so laid out it may, under such order as aforesaid, be transferred or paid over to trustees to be appointed or approved by the Commissioners, for the purpose of being so laid out as aforesaid, with such power for the investment thereof in government stocks, funds, or securities in the meantime, and such directions for the payment of the income of such investment in the manner in which the rents of the land to be purchased would be applicable, as the Commissioners shall think fit.

31. And it be enacted, that any money so paid into the bank as aforesaid may by order of the Commissioners be invested in their name in the purchase of any stocks, funds, or annuities transferable at the bank of *Ireland*; and, until the same shall be sold by order of the Commissioners for the purposes of this act, the dividends thereof shall from time to time be applied, under the order of the Commissioners, in like manner as the rents of the land or lease, or part thereof, from the sale whereof the money invested in such stocks, funds, or annuities has arisen would have been applicable.

32. And be it enacted, that whenever the Commissioners shall appoint or shall direct the appointment of Trustees for any of the purposes of this act it shall be lawful for the Commissioners to make or to direct to be made such provision as they shall think fit for the appointment of new Trustees, on any event to be determined by the Commissioners.

33. Provided always, and be it enacted, that no payment under this act towards discharge of what shall be due on any incumbrance or charge, not being payment in full, shall prejudice or affect any right or remedy of the incumbrancer or the person entitled to the charge in respect of the balance, otherwise than as against the land or lease, or part thereof, sold under this act; and no payment under this act of or in respect of any incumbrance or charge shall impair any right or equity of any persons out of whose estate such payment shall be made to be reimbursed or indemnified by any person or out of any other land or estate, except so far as the Commissioners under any special circumstances shall order.

34. And be it enacted, that it shall be lawful for the Commissioners to sell any land or lease, or part thereof, discharged from any crown rent or quit rent which they may be enabled and may, with the consent of the owner, think fit to purchase, or from any charge made by virtue of the

said acts of the sixth year and tenth year of Her Majesty, or either of them, which they may, with such consent, think fit to pay off or redeem; and in any such case the Commissioners shall, out of the money arising from the sale, and in preference to all other payments thereout, pay the consideration for the purchase of such crown rent or quit rent, or such sum as may be necessary for paying off or redeeming such charge; and it shall be lawful for the Commissioners, where they think fit, to pay to any person entitled to any annual or other charge, not being an incumbrance according to the definition of this act, who may consent to accept the same, a gross sum in discharge or by way of redemption thereof or of a part thereof, and where a part only of any land or lease subject to any incumbrance or charge is sold, to charge the part not sold with such incumbrance or charge, or an apportioned part thereof, in exoneration of the money arising from the sale, and to enable or authorize persons to release the money arising from the part so sold from any incumbrance or charge, or to relinquish their claim on such money in respect thereof, without impairing or affecting such incumbrance or charge as to the remaining part of the land or lease originally charged; and the Commissioners, where they think fit, may invest or provide for the investment of money to meet any annual or periodical charge, or any other charge, incumbrance, or interest, where, by reason of such charge, incumbrance, or interest being contingent or otherwise, it shall appear to the Commissioners proper or expedient so to do, and otherwise may make such orders and directions for applying the money arising from any sale in such manner as will secure the convenient application thereof for the benefit and according to the rights of the parties interested in the land or lease, or part thereof, from the sale of which the same shall have arisen.

35. And be it enacted, that where any money arising from a sale under this act is not immediately distributable, or the parties entitled thereto cannot be ascertained, or where from any other cause the Commissioners think it expedient for the protection of the rights and interests therein the Commissioners may order such money, or any stocks, funds, or securities in which the same may have been invested under this act, to be transferred to the account of the Accountant-General of the High Court of Chancery or of the Court of Exchequer in *Ireland*, or (where the case may require) of the High Court of Chancery in *England*, in the matter of the parties interested in the same, to be described as the Commissioners shall think fit and direct, in trust to attend the orders of such respective court; and the Commissioners may by their order declare the trusts affecting such money, stocks, funds, or securities, so far as they have ascertained the same, or state (for the information of the respective court) the facts or matters found by them in relation to the rights and interests therein; and the High Court of Chancery, Lord Chancellor, and Master of the Rolls, in *England* and *Ireland* respectively, and the Court of Exchequer in *Ireland* may make such orders and give such directions in relation to any such monies, stocks, funds, or securities as shall be so transferred to the account of the Accountant-General of such respective court as such court or judge respectively might make or give in relation to any trust monies, stocks, or securities paid in, transferred or deposited under the act passed in the eleventh year of Her Majesty "for better securing trust funds, and for the relief of trustees," or the act of the last session of Parliament for extending to *Ireland* the said act of the eleventh year of Her Majesty respectively; and no money transferred into the name of the Accountant-General of the Court of Chancery in *Ireland*, or paid out under this provision under any order of the Lord Chancellor or Master of the Rolls, shall be liable to *Usher's* poundage.

36. And be it enacted, that where there shall be separate applications to the Commissioners for sales under this act of any land and of any lease in the same land, or of two or more leases in the same land, or there shall be such applications for sales of different undivided shares of any land or lease, it shall be lawful for the Commissioners, where they shall see fit so to do, to include, with the consent of the persons by whom such respective applications may be made or prosecuted, and of any other persons whose consent the

Commissioners may, under the circumstances, think fit to require, in the same sale, upon such terms as they think fit, such land and lease, or such leases, or such several undivided shares as aforesaid, and where there shall be separate applications for sales under this act of any land and of any lease in other land, or of different lands or leases in different lands, it shall be lawful for the Commissioners, where, from the lands being intermixed, or from other circumstances, it shall appear to them convenient so to do, to include, with such consent as aforesaid, such land and lease, or lands or leases, in the same sale, upon such terms as they may think fit; and where any land or lease, or part thereof, subject to any incumbrance, is proposed or ordered to be sold under this act, it shall be lawful for the Commissioners, upon the application of the owner of any lease or under lease, or estate in reversion, or other estate or interest whatsoever in the same land, (and although such lease, under lease, estate in reversion, or other estate or interest be not subject to any incumbrance, or would not, if subject to any incumbrance, be subject to be sold under an order of the Commissioners under the provisions herein-before contained) or upon the application of any incumbrancer on any such lease, under lease, estate, or interest, to include the same, upon such terms as they may see fit, in the sale of the land or lease, or part thereof, so proposed or ordered to be sold as aforesaid; and all the provisions of this act applicable to any land or lease subject to any incumbrance, and ordered to be sold under this act, and to any incumbrance or charge upon such land or lease, and to the purchase money arising from the sale thereof, and to the conveyance or assignment thereof, shall, so far as circumstances admit, extend and be applicable to every such lease, under lease, estate in reversion, or other estate or interest to be so included in the sale; and in every such case as aforesaid the Commissioners shall apportion the purchase money and expenses as they see fit.

37. And be it enacted, that if any land or lease to be sold under this act shall be subject to a lease or under lease for years or lives comprising other land at an entire rent, it shall be lawful for the Commissioners to apportion the rent between the land to be sold and the remainder of the land subject to such rent; and where it is intended to sell under this act a part only of any lease in perpetuity or other lease, it shall be lawful for the Commissioners, where they shall think fit, and (having regard to the rights and interest of the owner of the reversion) it shall appear to them just so to do, to apportion the rent reserved by such lease between the land to be sold and the remainder of the land; and the Commissioners shall direct notices of any such intended apportionment as aforesaid to be given to such persons and in such manner as they shall think fit, and shall hear such parties as shall apply to them in relation thereto; and after such apportionment, and after the sale shall be completed, the owners of the reversion in the respective lands shall have the like remedies for the apportioned rents against the lands out of which the same shall be payable, and the owners and occupiers thereof respectively, as were subsisting for the entire rent before such apportionment; and all the covenants, conditions, and agreements of every lease or under-lease, except as to the amount of rent to be paid, shall, as regards the apportioned parts, remain in force in the same manner as they would have done in case no such apportionment had taken place.

38. And be it enacted, that where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding under this Act, shall be a minor, idiot, lunatic, or married woman, the guardian, committee of the estate, and husband respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such persons respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this Act; but a married woman entitled for her separate use (with or without power of anticipation) shall, for the purposes of this Act, be deemed a feme sole: provided always, that where there shall be no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person the committee of

whose estate if he were idiot or lunatic would be authorized to act for and represent such person under this Act shall be of unsound mind or incapable of managing his affairs, but shall not have been found idiot or lunatic under an inquisition, it shall be lawful for the Commissioners to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian; and where the Commissioners see fit they may appoint a person to act as the next friend of a married woman for the purpose of any proceeding under this Act, and from time to time remove or change such next friend.

39. And be it enacted, that proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such case of death or transmission or change of interest it shall be lawful for the Commissioners, where they see fit, to require notices to be given to persons becoming interested, or to make any order for discontinuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to them may appear just.

40. And be it enacted, that in every proceeding under this Act the Commissioners shall have full power and discretion as to the giving or withholding costs and expenses, and as to the persons by whom and the funds out of which the same shall in the first instance or ultimately be paid, repaid, and borne, and shall and may apportion the same amongst such parties, and in respect of interest, rents, or income, and principal or corpus, as they shall see fit.

41. And be it enacted, that application may be made to the Commissioners for a sale under this Act, and an order for such sale may be made by them notwithstanding any pending proceedings in a Court of Equity in *England or Ireland*, or any decree of any such Court of Equity already made for sale, and notwithstanding the owner may have power under an Act of Parliament or otherwise to make a sale; and where it shall be shown to the Commissioners that a decree for sale has been made by a Court of Equity, the Commissioners shall, if they see fit, without further inquiry, order a sale of the land or lease decreed to be sold; and where any sale shall be made of any land or lease, or part thereof, in respect of which there shall have been a decree of a Court of Equity, or any proceedings pending in a Court of Equity, the Commissioners shall, in distributing such monies and in their other proceedings, have regard to the proceedings in such court in relation to the priorities and rights of incumbrancers and others; and where there shall have been a decree of a Court of Equity the Commissioners shall, in distributing the monies arising on the sale and in their other proceedings, proceed upon and be guided by the declarations of and inquiries and proofs made and taken under such decree in relation to such priorities and rights as aforesaid; provided that it shall be lawful for the Commissioners, where it shall appear to them that there is any clerical error, or any error of names or in computation, or other like error, in such decree, or in any finding or proof, or where from matters coming to their knowledge it shall appear to them that the court in which the decree has been made should have an opportunity of reconsidering such decree, or considering or reconsidering any finding or proof, to direct such person as the Commissioners may think fit to apply to such court in relation thereto, and such court may make such order concerning the matter of such application as it may think fit; and the Commissioners shall, out of any monies arising from any sale under this Act, where there shall have been any such decree or pending proceedings as aforesaid, make such provision for payment of any costs incurred in relation to the proceedings in the Court of Equity as the circumstances may require; or the Commissioners may, in any of the cases aforesaid, where they think fit, order all or any part of the purchase money, after payment thereof of such costs and expenses as may be payable thereout under the orders of the Commissioners, to be paid into the Court of Equity in or under any suit or decree there pending or made.

42. And be it enacted, that where the Commissioners shall order the sale of any land or lease, or part thereof, in respect of which any decree shall have been already made by a Court of Equity for sale, or any proceedings shall be pend-

ing in a Court of Equity, they shall, by certificate under their seal, notify to such court the order so made by them; and all proceedings for or in relation to a sale under the decree of such court shall be stayed, and upon the completion of the sale under such order of the Commissioners any receiver appointed by such court shall cease to act as such receiver with respect to the land or lease, or part thereof, sold, and it shall be lawful for the court to suspend or stay any other proceedings in such court, or under any order or decree already made by such court, as the court shall think fit; and pending any proceedings for a sale under this Act it shall not be lawful for any owner or person claiming to be owner within the meaning of this Act, or claiming by the Act of such owner or person or by Act of Law, or any incumbrancer, to commence any proceedings at law or in equity for redemption, foreclosure, or sale, or to commence, sue, continue, or prosecute any proceeding whatsoever under the Act of the last Session of Parliament, "to facilitate the sale of Incumbered estates in *Ireland*," without the leave of the Commissioners.

43. And be it enacted, that where an application shall be made for a sale under this Act of an undivided share of any land or lease, or where any such undivided share shall have been sold under this Act, and either before or after the conveyance or assignment thereof under this Act, the Commissioners, on the application of any party interested in such undivided share, or of the purchaser, (as the case may be,) and after causing to be given such notices to the owner or owners of the other undivided share or shares of the same land or lease as they may think fit, and hearing such parties interested in the respective shares as may apply to them, and making or causing to be made such inquiries as may enable them to make a just partition, may, if they think fit, make an order under their seal for the partition of such land or lease; and in such order, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each of the undivided shares in such land or lease; and the Commissioners shall have the like authorities, jurisdiction, and powers in relation to such partition as a Court of Equity would have in the case of a partition under the direction of such court; and the part so allotted in severalty in respect of each such undivided share by such order for partition as aforesaid shall, without any conveyance or other assurance in relation thereto, go and endure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made; and the like order for a sale of the part allotted in respect of the undivided share to which the application for the sale shall relate may be made (where the order for partition is made before sale,) and the like proceedings had in relation to such sale, and the like conveyance or assignment may be made of the part allotted in respect of the share sold (where the order for partition is made after sale, and before conveyance or assignment,) and with the like consequences in the several cases aforesaid, as if the application for a sale, or the sale, (as the case may be,) had been in respect of the part so allotted as aforesaid; and where any land or lease, or part thereof, to be sold under this Act, is subject to any lease, under-lease, or tenancy under which the lessee, under-lessee, or tenants hold jointly or as tenants in common, it shall be lawful for the Commissioners, on the application of any such lessee, under-lessee, or tenant, and after causing to be given such notices as they may think fit, and hearing such parties as may apply to them, and making such inquiries as they may think necessary, to make an order under their seal for the partition, as between such lessee, under-lessee, or tenants, of the land included in their lease, under-lease, or tenancy, and for the apportionment of the rent reserved or payable under such lease, under-lease, or tenancy; and after such order of partition the owner of the reversion in the respective parts of the land shall have the like remedies for the apportioned rents against the respective parts out of which the same shall be payable, and the lessee, under-lessee, or tenants holding such respective parts under such lease, under-lease, or tenancy, and such order of partition, as were subsisting for the entire rent before such partition and ap-

portionment; and all the covenants, conditions, and agreements of every such lease, under-lease, or tenancy, except as to the amount of rent to be paid, shall, as regards the respective parts allotted on such partition, and the apportioned parts of the rent, remain in force as against the respective lessees, under-lessees, or tenants to whom under such partition such respective parts shall be allotted.

44. And be it enacted, that where an application shall be made for a sale under this Act of any land or lease, or part thereof, or where the same shall have been sold under this Act, and either before or after the conveyance or assignment thereof under this Act, if application be made to the Commissioners by any party interested in such land or lease, or by the purchaser, (as the case may be,) for the exchange of all or any part of such land, or of all or any part of the land comprised in such lease, for other land which the owner thereof may be willing to give in exchange, the Commissioners may make or cause to be made such inquiries as they may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands, and cause such notices to be given to parties interested in the respective lands as they may think fit; and if, after making such inquiries, and hearing such parties interested in the respective lands as may apply to them, the Commissioners shall be of opinion that such exchange would be beneficial, and that the terms thereof as proposed, or as modified by them, with the consent of such owner as aforesaid, are just and reasonable, they may make an order under their seal for such exchange accordingly, and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such order; and the land taken upon such exchange under such order shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given on such exchange would have stood limited or been subject to in case such order had not been made; and the like order for a sale may be made in respect of the land taken in exchange for any land, or any land comprised in any lease to which the application for a sale shall relate, (where the order for exchange is made before sale,) and the like proceedings had in relation to such sale, and the like conveyance or assignment may be made in respect of the land taken in exchange for the land or lease, or part thereof, sold, (where the order for exchange is made after sale, and before conveyance or assignment,) and with the like consequences, in the several cases aforesaid, as if the application for a sale, or the sale, (as the case may be,) had been in respect of the land so taken in exchange.

45. And be it enacted, that it shall be lawful for the Commissioners, upon the application of the owners of the several undivided shares (not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending,) of any land in *Ireland* who shall desire to effect a partition of such land, to make or cause to be made such inquiries as the Commissioners may think fit for ascertaining whether such partition would be beneficial to the persons interested in such respective shares; and in case the Commissioners shall be of opinion that the proposed partition would be beneficial, and that the terms thereof are just and reasonable, they shall make an order under their seal for such partition accordingly; and in such order, or in a map or plan annexed thereto, shall be shown the part allotted in severalty in respect of each such undivided share; and the part so allotted in severalty in respect of each such undivided share by such order of partition shall, without any conveyance or other assurance in relation thereto, go and enure to and upon the same uses, and be subject to the same conditions, charges, and incumbrances, as the undivided share in respect of which the same is so allotted would have stood limited or been subject to in case such order had not been made.

46. And be it enacted, that it shall be lawful for the Commissioners, upon the application of the owners of lands in *Ireland* not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending, who shall desire to effect an exchange of such lands, to make or cause to be made such inquiries as the Commis-

sioners may think fit for ascertaining whether such exchange would be beneficial to the persons interested in the respective lands; and in case the Commissioners shall be of opinion that the proposed exchange would be beneficial, and that the terms thereof are just and reasonable, they shall make an order under their seal for such exchange accordingly; and in such order for exchange, or in a map or plan annexed thereto, shall be shown the lands given and taken in exchange respectively under such order; and the land taken upon such exchange under such order shall, without any conveyance or other assurance, in relation thereto, go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges, and incumbrances, as the land given upon such exchange would have stood limited or been subject to in case such order had not been made.

47. And be it enacted, that it shall be lawful for the Commissioners, upon the application of any number of persons who shall be separately owners of parcels of land not subject to be sold under this act, or as to which no proceedings for a sale under this act shall be pending, so intermixed, or divided into parcels of inconvenient form or quantity, that the same cannot be cultivated or occupied to the best advantage, but forming together a tract which may be divided into convenient parcels, and who shall desire to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels, to make or cause to be made such inquiries as the Commissioners may think fit, for ascertaining whether such proposed division and allotment would be beneficial to the persons interested in such lands; and in case the Commissioners shall be of opinion that the proposed division and allotment would be beneficial, they shall make an order for the division and allotment thereof accordingly, with a map or plan thereunto annexed, in which shall be specified as well the parcels in which the several persons on whose application such order shall have been made were respectively interested before such division and allotment as the several parcels allotted to them respectively by such order; and the parcels of land taken under such division and allotment shall go and enure to and upon the same uses and trusts, and be subject to the same conditions, charges and incumbrances, as the several lands which the persons taking the same shall have relinquished or lost on such division would have stood limited or been subject to in case such order had not been made.

48. Provided always, and be it enacted, that in the case of land in respect of which no proceedings for a sale under this act shall be pending, no such order of partition or of exchange, or of division and allotment, as aforesaid, shall be made by the Commissioners until such notices by advertisement in such public newspaper or newspapers as the Commissioners shall direct shall have been given of such proposed partition, exchange, or division and allotment, and three calendar months shall have elapsed from the publication of the last of such advertisements; and in case before the expiration of such three calendar months any person entitled to any estate in or to any charge upon any land included in such proposed partition, exchange, or division and allotment, shall give notice in writing to the Commissioners of his dissent from such proposed partition, exchange, or division and allotment, (as the case may be,) the Commissioners shall not make an order for such partition, exchange, or division and allotment, unless such dissent shall be withdrawn, or it shall be shown to the Commissioners that the estate or charge of the party so dissenting shall have ceased, or that such estate or charge is not an estate or charge in respect of which he would be entitled in equity to prevent such partition, exchange, or division and allotment; but no such order as aforesaid shall be in anywise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made.

49. And be it enacted, that every conveyance and assignment respectively executed as required by this act, and every order for partition or for exchange, or for division and allotment, made by the Commissioners under their seal, shall for all purposes be conclusive evidence that every application, proceeding, consent, and act whatsoever which ought to have been made, given, and done previously to the

execution of such conveyance or assignment, or the making of such order respectively, has been made, given, and done by the person authorized to make, give, and do the same; and no such conveyance, assignment, or order shall be impeached by reason of any informality therein.

50. And be it enacted, that the Commissioners shall not be subject to be restrained in the execution of their powers under this act, nor shall any person be restrained from making application under this act to the Commissioners, or doing any other act or giving any consent under the provisions of this act, by order or injunction of a Court of Equity, or by writ of prohibition, nor shall the Commissioners be required by writ of mandamus to do any act or take any proceeding under this act, nor shall proceedings before them be removable by certiorari; and the Commissioners shall not, nor shall any of them, nor shall any person acting under the order or authority of them or any of them, be liable to any action, suit, or proceeding for or in respect of any act or matter *bona fide* done or omitted by them respectively in the exercise or supposed exercise of the powers of this act.

51. And be it enacted, that it shall be lawful for the Commissioners to review and rescind or vary any order which shall have been previously made by them, but, save as aforesaid and as herein-after provided, every order of the Commissioners shall be final: provided always, that where the Commissioners allow appeal, but not otherwise, appeal against any order of the Commissioners may be made to the Privy Council of Ireland within one calendar month from the making of the order appealed against, and such appeal shall be heard and reported on by members of the Privy Council, to be appointed by such judicial committee of the said Privy Council as herein-after mentioned, and the orders of the said Privy Council in relation to such appeal shall be made according to the reports of such judicial committee, and the order of the said Privy Council on the appeal shall be final.

52. And be it enacted, that the judicial committee herein-before referred to shall consist of the Lord High Chancellor of Ireland for the time being, and such of the members of the said Privy Council as shall from time to time hold any of the following offices in Ireland; that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Ireland, Lord Chief Justice or Judge of the Court of Queen's Bench, Master of the Rolls, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, and Judge or Commissary of Her Majesty's Court of Prerogative for Causes Ecclesiastical and Court of Faculties in and throughout Ireland, and of all persons members of the said Privy Council who shall have held the office of Lord Chancellor of Ireland, or any of the other offices herein-before mentioned, and of such other persons not exceeding four in number, being Privy Counsellors in Ireland, as the Lord Lieutenant or other chief governor or governors for the time being of Ireland shall appoint to be members of such committee; and no such appeal as aforesaid shall be heard or reported on by the said judicial committee unless in the presence of at least four members of the said committee; and no report on such appeal shall be made unless a majority of the members of such committee present at the hearing concur in such report.

53. And be it enacted that every person who upon examination upon oath, affirmation, or declaration before the Commissioners or any of them, or any person appointed and authorized under this act by the Commissioners to administer such oath, affirmation, or declaration, shall wilfully give false evidence, and every person who shall wilfully swear affirm, or declare falsely in any affidavit authorized under this act to be received in evidence by the Commissioners, shall be liable to the pains and penalties of perjury.

54. And it be enacted, that in the construction of this act (except where the context or other provisions of the act require a different construction) the word "Land" shall extend to manors, advowsons, rectories, messuages, lands, tenements, rents, and hereditaments of any tenure, whether subject to any fee farm or other perpetual rent, with or without condition of re-entry for securing the same, or other-

wise, and whether corporeal or incorporeal, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and to an equity of redemption, and to the benefit of any covenant or contract for or right of renewal; and the word "Lease" shall include an agreement for a lease, and the estate or interest created or agreed to be created by such lease or agreement in the whole or any part of the land therein comprised; and the expression "lease in perpetuity" shall mean any lease or grant for one or more life or lives, with or without a term of years, or for years determinable on one or more life or lives, or for years absolute, with a covenant or agreement in any of such cases, whether in the same or in any other instrument, for the perpetual renewal of such lease or grant, whether such lease shall be derived out of the inheritance or by way of under lease out of any lease or other estate; and the expression "church or college lease" shall include any lease by any archbishop, bishop, dean, or dean and chapter, or other ecclesiastical corporation, sole or aggregate, or by the College of the Holy and Undivided Trinity near Dublin, or by the Ecclesiastical Commissioners for Ireland, where a fine has been paid on the grant of such lease; and the word "incumbrance" shall mean any legal or equitable mortgage in fee, or for any less estate, and also any money secured by a trust, or by judgment, decree, or order of any superior court of law or equity duly registered, and also any legacy, portion, lien, or other charge, whereby a gross sum of money is secured to be paid on an event or at a time certain, and also any annual or periodical charge which by the instrument creating the same, or by any other instrument, is made repurchasable on payment of a gross sum of money, and also any arrear remaining unpaid of any annual or periodical charge, for payment of which arrear a sale of any land charged therewith might be decreed by a court of equity; and the word "incumbrancer" shall mean any person entitled to such incumbrance, or entitled to require the payment or discharge thereof; and the word "possession" shall include the receipt of the rents and profits; and the word "owner" as applied to any land, shall include any person entitled in possession in fee simple or in tail, or grant in tail, and any person entitled in possession for a life or lives, or for a term of years determinable on the dropping of any life or lives, or for a term of years of which not less than ninety-nine years are unexpired, not being a lessee at a rent, and also any person entitled in possession as tenant by the curtesy, whether at law or in equity, and any person entitled in possession, whether in fee or for any lesser estate as aforesaid, to the equity of redemption in any land, or to the land subject to any incumbrance, or a trust for the payment of any incumbrance, and any feeoffees or trustees for charitable or other purposes, entitled in possession; and the word "owner" as applied to a lease in perpetuity or other lease, shall include any person entitled in possession to the land comprised in such lease for the whole estate created or agreed to be created by such lease, or for any derivative estate (created by settlement, or testamentary or other disposition thereof), *quasi* in tail, or for a life or lives, or for years determinable on the dropping of a life or lives, or for years of which not less than fifty years are unexpired, not being an under lease at a rent derived out of such lease, and any person entitled in possession, for such whole estate or such derivative estate as aforesaid, to the equity of redemption in such lease, or to such lease subject to any incumbrance, or a trust for the payment of any incumbrance: and the word "person" and the word "owner" shall extend to a body politic or corporate as well as to an individual; the word "Commissioners" shall mean "the Commissioners for sale of Incumbered Estates in Ireland;" the expression "the Commissioners of Her Majesty's Treasury" shall mean such Commissioners for the time being or any three of them, or the Lord High Treasurer for the time being; and every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing; and every word importing the masculine gender only shall extend to a female.

55. And be it enacted, that this act shall, except so far as the special provisions of the same otherwise require, extend

only to *Ireland*, and may be amended or repealed by any act to be passed in this session of parliament.

SCHEDULE.

Form of conveyance on sales by the Commissioners (which may be used with such variations as the circumstances may appear to the Commissioners to require).

WE two of the Commissioners for sale of Incumbered Estates in Ireland, under the authority of an act passed in the year of the reign of Queen Victoria, intituled [*here set forth the title of this act*], in consideration of the sum of by E. F. of &c., paid into the Bank of Ireland to our account to the credit of do grant unto the said E. F. all [*here describe the premises to be sold*], to hold the same unto the said E. F., his heirs and assigns, [*or, in the case of a chattel interest in a lease, his executors, administrators, and assigns,*] for ever, [*or for the unexpired term created by a certain lease, describing the lease, as the case may be*], subject to [*here specify, where the sale is made subject thereto, the tenancies, leases, under leases, or charge, either by reference to a schedule or otherwise*].

In witness whereof we the said A. B. and C. D. have hereunto set our hands and the seal of the said Commissioners, this day of in the year of our Lord

A. B.
C. D.

[*Seal of the Commission.*]

The certificate of payment to be endorsed on or written at the foot of the conveyance or assignment may be in the following form:

WE certify that the within [*or above*] mentioned sum of was paid into the Bank of Ireland to the account and credit within [*or above*] mentioned on the day of

A. B.
C. D.

[*Seal of the Commission.*]

GENERAL RULES.

UNDER THE 12TH & 13TH VIC.. CHAP 77.

Dated the 18th day of October, 1849.

It is this day ordered by the Right Honourable John Richards, one of the Barons of Her Majesty's Court of Exchequer in Ireland, Mountfort Longfield, LL.D., and Charles James Hargreave, Esq., being the Commissioners for sale of incumbered estates in Ireland, pursuant to the statute in that case made and provided, that the following general rules and orders shall take effect and be binding in relation to all proceedings to be hereafter had or taken under and in pursuance of the provisions of an act passed in the session holden in the 12th and 13th years of the reign of Her Majesty Queen Victoria, chap. 77, entitled "An Act further to facilitate the sale and transfer of incumbered estates in Ireland":—

1. That in the construction of any general rules or orders made by the Commissioners, the words and phrases to which a particular or extended meaning is assigned by the 54th section of the act shall, when used in such rules or orders, be understood to bear such particular or extended meaning, except where the context or other provisions of the rules require a different construction; and the word "affidavit" shall include an affirmation or declaration made by any person who by law is empowered to give evidence by affirmation or declaration in lieu of oath; and that when time is to be computed by days, it shall be exclusive of *Sundays*, and the holidays in the next succeeding rule stated, and when it is to be computed by the month, it shall be construed calendar month, and in all cases it shall be exclusive of the first, and inclusive of the last day, unless the last day be one of such holidays, when the following day shall be included.

2. That the Commissioners may adjourn their sittings from one day to the next, or to any other day they may think expedient, having regard to the state of their business and

the public convenience; but they may resume such sittings again for the despatch of business on any day or days during the interval of any such adjournment, should they find it necessary so to do; and the several offices of the court shall be open for business upon all days of the year, except on *Sundays, Christmas Day*, and the three days next after *Christmas Day, New Year's Day, Good Friday, and Easter Monday and Tuesday*; and shall continue open for the despatch of business from ten until four o'clock each day during the period appointed for the sittings of the court, and from twelve until three o'clock on all other days; and the officers and clerks belonging thereto respectively, shall attend in such offices in the discharge of their several duties during the periods above mentioned, unless otherwise engaged in the business of the court, or unless prevented by sickness, or other unavoidable cause, or allowed leave of absence by the court.

3. That an entry be made in the office, in a book to be kept for that purpose, of every matter depending in the court, with a proper index, for the purpose of reference; and whenever a petition shall be presented by a party who is not the owner, the name of the owner, as well as the petitioner, shall be inserted in the index to such book, in order that the proceedings pending in the court, may be the more easily searched for and ascertained; and that all orders and rules made by the Commissioners shall be entered in a book to be called the "Rule Book."

4. That all attested copies of petitions, affidavits, and other documents, in the offices of the court shall be written on foolscap paper, bookwise, and shall contain three folios of ninety words in each page; and all copies shall be attested by the secretary or a chief clerk, whether such copies be brought in for attestation, or be made out in the office, and when it is required that the common seal of the Commissioners shall be affixed to any document, the same shall be done by the secretary, or by such other persons as the court shall from time to time appoint for that purpose.

5. That proceedings under this act shall be commenced by petition, to be addressed and framed according to the forms to be approved of by the Commissioners; and every such petition shall be signed by the petitioner or his attorney, and shall be accompanied by an affidavit verifying the material facts therein.

6. That every person presenting a petition to the Commissioners, otherwise than through the agency of an attorney, shall state some place at foot thereof, within the City of Dublin, where notices and orders may be served on him; and such party, or in case of his death or transmission of his interest, the party claiming in his right may from time to time change such place of address, and substitute some other place within the City of Dublin for the like purpose.

7. That after a petition is filed, the secretary, or such other officer as the Commissioners shall from time to time, for that purpose appoint, shall, on the application of any party interested, give a certificate that such petition has been filed, in order that the matter may be registered as a *lis pendens*.

8. That on every petition for a sale, an order shall be made by the Commissioners, either dismissing the petition, or referring it for inquiry to one of the Commissioners, or granting a conditional order for a sale, stating therein by name or general description, the parties who must be served with such order, and the time within which cause against such order must be shown; but the petitioner, if he be dissatisfied with the fiat of the Commissioners, may, by notice left in the office, require that the matter of his petition may be moved in court.

9. That in any case in which a party shall seek to show cause against, or to set aside any order made by the Commissioners, he shall lodge a notice to that effect in the office, and state at foot, or on the back thereof, upon what party he requires such notice to be served, and the subject matter of such notice shall come on to be heard in due course before the Commissioners; and the Commissioners, on the hearing of such matter, shall make an order to vary, or to discharge the order already pronounced, or to direct a reference to one of the Commissioners, or make such other

order as they shall think fit, and may order the whole, or any portion of the costs, up to and including the hearing of such matter, to be paid by such of the parties as they shall think properly liable thereto.

10. That, if the owner shall rely upon the provisions of the 22nd section of the Act, in opposition to a sale, he shall file an affidavit containing all the particulars required by that section; and also stating, as nearly as he can, how much has been received during each of the seven years immediately preceding the presentation of the petition for the rent and arrears of rent, of all the premises subject to the incumbrance of the petitioner, and how much has become due during that period for tithe rent-charge, poor's rate, and county cess.

11. That when an absolute order for a sale shall be pronounced, the Commissioners may, if they shall think it necessary, require the owner, and all other persons, to produce to, or lodge with, the Commissioners, on oath, all deeds, books, papers, documents, and writings in their possession, custody, or power respectively, relating to the premises ordered to be sold, and to the charges thereon, and to do all such other acts, and furnish such information within the authority of the Commissioners, to direct as may be necessary to enable the Commissioners to sell the premises to the best advantage.

12. That the statements in any petition shall not constitute an admission of the validity of any claim stated therein or of any particular sum being due in respect of any incumbrance, save claims and sums expressly admitted by the petitioner.

13. That on the order for a sale being made absolute, a notice shall be circulated among the tenantry or persons residing on the property, according to a printed form to be approved by the Commissioners, specifying the tenancies, leases, and agreements which are admitted, and calling upon all parties who have claims for other tenancies, leases, or agreements not specified, or who consider that the terms of their tenancies, leases, or agreements are incorrectly stated, to come forward, and apply for an amendment of the order in this behalf. But this rule shall not be construed as rendering it necessary to serve every tenant, or every person residing on the property, or claiming to be interested therein, with such notice.

14. That if any person shall claim to be entitled to any lease or agreement other than those which are admitted, he shall lodge in the office, the particulars of such claim, accompanied by an affidavit that he believes the same to be just and true, and (if he does not appear by attorney) stating the address to which notices and orders may be served on him; and the Commissioners shall thereupon make an order, either allowing his claim in the whole or in part, or calling upon him to sustain it by sufficient evidence, or such other order as may meet the merits of the case.

SALE AND CONVEYANCE.

15. That, if upon a sale by auction, the highest price offered for any lot be, in the opinion of the Commissioners, clearly inadequate, they shall be at liberty to adjourn the sale of that lot to a future day; and no sale of any lot shall be deemed to have been made until the amount of deposit (if any) required by the conditions of sale shall have been actually paid in the manner prescribed by such conditions.

16. That immediately after a sale, whether by public auction or private contract, the purchaser shall obtain a certificate under the seal of the Commissioners, that he is the purchaser, thereby authorizing him to pay the amount of his purchase money, into the Bank of Ireland, to the account of the Commissioners, to the credit of the estate of A. B. of, &c., [as the case may be,] and shall procure the notification by the bank to the Commissioners of the receipt of the money; and no sale shall be opened merely by reason of any advance being made upon the biddings or price.

17. That in any case in which it shall appear to the Commissioners that any premises can be sold by auction to better advantage out of Dublin, the Commissioners may direct that the biddings shall be made at such place, and before such person, as they shall for that purpose appoint, and thereupon such biddings shall be had accordingly, and shall be returned to the Commissioners, who shall declare the

highest bidder the purchaser, unless the highest sum offered shall be, in the opinion of the Commissioners, clearly inadequate, or unless the Commissioners shall see good cause against confirming the sale.

18. That, the conveyance or assignment of all premises sold by the Commissioners, shall be prepared by and at the expense of the purchaser, and the draft thereof shall be approved of by the Commissioners, or by the Commissioner, to whom the matter is referred. It shall specify the tenancies (if any) subject to which the sale is made, and any apportionment of rent between the purchaser and the proprietor of other lands demised with the lands sold or any part thereof, and any rents or incumbrances remaining charged upon the property or any part thereof in the hands of the purchaser; and the Commissioners shall, when necessary, ascertain and define the relative rights of the purchaser and the prior possessor with respect to any crops on the land.

19. That the Commissioners, whenever they shall think fit, may dispense with the personal service of notice upon any of the tenants to the lands who may be required to attend, and may direct that such notice shall be given to such tenants, either by posting the same on some conspicuous place on or near the lands, or by advertising the same in one or more newspapers, or transmitting the same notice through the Post Office, or otherwise, as to the Commissioners shall seem proper.

20. That the duplicates, or counterparts of leases, where they exist, and can be had, or other evidences of the tenancies subject to which the sale is made shall be delivered to the purchaser, except where they relate also to other lands, in which case copies shall be delivered to him.

21. That the Commissioners may require and compel all persons claiming to be tenants to produce the leases or agreements, or other instruments under which they so claim, and to give copies thereof.

22. That in case the purchase money and any interest which may have accrued upon it under the terms of the sale or by law shall not be paid into the bank within fourteen days after the sale, any party to the proceedings may procure an order for payment; or the Commissioners may make such order without any special application, or may, if they think proper, re-sell the property, and the expenses incident to such re-sale, together with the deficiency, if any, in the price obtained below the former price, shall be paid forthwith by the purchaser at the former sale, for which payment, the deposit (if any) shall be a guarantee; but he shall not be entitled to the benefit of any excess in the price, which may be obtained at the latter sale.

DISTRIBUTION OF THE PURCHASE MONEY.

23. That, when the absolute order for a sale shall be pronounced, advertisements shall be published in a Dublin newspaper, and in one or more local newspapers, and such other newspapers as the Commissioners shall direct, giving notice of such order, and calling upon all claimants of estates, interests, or incumbrances in or upon the premises ordered to be sold, to come forward and establish their several claims and demands.

24. That when the absolute order for a sale shall be pronounced, the Commissioners, or in case of a reference to one Commissioner, such one Commissioner shall direct what further information shall be procured respecting the title of all parties to the premises, and to the incumbrances affecting the same, and what searches or further searches should be made in relation thereto, and such person as they or he shall direct, shall forthwith proceed to make out a full title to the premises, including charges and incumbrances thereon, and shall prove and verify the same in such manner as the Commissioners, or such one Commissioner, shall direct; but the sale itself shall not be delayed by the proceedings under this and the preceding rule, unless the Commissioners shall see cause for deferring such sale.

25. That the costs chargeable against the fund produced by a sale shall be, first, such costs of, and consequential on the application for the order for sale, as the Commissioners shall think fit to allow; secondly, the expense of, and incidental to the sale; thirdly, the costs awarded to any tenant who shall establish a claim for a lease or agreement not set forth in the schedules given by the owner of the land, ex-

cept such part of the last-mentioned costs as shall be actually recovered under the order of the Commissioners from the owner or person who shall have contested such claim; and the Commissioners may direct the owner or other person contesting such claim to reimburse the fund in any costs awarded to the tenant establishing his claim, and paid to him out of the funds in court, provided that nothing herein contained shall preclude the Commissioners from giving costs to an owner not being the petitioner or party having the carriage of the proceedings in any case in which it shall appear to be just and reasonable that such owner should be allowed costs.

26. That the costs properly incurred by an incumbrancer coming in and proving his incumbrance, shall, except where the Commissioners may otherwise direct, rank in point of priority with the incumbrance, in respect of which such costs have been incurred.

27. That a schedule of incumbrances shall be prepared by the Commissioners, or one of them, or such of their officers as they shall appoint, according to their several priorities, with the sums due on each for principal, interest, and costs respectively, and in case of an annuity, for arrears and costs; and when such schedule shall be filed, notice thereof shall be given in a Dublin newspaper and in a local newspaper, and such other newspapers as the Commissioners shall direct, and if the Commissioners shall consider it necessary, notice shall also be specially given to the incumbrancers and other parties interested in the premises, or their attorneys; and if no party interested shall file an objection thereto, within such time as the Commissioners shall appoint for that purpose, the same shall stand confirmed without further order, and all parties shall be bound thereby, so far as relates to the money produced by the sale of the premises, in respect of which such schedule shall be made, unless the Commissioners shall, on special application, make an order to the contrary.

28. That any party may file an objection to the schedule of incumbrances, within the time specified under the last preceding rule, and shall briefly state therein the grounds of his objection, and such objection shall be heard and dealt with by the Commissioners in such manner as they shall think fit.

29. That after the schedule of incumbrances shall be confirmed, and if the Commissioners shall think the funds may be safely distributed, one of the Commissioners shall allocate the stock and funds in court (computing the value of the stock at the price of the day of such allocation) among the several incumbrancers and parties entitled, according to their priorities; and such allocation, so far as it may extend, shall be deemed payment of such incumbrances so that they shall cease to bear interest, and the owner of the incumbrance shall be entitled to the dividends on the stock, and shall be liable to all the consequences of its fall or rise in price, but such Commissioner shall not be bound to make any allocation of stock or funds in part payment of an incumbrance, unless the incumbrancer consents to such allocation.

30. That the Commissioners may, before such schedule as aforesaid shall be finally settled, upon the application of any person who shall be the first or an early incumbrancer, and whose claim shall appear to be valid, order payment to such incumbrancer of the amount claimed by him, or any part thereof, if it shall appear to the Commissioners that such order may be made with safety to all parties; but the costs of such application shall not be allowed on taxation against the fund, unless in the order pronounced by the Commissioners they shall award the costs thereof to such incumbrancer.

31. That when stock or money is allocated to trustees, the Commissioners may refuse to order a transfer or payment thereof to be made to them, unless the full number of trustees shall exist according to the provisions of the instrument creating the trust.

32. That the fund allocated to any party shall not be transferred or paid over to him, until he shall have verified his title thereto as the Commissioners shall direct.

33. That the Commissioners shall not draw in favour of, or transfer stock to, any person in payment of a legacy, until

the person entitled to such payment shall produce a certificate from the proper officer, of the payment of the legacy duty, if any payable in respect thereof; but the Commissioners may, with the consent of such person, draw in favour of, or transfer to, the proper officer authorized to receive the same, the amount of such duty.

34. The Commissioners may, in any special case, order the payment of money or transfer of stock to any person upon his giving such security as shall be approved of by the Commissioners, to abide any order which the Commissioners may make in regard thereto.

35. That notice, in writing, of any assignment, charge, or other disposition of any funds in the hands of the Commissioners, or of the interest of any person therein, must be lodged in the office, stating particularly the fund to which the same relates, and the name of the person whose interest therein is affected, and the name of the party so claiming to be interested in such charge, and some place in Great Britain and Ireland where notice may be served upon such party or his attorney.

PROCEEDINGS FOR AN APPORTIONMENT OF RENT.

36. That when it is proposed to sell a part only of any lease, any person interested may apply to the Commissioners for an apportionment of the rent reserved by such lease; and notice of such proposed apportionment shall be given to the landlord and to the owner of the remainder of the land included in the lease; and such landlord or owner may lodge in the office a notice of his intention to oppose such apportionment; in which case the matter shall be heard and determined by the Commissioners.

37. That an application for apportionment may be included in a petition for sale.

PROCEEDINGS FOR A PARTITION.

38. That when an application for a partition is presented under the 43rd section of the act, the Commissioners shall direct what notices shall be served, and on whom, and shall direct advertisements to be published in at least one Dublin newspaper and one local newspaper, calling on all parties interested to serve notice of objections, (if any they have to a partition) before a certain day therein to be named, and on the day named in such advertisement, or as soon after as may be convenient, the Commissioners shall hear the said application, and if no objection shall be substantiated, will issue an order to one or more surveyor or surveyors to make a report according to instructions to be contained in such order, and as soon as the report of the surveyor or surveyors shall be returned to the Commissioners, they shall name a day on which a partition shall be made, unless in the meantime a notice of objection shall be served on behalf of some interested party, in which case the Commissioners shall hear all parties who require to be heard, and examine the proceedings, and make a partition, or such other order thereon as may appear to them to be proper.

39. That application for a partition, under the 43rd section of the act, may be either included in an original petition for a sale, or made by supplemental petition referring to the former petition, and to the proceedings thereon.

40. That the costs properly incurred in proceedings for a partition, including the costs of the survey and advertisements, shall be borne by the owners of the estate in proportion to their respective shares; and the amount paid by any owner having a limited interest, shall be a charge in his favour upon the inheritance or whole interest in the share allotted to him.

PROCEEDINGS FOR EXCHANGE, OR FOR DIVISION OF INTERMIXED LANDS.

41. That application for an exchange under the 44th section of the act, may be either included in an original petition for sale, or made by supplemental petition, referring to the former petition, and to the proceedings thereon.

42. That the costs properly incurred in proceedings for exchange or division shall be borne in such proportions as the Commissioners shall direct, having regard to any special agreement between the parties; and the amount paid by any owner having a limited interest, shall be a charge in his favour, upon the inheritance or whole interest in the lands allotted to him.

PRACTICE.

43. That every attorney who appears for any party, shall enter his name and address in a book, to be kept in the office for that purpose; and every change of attorney or address shall be entered in the same manner.

44. That every person making an application to the Commissioners shall enter an address in Great Britain or Ireland, to which all notices or orders to him may be sent, and may change the same from time to time; and that any notice or order which may require to be served in any matter shall be lodged with such of the officers of the court as the Commissioners shall appoint for that purpose, and shall be served in manner hereinafter mentioned, through the office of such officer, unless the court, or a Commissioner, when sitting alone upon any matter referred to him, shall otherwise order; and such notice or order may be transmitted by the post, by the clerk or officer so to be appointed for that purpose; and the certificate of such clerk or officer, of the sending by post of such notice or order, shall be sufficient proof that such notice or order was duly served at the time when the same would reach the said address in the ordinary course of the post.

45. That whenever a notice or order shall be lodged in the notice office, for the purpose of being served, the person lodging the same shall at the same time bring in and lodge as many copies of such notice or order as such person shall require to be served, and shall also at the same time bring in and lodge in the office as many covers or envelopes, with a sufficient postage stamp affixed on each, as may be necessary for the purpose of transmitting such copies free by post; and upon which envelopes or covers shall be legibly written by the party bringing in the same, the address of the parties respectively on whom such copies are to be served; and it shall be the duty of the officer to compare such copies with the notice, and to correct the same when necessary, and also to compare the address on each cover or envelope with the address mentioned at the foot of such original notice, and to see that the same is correct. And that all notices to be served through the notice shall be lodged in such office before the hour of two o'clock on the day upon which it is required that the same shall be sent; and that the notice clerk himself, or some other of the sworn clerks of the court, shall deliver into the General Post-Office copies of the different notices, properly addressed, as before mentioned, previous to the usual time for closing the post-office for receipt of letters to be despatched by the evening mail of that day; and such clerk shall enter in a book, to be kept for that purpose, a memorandum or minute of his having posted such notices, and there shall be endorsed at the foot or on the back of every notice or order that shall be brought into the notice office, the name and address of every person upon whom it is required that such notice or order shall be served, and if an attorney, the name of the party for whom he is concerned.

46. That when ever the Commissioners shall appoint any person to act in the nature of guardian, or next friend, to protect the rights of any infant, idiot, lunatic, or married woman, in any matter depending before them, the order made by the Commissioners to that effect shall be served upon such person, and all notices and orders subsequently served upon such person shall be deemed to have been duly served upon the party whose interests such person has been so appointed to protect. But it shall be competent for any person interested, or claiming to be interested, to apply to the Commissioners to rescind or vary the order appointing such guardian, or next friend, or to have some other person appointed in his place.

47. That when any person claiming to be interested shall desire to be served with notice of the proceedings in any matter he shall be at liberty to enter an appearance in the form or to the effect following:—

"C. D. appears in this matter [stating the title of the matter], for the purpose of being served with notice of all proceedings therein.

"Dated this day of 184 ."
And which notice must be signed by the party himself, or his attorney, and some place stated therein where notices are to be served on him, or on his attorney; and thereupon the party entering such appearance shall be certified, unless

the court shall think fit otherwise to direct, to be served with notice of all proceedings in the matter, and to appear thereon, until he shall, by notice declare that he withdraws such appearance; but the costs occasioned by entering such appearance, shall be paid by the party entering the same, unless the court shall otherwise direct.

48. That the Commissioners, or one of them, shall, in the first week of each month, from November to August, inclusive, examine the state of each matter, and the proceedings which may have taken place since such last examination; and if any matter shall appear not to have been prosecuted with due diligence, they shall require the party having the carriage thereof to explain the reason of such neglect or delay, and if such reason shall not appear satisfactory they shall be at liberty to order the carriage of such matter to be transferred to some other party interested in such matter, who shall undertake to prosecute the same with due diligence and shall order the costs occasioned by such transfer to be paid by the party guilty of such delay, and shall order all such papers and documents relating to the proceedings in such matter, which were in the custody, power, or procurement of the petitioner, or party having the carriage of the proceeding or his attorney to be handed over to such other party, or lodged in court, as the Commissioners shall direct; and no petition shall be withdrawn or dismissed without the leave of the Commissioners,

49. That every petitioner shall be at liberty, until an order shall be made upon his petition, to amend the same, as often as he may be advised; but after any order shall be made upon the petition no other amendment shall be made on any petition, without the leave of the court; and all cases of amendment, the material facts, the subject matter of the amendment so sought to be made, shall be verified by affidavit.

50. That any party introducing any scandalous, prolix, or irrelevant matter into any petition, affidavit, or other document, shall pay the costs incident to such misconduct, and all such scandalous, prolix, and impertinent matter shall be expunged at the expense of such party.

EXAMINATION.

51. That all examinations before the Commissioners, or one of them upon reference to a single Commissioner, or before any examiner, shall be *vidæ voce*, unless the Commissioner in any special case shall otherwise direct.

52. That whenever any witness shall be examined otherwise than *vidæ voce*, he shall be examined upon interrogatories which shall be previously lodged in the office two days prior to such examination, and copies of which interrogatories may be taken out by all parties; but in case of emergency, the Commissioners, or one of them, may certify that the party examining should not be required to wait for two days after the lodging of his interrogatories, before commencing such examination, and in that case the examination may be proceeded with at such time as the Commissioners, or one of them, shall certify to be proper; and when an examination shall take place out of Dublin, the party examining shall not be precluded from lodging with the examiner additional interrogatories, and examining the witnesses thereto, in case any matter shall come to the knowledge of such party or his attorney, subsequent to his lodging his interrogatories originally in the office, but in such case the party or his attorney must make an affidavit to account for his not having lodged such additional interrogatories originally in the office, and such party shall be bound to furnish a full and true copy of such additional interrogatories to the opposite party at or prior to his lodging the same with the examiner. But this rule shall not extend to cross-interrogatories or to the cross-examination of witnesses; and it shall not be considered necessary to lodge in the office, or to furnish copies to the opposite party, of cross-interrogatories to be exhibited to witnesses.

53. That all witnesses examined, whether in Great Britain or Ireland, who shall not be examined *vidæ voce*, shall be examined by such of the officers of the court as the Commissioners shall appoint for that purpose, and with respect to all examinations that shall take place more than ten statute miles from the General Post Office, Dublin, the officer performing that duty shall receive, for each day upon which

he shall be actually engaged on that duty, such sum (in addition to his yearly salary) as the Commissioners of Her Majesty's Treasury shall allow, and also his actual travelling charges, not including any allowance for his support, such allowance and charges to be ascertained before the Commissioners, upon the oath of the officer, and to be included amongst the incidental charges and expenses of the court, in each quarterly account returned to the Commissioners of Her Majesty's Treasury. And it shall be competent for such person as the Commissioners shall so appoint for the examination of parties or witnesses, to administer all necessary oaths to such parties and witnesses. But in no case shall it be necessary to issue any Commission for the examination of parties or witnesses to the person so authorized to act as examiner.

54. That when a party or witness shall be examined out of Dublin, it shall be the duty of the examiner to be at the place appointed for the examination of such party or witness, at the hour of eleven o'clock in the forenoon, at the latest, on each day, and to be then ready to proceed with such examination, and to continue in the discharge of such duty till four o'clock in the afternoon; and in case such examination shall not have been commenced at eleven o'clock, and continued till four o'clock, each day, such examiner shall state, on the dominical to be returned by him, by whose delay or default it was that such examination was not so commenced or continued.

55. That all examiners shall take down the depositions of parties and witnesses in the first person, and no party or witness shall be examined in Dublin, except before the Commissioners, or one of them, or at the usual public office of the examiner, unless the Commissioners, or one of them, shall certify that such examination may be had at some other place, to be mentioned in such certificate.

56. That the Commissioners, if they shall think fit, on the application of any party, shall make an order for the examination of any witness out of Great Britain and Ireland, before a person to be mentioned in such order, and the expenses of such order and of executing the same shall be in the discretion of the Commissioners; and the examination and cross-examination of such witness shall be subject to the rules applicable to the examination of a witness in Great Britain or Ireland, unless the Commissioners shall otherwise direct.

57. That prior to any examination the Commissioners, or one of them, shall certify the day when publication shall pass, and unless the time so appointed for passing publication shall be enlarged by the Commissioners, or one of them, publication shall pass on that day.

58. That all parties claiming to be interested, in any matter before the Commissioners, and all witnesses, shall be bound to answer all lawful questions; and in the event of such parties or witnesses not fully or fairly answering the same, whether upon *vind voce* examination, or upon interrogatories, shall be deemed guilty of a contempt of court.

59. That the examiner shall, at the instance of any party, sign a notice specifying the time and place when and where such examination shall be held, which notice shall be duly served on the opposite party, seven days at least before the day named for commencing the examination, if in Ireland, and fourteen days before commencing the examination, out of Ireland.

60. That all interrogatories shall be conveniently distinguished and numbered, and a copy of all direct interrogatories shall be left with the examiner two days before they shall be administered to any witness.

61. That at least four days before the direct examination of any witness by either party, a notice shall be duly served on the opposite party, describing such witness by name, place of residence, and addition, and specifying, by the numbers thereof, the interrogatories which are to be administered to such witness; and the interrogatories to be administered for the cross-examination of any witness shall be confined to matters affecting the credit of such witness, or tending to discredit, to explain, or to qualify the evidence which he may have given on his direct examination; but it shall be competent for a party cross-examining a witness, to administer direct interrogatories also to such witness, in like

manner, and subject to such rules, as if such witness had been originally produced by him.

62. That any party interested in any matter shall be at liberty to examine any other party interested therein upon such personal interrogatories as the Commissioners, or one of them, shall approve of, and such examination shall take place within such time as the Commissioners, or one of them, shall appoint; and the examination of any party on personal interrogatories shall be conducted in the same manner as the examination of a witness before an examiner.

AFFIDAVITS.

63. That whenever any affidavit shall be made before the Commissioners, or any of them, or before any of their officers whom they shall authorize to take the same, such affidavit or affirmation shall not be returned to the party, but shall be filed in the proper office of the court.

64. That no affidavit shall be received in which there shall appear to be either interlineation or erasure, unless such interlineation or erasure be noticed in the *jurat* of such affidavit; and the time when, and the place where, every affidavit is sworn, shall be stated in the *jurat* thereof.

65. That every affidavit to be made elsewhere than in the City of Dublin shall be folded up in a proper cover, and sealed by the person before whom such affidavit shall be sworn, with his seal, and endorsed and signed by him on the outside, in manner following:—

In the matter of the estate of }
A. B., owner, &c., [as the } The affidavit of X. Y., sworn
case may be.] before me on this
day of M. N. [stating what character the person
taking the affidavit fills—such as Master Extraordinary, or Commissioner for taking Affidavits for the
Court of Chancery, &c.]

And such cover shall not be opened, or the seal broken until the same shall be delivered to the proper officer of the court; but it shall be competent for the party making such affidavit to transmit the same by post, addressed to the secretary, first paying the postage thereof.

66. That all affidavits, answers, and all other proceedings that could be read and relied upon in any of the Superior Courts of Law and Equity, may be read and relied upon before the Commissioners, subject to all just exceptions; and that copies thereof, purporting to be attested by the proper officer, shall be considered as *prima facie* evidence thereof.

67. That the Commissioners shall not be bound to reject any affidavit, by reason of any irregularity in the heading or the *jurat* thereof, or by reason of non-compliance with any of the preceding rules.

ORDERS.

68. That whenever a party served with a conditional order shall file an affidavit, or rely on any other matter as cause against such order, and shall give notice thereof, and the party obtaining such conditional order, shall not, within the time specified in such conditional order, or within four days after the expiration thereof, serve notice of motion to make the same absolute, the party opposing such order shall be entitled to have an office rule entered, allowing the cause shown as an authority for taxing the costs of resisting such conditional order; and such costs shall be taxed accordingly: and upon the entering such office rule, and not before, the cause shall be deemed to be allowed.

69. That in case of disobedience of any order made by the Commissioners, a writ of attachment, in the form to be hereafter settled by them, shall issue against the party so in default or disobeying the order of the court; and all sheriffs and other officers charged with the execution of like writs, issuing out of the Court of Chancery in Ireland, shall be bound duly to execute the same.

70. That the Commissioners shall, in case they think fit, in order to enforce obedience to their orders, cause a writ of sequestration to issue against any party in default, such writ to be in the form to be hereafter approved of by the Commissioners; and such writ of sequestration shall be executed in like manner as writs of sequestration issuing out of the Court of Chancery in Ireland may now be executed.

COSTS.

71. That all costs incurred in proceedings before the Commissioners, or in relation thereto, shall be taxable upon the requisition of any party (without any order referring the same for taxation) by such officer of the court as the Commissioners shall from time to time appoint for that purpose; and it shall be the duty of such officer, if any difficulty shall arise upon the taxation of such costs, to consult the Commissioners, or one of them, in regard thereto. And it shall be lawful for any party dissatisfied with such taxation, to apply to the Commissioners by way of appeal from such taxation. But unless notice of such application shall be lodged for service within two days after such costs shall be certified by the officer appointed to tax the same, the taxation thereof shall be conclusive upon all parties, unless the Commissioners, upon special grounds, shall otherwise order.

72. That the officer appointed to tax costs, shall be at liberty to tax costs incurred in proceedings before the Commissioners, or in relation thereto, between attorney and client, without any rule or order for that purpose, and it shall be his duty so to do, upon the requisition of the client.

73. That in all cases of costs, whether between party and party, or attorney and client, it shall be competent for the party against whom such costs are claimed, to offer by notice a sum in gross in lieu of such costs. And if the party entitled to such costs shall agree to accept of such sum, the officer appointed for the taxation of costs shall certify the sum specified in such notice, as the sum to which he has ascertained such costs; but in case the party entitled to such costs shall refuse to agree to such notice, and shall thereby render it necessary to have such costs taxed, and the same shall be taxed to less than the sum so offered by such notice, the party entitled to such costs shall be charged with the expenses of such taxation, and the same shall be ascertained by the officer and deducted from the amount of such costs, or an office rule may be obtained for the payment of the same, in case the sum due on such costs shall not be sufficient to cover the amount of such expenses.

74. That in any case in which the court shall award costs to any party, it shall be optional with the court, either to refer the costs to be taxed, or by the order to direct payment of a sum in gross in lieu of taxed costs, and also to direct by, and to whom, such sum in gross shall be paid.

75. That in any case in which costs are directed to be paid by any order, and the same shall be subsequently taxed or ascertained, the party entitled to such costs may, upon production of the said order, and the officer's certificate of the amount thereof, have an office rule entered for the payment of the same.

76. That all bills of costs, whether between attorney and client, or party and party, when taxed, shall be retained in the office; and at the end of every term, all such bills of costs taxed since the previous term, shall be bound up in one or more volumes, with proper indexes, and to that end the costs for taxation shall be written on post paper, book-wise, with a sufficient margin; and in taxing any subsequent costs in the same cause or matter, regard shall be had to the preceding bills, so as to ascertain that none of the items charged were included in any previous bill; but no inspection shall be given of any bills of costs lodged in the office between attorney and client, except to the attorney or client, or their respective agents, without the special order of the court.

77. That on the taxation of costs, no sum shall be allowed for the attendance of counsel, on a reference before a Commissioner, unless such Commissioner shall have entered in his book his approbation of the attendance of such counsel.

MONEY AND STOCK.

78. That when any stock shall stand in the Bank of Ireland, to the credit of the Commissioners, the Governor and Company of the Bank of Ireland shall from time to time receive the dividends arising therefrom, and furnish to the Commissioners a schedule signed by the proper officer of the Bank of Ireland, containing all sums of money received by them for such dividends, specifying in what matter and account each sum is received.

79. That the Governor and Company of the Bank of Ireland shall not transfer stock, or pay money, standing to the credit of any matter, without an order of the court, under their seal, and signed by two of the Commissioners.

80. That in order to provide against the accumulation of accounts for sums under six-pence, in all cases where a fractional part of six-pence may occur in dividing sums in cash or stock, or may remain, after payment out of all other funds, as the sole balance, the Commissioners may pay or transfer the same, not exceeding six-pence, to the parties in such manner as shall appear most convenient for closing finally such account; and that where an allocation or order shall be made for any fraction under one penny, the Commissioners may draw without regard to such fraction.

81. That in any case in which an order shall direct the dividends of stock to be invested from time to time, the officer of the court shall give a schedule and notice thereof to the broker, who shall accordingly invest such dividends at the end of each half year, deducting therefrom his lawful commission; and thereupon the Commissioners shall draw in favour of such broker for the sum so invested.

82. That the broker, in figuring valuations of stock under any money order, shall not charge more than five shillings for the first valuation, and two shillings for every subsequent valuation; and shall, on the first day of January, and first day of July, in every year, certify to the Commissioners what has been received by him for such valuations during the preceding six months.

83. That in any case in which any stock shall have been allocated to, and afterwards ordered to be transferred to any person, the Commissioners shall draw in his favour for the dividends (if any) received, subsequent to such allocation.

84. That whenever any order shall be made for the purchase of stock with money standing to the credit of the Commissioners, the price shall not be paid to the broker until he shall have transferred to the Commissioners, stock equal in value to the money to be invested, deducting his lawful commission, and shall have produced the certificate of the proper officer of the Bank of Ireland to that effect, unless the Commissioners shall, under special circumstances, otherwise direct.

85. That whenever an order shall be made for the sale of stock standing in the names of the Commissioners, the same shall not be transferred until the broker shall have lodged in bank, to the credit of the Commissioners, the price thereof, deducting his lawful commission, and shall have produced the certificate of the proper officer of the Bank of Ireland to that effect, unless the Commissioners shall, under special circumstances, otherwise direct.

SCHEDULE OF FEES.

	s.	d.
Instructions to Proceed	6	8
Instructions for Affidavit	6	8
Instructions for Affidavit to verify Undisputed Claim	6	8
Term Fee for Party having the Carriage of the Suit, or for the Owner, only once	21	0
Entering an Appearance, and all Attendance in relation thereto	6	8
Term Fee for other Parties, only once	6	8
Writing Letter, Signing, and Entry	3	4
If several of the same Import, in Nature of a Circular, for the First	3	4
For each subsequent one, or Copy	1	0
Reading Letter containing Instructions	2	6
Signing any Document requiring Signature	3	4
Attending on Client not exceeding One Hour	6	8
For each subsequent Hour	6	8
For each Day Cause or Motion in Day List, and not at Hearing	6	8
Each Day it is at Hearing	13	4
[Not to be allowed unless a competent person attends, acquainted with the facts and proceedings in the Cause, and having the proper documents in readiness.]		
Fee on each Office Rule	3	4
Filing a Notice Order, or Marking the Names of the Parties on whom it is to be Served, and attending with it at the Notice Office	3	4

for each Copy, including Postage Stamp and Envelope directed	1	0
Attendance on Counsel, with Brief or Case	6	8
for all Attendances to Lodge Money in Bank, including the procuring of the Order and returning the Receipt to Court	20	0
for Drawing Money, obtaining Order, and returning Receipt	20	0
for Appointment of New Solicitor for Reading Documents, Proceedings, and Rules	20	0
for Writing and Abstracting Deeds Preparatory to Drawing Statement of Title, for each Skin of Fifteen Office Sheets of Ninety words each	3	0
for concluding Fraction of a Skin	3	0
for Writing any Document to be Filed in Court, not otherwise provided for, per Skin	15	0
for last Fraction to be deemed a Skin		
for Copy of any Document or Statement of Title, under Six Folios of Ninety Words each	1	6
for each succeeding Folio of Ninety Words	0	3
for the Solicitor who obtains any Order of Court, being out same, Attendance included	6	8
for Petition for Sale, Exchange, &c., and copy thereof	42	0
for each Folio lodged therewith, per Folio	0	3
for Schedules attached to Petition; for each Denomination of Land Incumbrance or Lease	2	0
for additional charge to be allowed for any amendment that may be made in Abstract or Petition.]		
for my Claim of Lease or Agreement on behalf of Tenant, including Attendance	20	0
for Copy of Lease or Agreement, Signed by Tenant, per Folio	0	3
for Preparing Schedule of Incumbrances, after Absolute Order for Sale, for each Incumbrance	5	0
for Preparing Copy of Advertisement	6	8
for each Newspaper in which same is inserted, exclusive of Charges by Proprietor of Newspaper	3	4
for of Costs, each Item	0	1
for ending on Taxation, including Perusal and Instructions, each Item	0	1
for of Brief for Counsel, per Folio of Ninety words	0	3
for e of Examination of each Witness	6	8
for ending on Witness in Town	6	8
for ending with Witness to Examination	6	8
for Search in the Registry Office for each Head Nomination of land, for each Ten years, or fraction of Ten Years	6	8
for Search, for each Person searched against, for Ten Years, or fraction of Ten Years	6	8
for every Negative Search by Officer	12	6
for Requisition for Search, per Folio of Ninety words	1	0
for like fees for searches in any public office, when directed by the Court.]		
for Drawing Deed of Conveyance, per Skin	15	0
for Writing same, per Skin	15	0
for each skin to contain fifteen folios of ninety words each.]		
for any business not specified above, the same Fee allowed for similar business in the Court of Chancery.		
for above Fees are to be exclusive of all Disbursements, except for Clerks, Stationery, and Scribes' Work.		
for Preparation of Documents, Fees to Counsel on Perusing and Settling Draft Petition, Interrogatories, Cross Interrogatories, and Consequence.		
for submitted to the Privy Council for their approbation, number 18, 1849.		

S. Woulfe Flanagan, Sec.

FORMS AND DIRECTIONS

Petitions shall be addressed to "The Commissioners

for sale of Incumbered Estates in Ireland," and shall be entitled to the effect following:—

"In the matter of the estate of A. B. of [naming the owner.]"

And shall commence as follows:—

"The petition of J. D. of an owner of land [or an incumbrancer on land, as the case may be.]"

And all subsequent proceedings shall be entitled to the effect following:—

"In the matter of the estate of A. B., owner and petitioner [or in the matter of the estate of A. B. owner, and of E. F. petitioner, as the case may be.]"

But in case of the death, or transmission, or change of interest, of such owner or petitioner, the name of the person in regard to whom such proceedings shall be continued in place and stead of such original party, shall also be stated in the title of all such subsequent proceedings in the manner or to the effect following:—

"In the matter of the estate of A. B., owner and petitioner, now deceased [or otherwise as the case may be] and of C. D. [stating his character in reference to the original party, whether heir, devisee, or personal representative, assignee, &c.]"

or otherwise:—

"In the matter of the estate of A. B., owner, and of C. D. petitioner, now deceased [or otherwise as the case may be.] and of E. F. [stating his character in reference to the original petitioner, as the case may be.]"

And in case of the death, or transmission, or change of interest, of such added party; then substituting for such firstly added party, the name of the new party in regard to whom such proceedings shall be still continued.

Any party presenting a petition shall be bound to bring in, and lodge at the same time, a fair copy of such petition, for the use of the court.

If a petition is signed by counsel, it will be his duty to see that the petition and schedules are justified by the abstract, and that the abstract is drawn in a fair and concise form. No costs will be allowed, without the special order of the Commissioners, for any amendment to the petition, schedules, or abstract; but if such amendments shall be made by a different attorney, he shall be allowed his reasonable costs, which shall be deducted from the costs allowed to the attorney for preparing the petition and abstract, unless the Commissioners shall otherwise direct. If the party who presents the petition gives the secretary, at the same time, a stamped envelope, entitled in the matter, and addressed to himself, he will receive notice when the petition is filed, and may thus avoid the trouble of calling at the office.

In every petition, the petitioner shall state whether he knows, or has reason to suppose that any person interested in the premises to which the petition relates, is an infant, idiot, lunatic, or married woman; and if so, he shall state, so far as he is able, the names and addresses of the guardian or committee of the estate and person, or husband, of any such person.

FORM.—Petition for sale by an owner.

In the matter of the Estate of William Howard, of Ballinderry, in the co. of Cork. To the Commissioners for Sale of Incumbered Estates in Ireland.

The petition of William Howard, an owner of land. Sheweth,

That he is owner, as tenant in fee, of the premises described in the first part of the first schedule hereunto annexed, under the title set forth in the abstract accompanying this petition, and that he is in possession and receipt of the rents and profits of the whole thereof, under his said title, since the 1st of January, 1835.

That he is owner, as tenant for his life, of the premises described in the second part of the first schedule hereunto annexed, under the title set forth in the abstract accompanying this petition; and that on the 15th of June, 1830, he entered into possession and receipt of the rents and profits thereof, and is still in receipt of the rents and profits of every portion thereof, except the lands of Ballintoye and Garranebeg.

That William Johnson, of the city of Dublin, entered

into receipt of the rents and profits of Ballintoye, under an elegit, on the 20th of April, 1844, and has continued in the receipt thereof to this date; and that George Symons entered into receipt of the rents and profits of Garranebeg on the 5th of March, 1845, under the mortgage in the abstract stated, bearing date the 11th of May, 1849, and is still in receipt thereof.

That the said premises are subject to the several incumbrances set forth in the second schedule hereunto annexed, and that there is not any suit or matter depending in any court of equity in relation to the premises, or any part thereof, or in relation to the receipt of the rents and profits thereof.

Your Petitioner therefore prays that the premises, or such part thereof as the Commissioners shall direct, may besold, and that the petitioner may have such further relief in the premises as to the Commissioners shall seem meet. The petition shall contain a schedule of the property of which a sale is sought, stating—

- 1st. The denominations of the land, or in the case of incorporeal hereditaments, a full and complete description thereof.
- 2nd. The head-rent or quit-rent, if any, to which the property or any part thereof is liable, and the gale days, and if held by lease the particulars thereof and the gale days, and if held by lease in perpetuity the circumstances of the property in regard to renewals.
- 3rd. The arrears, if any, of head-rent or quit-rent, due up to and including the last gale-day.
- 4th. The tenants' names.
- 5th. The date and description of the instrument, if any, under which each tenant holds, and the tenure of each tenant, and whether any timber or trees on the land belong to the tenant, or are claimed by him.
- 6th. The extent and description of each holding or farm.
- 7th. The annual rent.
- 8th. The gale-days.
- 9th. The arrears due up to last gale-day inclusive.
- 10th. Observations, relating for example to the character and capabilities of the estate proposed to be sold, to the liability of the estate to any arrear of tithe rent-charge, or to any charge for money borrowed under the acts for promoting the drainage of lands and the improvement of navigation and water-power, in connexion with such drainage; or the act to facilitate the improvement of landed property in Ireland, or imposed thereon under the provisions of the labour rate acts, and the acts for the relief of the poor; or to any other special matter affecting the circumstances of the premises proposed to be sold, and the charges affecting the same.

It shall also contain a schedule of all charges and incumbrances, whatever, affecting the premises, and each and every part thereof, specifying—

- 1st. The date of each incumbrance.
- 2nd. The name of the party entitled to the same.
- 3rd. The manner in which such charge was created, whether by will, settlement or mortgage, judgment or otherwise.
- 4th. The sum due for principal on each incumbrance.
- 5th. The annual rate of interest payable in respect of each charge or incumbrance; the day or days of payment of the same, if there be any specially appointed for that purpose; and the amount due for interest up to some certain day to be named in the petition; or in the case of an annuity, the arrears up to and including the gale-day next before the presenting of the petition.
- 6th. Any special circumstances, such, for example, as any proviso respecting the rate of interest, or the terms on which an incumbrance may be paid off, or an annuity redeemed, or any exemption of a portion of the premises from the whole or any portion of the incumbrance, or the liability of any other property, or of any person, to pay any incumbrance, whether in exoneration of the premises or otherwise, distinguishing whether the estate proposed to be sold is primarily liable to the incumbrance or only by way of guarantee-ship or suretyship.

The petition shall be accompanied by a concise abstract of the title to the premises, and by an affidavit by the petitioner or his attorney, that he has read the petition, including the schedules, and also the abstract of title accompanying the same, and that he believes the said petition and schedules to be true, and that he believes the abstract to be a correct and fair abstract of petitioner's title.

The deponent must sign the petition and each schedule, and the abstract of title.

Form.—Petition for Sale by an Incumbrancer.
In the Matter of the Estate of William Howard, of Ballinderry, in the co. of Cork, Sale of Incumbered Estate in Ireland.

The Petition of James Johnson, an incumbrancer on land, Showeth,—That on the 17th of December, 1810, James Howard, of Ballinderry, in the county of Cork, Merchant, since deceased, conveyed the lands mentioned in the last schedule hereto, in fee to one Henry Dillon and his heirs by way of mortgage, to secure the sum of £10,000 with interest, at the rate of 5 per cent. per annum payable the 1st of March, and 29th of September.

That the said James Howard had such an estate or power over the premises as enabled him to execute the said mortgage.

That your petitioner is now the owner of the said mortgage, as appears by the abstract of title herewith lodged.

That William Howard, of Ballinderry, is now the owner of said lands, as tenant for life thereof.

That on the 5th of May, 1838, one John M'Namara, in his bill in the Court of Chancery in Ireland (among other purposes) to recover a certain charge of £5,000 affecting the premises, and to which the said John M'Namara claims to be entitled.

That a receiver in said cause is now in the receipt of the rents and profits of the premises, except the lands of Ballinderry, which are in the possession of the said William Howard.

That a decree to account in the said cause was pronounced on the 16th of June, 1843, a copy of which is annexed hereto.

That the Master in the said cause made his report, bearing date the 3rd of August, 1847, a copy of which is annexed hereto.

That the said report was confirmed, and a decree pronounced in the said cause on the 18th of November, 1847, a copy of which is annexed hereto, and that no person is known to object to the said decree and report.

That the sum of £12,500 is now due on foot of the said mortgage, together with interest, since the 29th of September, 1849, the gale day up to which interest is compounded.

That your petitioner is not the first incumbrancer on the said premises, and that he has in a schedule hereto annexed set forth the other incumbrancers affecting the premises, and in whom the same are vested according to the best of his knowledge, information, and belief.

Your petitioner prays that the premises or a competent part thereof, for the discharge of the incumbrances affecting the same may be sold, and that your petitioner may have such further relief in relation to the matters aforesaid, as to the Commissioners shall seem meet.

To this petition must be annexed a schedule of the lands proposed to be sold, which shall be in the same form as the schedule to a petition by an owner, so far as the information of the petitioner shall enable him to give the same; and also a schedule of the incumbrances affecting the premises, so far as petitioner is acquainted with the same, and copies of the decrees and reports made in the pending suit in Chancery. The petition must be accompanied by an abstract of petitioner's title, and by an affidavit by petitioner or his solicitor, that he has read the said petition, and schedules, and abstract, and that the petition, including the schedules, is true to the best of deponent's knowledge, information, and belief, and that he believes the abstract to be a fair and true abstract.

The deponent must sign the petition and each schedule, and the abstracts of title.

Where an application for a sale of any land or lease has been dismissed with costs by a competent tribunal, ap-

application by the same party for a sale of such land or lease, or any part thereof, he shall, by his petition, state that such costs have been paid, and when, and to whom, and verify such statement by affidavit.

That every petition for sale, whether by an owner or incumbrancer, shall state whether there is any suit or matter depending in any court of equity in relation to the premises or any part thereof; or in relation to the receipt of the rents and profits thereof; and if there be any such suit or matter, it shall state in what court such suit or matter is depending, and a short description of the title thereof, and to what state such suit or matter has reached, and what declarations, inquiries, or proofs have been made under any decree or order in such suit or matter, and whether the petitioner, or any other person to his knowledge, objects to the decree or to any finding or proof under it, as erroneous or proper to be reconsidered.

In case an agreement by private contract for sale of any portion of the lands of which a sale is sought by petition, shall be entered into with any person before the premises are set up to auction, the parties shall be at liberty to apply by motion to the Commissioners that such sale shall be confirmed, and a conveyance executed to the purchaser; such motion shall be grounded on an affidavit by the party making the application, showing that such sale would be beneficial to the parties, and stating that no consideration has been directly or indirectly given or agreed to be given for the premises, except the purchase-money stated in such affidavit.

In setting forth the schedules of tenancies, leases, agreements for leases, and incumbrances, the owner shall include all such as he knows or believes to be claimed by any person, although he may dispute the validity of such claim; and in the column of observations, he may state how far he disputes such claim.

In preparing an abstract of title, either to land or to an incumbrance, accompanying a petition by an owner or incumbrancer, it is not necessary to go back earlier than the earliest deed creating an incumbrance still affecting the premises. But as a perfect abstract of title will be required in the course of the proceedings, it may in some cases expedite the distribution of the purchase-money if a complete abstract is presented in the first instance. This is left to the discretion of the petitioner.

The attorney presenting a petition for an incumbrancer, ought to be prepared with the documents showing the existence of the incumbrance and of petitioner's title thereto, as the Commissioners may require to inspect them, before filing the petition under rule.

Form.—Petition for partition, under 43rd section, before sale.

In the matter of the Estate of Jacob Dixon, of &c., Esq., late an Owner of Land.

To the Commissioners for the Sale of Incumbered Estates in Ireland.

The petition of Jacob Dixon, of &c., Esq., an owner of land, Showeth,

That James M'Cann, of &c., gentleman, did, on the 28th day of May last, present his petition in this court, in the above matter, praying for a sale of one undivided moiety of certain lands and premises in such petition mentioned or referred to, of which moiety your now petitioner is the owner, and the matter of the said petition is still pending, and no sale has been made under the said petition.

That Sarah Bright, of &c., spinster, and Jane Dickins, of &c., widow, are the owners of the other moiety of the said premises, the said Sarah Bright being entitled to one-fourth part of such moiety, and the said Jane Dickins to three-fourth parts thereof.

That the said Sarah Bright has been found a lunatic by inquisition, and Thomas Bright, of &c., gentleman, is the committee of her estate, and Mv. Allen, of &c., Esq., is committee of her person.

That your petitioner believes that the said Jane Dickins is tenant for her life only of her said shares, but your petitioner has not been able to learn how such estate was created, or who is entitled in remainder.

That your petitioner is desirous that a partition should be made of the said premises before proceeding to a sale of his moiety thereof.

Your petitioner therefore prays that a partition may be made of the premises mentioned in the said petition for sale, and that your petitioner may have such further and other relief in relation to the matters aforesaid, as to the Commissioners shall seem meet.

Form.—Petition for partition under 43rd section, after sale and conveyance.

In the matter of the Estate of Jacob Dixon, of &c., Esq., late an Owner of land, and of Samuel Green, of &c., Esq., a Purchaser of such land.

To the Commissioners for the Sale of Incumbered Estates in Ireland.

The petition of Samuel Green, of &c., Esq., an owner of land, Showeth,

That James M'Cann, of &c., gentleman, did, on the 28th day of May last, present his petition in this court, "*In the matter of the estate of Jacob Dixon, of &c., Esq.*," praying for a sale of one undivided moiety of certain premises, including the lands and premises mentioned in the schedule hereunto annexed; and that such proceedings were had in the matter, that on the 30th day of August last, two of the Commissioners duly conveyed one undivided moiety of the premises mentioned in the schedule hereto unto your petitioner, his heirs and assigns for ever.

That the other moiety of the said premises is vested in fee in John Taylor, of &c., Esq., and Richard Smyth, of &c., merchant, as trustees of the will of Thomas M'Mahon, of &c., brewer, deceased, upon trust to pay certain annuities to A. B. and C. D., and subject thereto upon certain trusts under which the children of the said Thomas M'Mahon are interested.

Your petitioner therefore prays that a partition may be made of the premises mentioned in the schedule hereto, and that your petitioner may have such further and other relief in relation to the matters aforesaid, as to the Commissioners may seem meet.

Schedule of lands intended to be partitioned, specifying the denominations and head rent (if any) and the tenancies.

If the purchaser has mortgaged, settled, or otherwise dealt with the property, there should be an abstract of his title.

The purchaser may petition for a partition before he has obtained his conveyance, in which case he may, if convenient, describe the lands by reference to the order for sale.

Form.—Petition for partition, under the 45th section.

In the matter of the Estate of John Jones, of &c., farmer; Wm. Blake, of &c., bookseller; and Jane, the wife of Ar. Daly, of &c., innkeeper, Owners of land.

To the Commissioners for Sale of Incumbered Estates in Ireland.

The petition of John Jones, of &c., farmer; Wm. Blake, of &c., bookseller; and Jane, the wife of Ar. Daly, of &c., innkeeper, owners of land, Showeth,

That your petitioners are the owners of the lands and premises mentioned in the first schedule hereunto annexed, which are held for an estate in fee-simple, subject to an annual quit rent of £2 16s. 8d., payable to the crown.

That your petitioner, John Jones, is the owner of seven equal sixteenth parts of the said premises, in the following manner, that is to say, he is entitled in fee-simple to four of such parts, and he is tenant for his life of the remaining three of such parts, with remainder to such of his children as shall be living at his decease, equally as tenants in common in fee, as by the abstract of title lodged herewith by the said John Jones more fully appears.

That your petitioners, Wm. Blake, and Sarah, his wife, formerly Sarah Jones, spinster, in right of the said Sarah Blake, are entitled in fee-simple to one equal sixteenth part of the said premises, as appears by the abstract of title lodged herewith by the said Wm. Blake.

That no settlement was ever made of the said share of the said Sarah Blake.

That your petitioner, Jane Daly, is entitled for her life and during her present coverture, for her separate use to one moiety or eight equal sixteenth parts of the said premises,

the said Jane Daly being so entitled under the settlement made upon her marriage with Ar. Daly, bearing date the 23rd day of July, 1837, whereby the said last-mentioned parts (which were the property of your petitioner, Jane Daly, then Jane Jones, spinster), were vested in certain trustees upon trust, during the joint lives of your petitioner Jane Daly and her said husband, for your petitioner, Jane Daly, for her separate use, with power of anticipation. And upon further trust for the survivor of your said petitioner and her said husband during her or his life. And upon trust after decease of your said petitioner and her said husband, to sell the said shares and hold the proceeds thereof upon trust, for such of the children of your petitioner, Jane Daly, as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, as by the abstract of title lodged herewith by the said Jane Daly more fully appears.

That your petitioners are desirous to effect a partition of the said premises, and have proposed that such partition should be made on the following terms (that is to say), that the premises mentioned in the first denomination of the said schedule, subject to the quit-rent of 14s. 2d., should be allotted in respect of the four-sixteenth parts whereof your petitioner John Jones is seized in fee; that the premises mentioned in the second denomination of the same schedule, subject to the quit-rent of 10s. 7½d., should be allotted in respect of the three-sixteenth parts, whereof your petitioner John Jones is tenant for life. That the premises mentioned in the third denomination of the same schedule, subject to the quit-rent of 3s. 6½d., should be allotted in respect of the one-sixteenth part of your petitioner William Blake and Sarah his wife; and that the premises mentioned in the fourth denomination of the same schedule, subject to the quit-rent of £1 8s. 4d., should be allotted in respect of the eight-sixteenth parts settled for the benefit of your petitioner Jane Daly and her husband and children.

Your petitioners therefore believing that such partition will be beneficial to all persons interested in the premises, pray that a partition may be made of the said premises according to the terms aforesaid, and that your petitioners may have such further and other relief in relation to the matters aforesaid, as to the Commissioners shall seem meet.

Schedule (showing the lands in the divided parts, and stating minutely any rights of way or other easements created for the purpose of the partition).

If convenient, the general description of the whole property may be placed in a separate schedule from the divided lots, and in all cases the schedule must specify the denominations of the land, the head-rent or quit-rent, if any, with the arrears, if any; the tenants' names, and the date and description of the instrument, if any, under which each tenant holds.

If there be any incumbrances affecting the entirety of the property, or of any portion thereof, they should be noticed; and incumbrances affecting any undivided shares should be scheduled or mentioned explicitly in the body of the petition.

The petition should be accompanied by concise abstracts of each petitioner's title, from the period when the interests were severed, and by an affidavit by each petitioner, or his attorney, that he has read the petition, including the schedules, and also the abstract of his own title, and that he believes the petition and schedules to be true, and that he believes the abstract to be a fair and correct abstract of his title. The deponents must sign the petition and each schedule, and each deponent must sign the abstract to which his affidavit relates.

Form.—*Petition for exchange after sale and conveyance, the proceedings upon the petition for sale being still pending.*

In the matter of the Estate of Jacob Dixon of &c., Esq., late an owner of land, and of Samuel Green, of &c., Esq., a purchaser of such land.

To the Commissioners for sale of Incumbered Estates in Ireland.

The petition of Samuel Green, of &c., Esq., an owner of land.

Showeth,

That James M'Cann, of &c., gentleman, did on the 26th day of May last, present his petition in this court, "*In the matter of the estate of Jacob Dixon, of &c., Esq.,*" praying for a sale of the premises mentioned in the first schedule hereto, the same premises being then held by the said Jacob Dixon, in fee-simple, subject to a fee-farm rent of £20: and that such proceedings were had in the said matter, that on the 30th day of August last, two of the Commissioners duly conveyed the said premises unto your petitioner, his heirs and assigns.

That your petitioner is still the owner of the said premises, the same being vested in trustees (subject to an incumbrance affecting the same), upon trust for your petitioner, for his life, and subject thereto upon certain trusts for the children of your petitioner who shall attain the age of twenty-one years, as appears more fully by the abstract of title lodged by your petitioner.

That your petitioner has agreed with the Right Hon. James, Earl of B. for an exchange of the said premises for the premises mentioned in the second schedule hereto, whereof the said James, Earl of B. is seized in fee-simple, and Wm. M'Mahon, who is the sole incumbrancer on the premises mentioned in the said first schedule, has joined in the said agreement, and thereby agreed to accept a mortgage of the said premises mentioned in the said second schedule, in lieu of his said former mortgage as by the said abstract of title more fully appears.

That your petitioner has caused an abstract of the title of the said James, Earl of B. to the said premises mentioned in the second schedule, to be lodged with this petition.

That the said exchange will be very beneficial to your petitioner and his children, inasmuch as the premises mentioned in the said first schedule be dispersed and intermixed with the lands of the said James, Earl of B., and the said Earl being desirous of laying out such lands for building purposes, and being unable conveniently to do so without acquiring the said lands mentioned in the first schedule, has been willing to contract for the same upon terms highly advantageous to your petitioner and his children.

Your petitioner therefore prays that an exchange may be made of the aforesaid premises upon the terms herein before mentioned, or upon such other terms as the Commissioners shall approve of, and as shall be consented to by the said James, Earl of B. and that your petitioner may have such further and other relief in relation to the matters aforesaid, as to the Commissioners shall seem meet.

Schedules specifying the denominations, the head or quit rent (if any), and the tenancies.

If the proceedings upon the original petition for sale are no longer pending, both owners should be petitioners under the 46th section, and the petition should be entitled, "*In the matter of the estate of Samuel Green, of &c., Esq., and of the estate of the Right Hon. James, Earl of B.*"

This precedent may be adapted to the case of a petition by the owner before sale, or by the purchaser after sale, and before conveyance; and to the case of a petition for division of intermixed lands by several owners.

In all cases of partition by consent, and of exchange and division of intermixed lands, the affidavit of the petitioner or petitioners, shall deny all collusion, and shall state that no consideration has been directly or indirectly given or agreed to be given otherwise than as appears by the petition and abstracts.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 43, FLEET-STREET, in the Parish of St. Andrew, and published at 15 COLLEGE-GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin. Saturday, October 27, 1849.

THE Irish Jurist

No. 53.—VOL. I.

NOVEMBER 3, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 6d

The Names of the Gentlemen who favour THE IRISH JURIST with Reports in the several Courts of Law and Equity in Ireland, are as follows:—

Court of Chancery, including Bankruptcy Appeals.....	{ ROBERT LONG, Esq., and JOHN PITT KENNEDY, Esq., Barristers-at-Law.
Rolls Court.....	{ WILLIAM BURKE, Esq., and WILLIAM JOHN DUNDAS, Esq., Barristers-at-Law.
Equity Exchequer.....	{ CHARLES HAZE HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
Bankrupt Court,....	{ ROBERT GRIFFIN, Esq. and W.G. CHAMNEY, Esq. Barristers-at-law.

Court of Exchequer Chamber.....	{ JOHN BLACKHAM, Esq., and A. HICKEY, Esq., Barristers-at-Law.
Queen's Bench, including Civil Bill and Registry Appeals.....	{ FLORENCE M'CARTHY, Esq., and SAMUEL V. PEET, Esq., Barristers-at-Law.
Exchequer of Pleas, including Manor Court and Registry Appeals.	{ CHAS. H. HEMPHILL, Esq., and WILLIAM HICKSON, Esq., Barristers-at-Law.
Common Pleas.....	{ ROBERT GRIFFIN, Esq. and W. G. CHAMNEY, Esq. Barristers-at-law.
Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W.G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, NOVEMBER 3, 1849.

We are disposed to regret the rule adopted by the Commissioners, which precludes the biddings being opened by an advance of price.

From the combined working of legislation and of famine, the real property of Ireland is thrown upon the market in enormous quantities, and as a consequence at a depreciated value.

No owner, who could stem the torrent of the times, would voluntarily sell an acre of his estate; he would hold it over until a re-action in value took place, and the new Court should deal towards those hapless owners—whose properties must be sold—with as much consideration as possible, and in offering an estate for sale, should be scrupulous in not depriving the owner or creditor of the smallest possible advantage, even if that should turn out to be more imaginary than real.

Baron Richards states "that nothing shall be wanting on the part of the Commissioners to carry out, as far as in them lies, the great objects which the Legislature had in view in enacting this law." And in close connection with this statement he pointedly adverts to the sixteenth rule, "chiefly because that rule establishes a practice essentially variant from the practice of every other Court of Equity, both in England and Ireland."

This departure from the long established practice of every Equity Court is startling, and, we should say, will be looked upon with great alarm by the great body of the incumbrancers upon real property, and all its owners.

The policy of the measure is admittedly the introduction of a new unembarrassed proprietary; we neither deprecate that, nor the avowed intention of the Commissioners to carry it out, provided it be done with the greatest regard to existing interests, compatible with the working of the measure.

It is quite true, that at the sale of a horse, or of household furniture, when the auctioneer's hammer once knocks down the article to the purchaser, no advance of price will take it from him; and the present rule of the Commissioners is calculated to assimilate the laws which regulate the sale of land and chattels; but this attempt is best made when made gradually, and so as not to excite alarm or distrust. The minds of the great majority of the upper orders of this country are not prepared to carry out the designs of the economic school, and to consider land in the same light as a bale of merchandise.

The vast body of incumbered proprietors look upon this new court as unjust in its constitution towards them, as created to give facilities for the sale of their properties, at a period when they are unduly and unjustly depreciated; and neither their minds nor those of their creditors, are made up to have their properties knocked down irrecoverably at the first offer.

The Commissioners are of opinion that the practice of opening sales "was calculated to damp very much the ardour of *bonâ fide* purchasers, to delay the final completion of the sale, and winding up of the cause, and, in fact, more or less to damage all parties interested in the cause."

With the exception of speculative landjobbers, we doubt very much whether the practice of opening the sales was calculated to damp the ardour of purchasers; but we strongly suspect that the 16th rule is calculated to damp very much the flow of business into the new court. What puisne incumbrancer who has not his purchase money in his pocket, will be disposed to try a tribunal when the sale may be made at ten years purchase, and just produce sufficient to pay the incumbrancer before him? How could that rule be said to damp sales, when a purchaser, according to the practice of the Court of Chancery, could have his sale confirmed

absolutely within twelve days after his purchase; was that too long a *locus penitentiæ* for an undecided bidder to offer an advance of price, and has the rule worked well or ill for creditors?

In *Tyndale v. Warre*, (Jacob 525,) the biddings were opened on an advance of £600 upon £3,800. In *Brookes v. Smith*, (3 V. & B. 144,) upon an advance of 5 per cent. on £10,000, and where the purchase money is under £10,000 the amount of advance required is ordinarily 10 per cent. Now in these cases it is obvious to our view that the rule of the Court of Chancery worked well for the creditors. In the first case put, the person offering the advance was present at the sale, and it was objected that, having had the opportunity of bidding, he should not be allowed to displace the accepted bidder; but this objection was overruled by the court, and a hundred reasons may suggest themselves, why upon one day a bidder may not, in the babble of the auction room, wish to go as far as he would on another. He may not have mustered his resources, he may not have acquired a sufficient knowledge of the property, he may not —; but why suggest reasons which will occur to every one?

It is true the Commissioners have reserved the power of adjourning the sale, when the offer is clearly inadequate, "but this is a power"—we quote from Baron Richards—"which, I apprehend, we shall very seldom have occasion to exercise, and most likely, *never shall exercise*, except when we have reason to suspect something in the nature of fraud or contrivance in the case."

So that, apart from fraud, there will be no adjournment, and the inadequacy will not be *per se*, an element for adjournment, it must exist in conjunction with fraud. That adequacy is so purely arbitrary, and so purely in the breast of the Commissioners, that the power of adjournment, accompanied by the expression of the intended use of it, goes for almost nothing, and we can conceive many instances in which there will be no discoverable fraud, but, nevertheless, in which properties will go at an inadequate price, without the possibility of that price being enhanced, if the present rules and their exercise be continued.

We regret, as we have before stated, their adoption, because we think the Chancery rule intrinsically a good one, because an analogous one could have been made so stringent, as to have interposed almost no delay in the completion of the purchase, and because the new practice is calculated to induce the belief that the policy of the Act will be carried out with too stern a necessity. Even a respite of 48 hours, during which the bidding books might be kept open, would be a boon to the public, and a desirable power for the Commissioners.

Turning from this subject to another, we can conceive great injustice worked by the new Statute, except great caution be exercised by the Commissioners. By its 41st section it is enacted, that, "Where it shall be shewn to the Commissioners that a decree for a sale has been made by a Court of Equity, the Commissioners shall, if they see fit, *without further inquiry*, order a sale of the land or lease decreed to be sold."

Now it is notorious that decrees are frequently made by Courts of Equity where the title is defective, and in this enactment the difference of the constitution of the two courts has not been sufficiently kept in sight. A Court of Equity decrees a sale, but *does not warrant title*. A purchaser, to save himself hereafter, sees that all proper parties are bound, and this is the greatest possible protection to absent parties; but by the transfer of jurisdiction a defeasible title, without further inquiry, may now be made indefeasible, and we can therefore perfectly well understand cases in which decrees have been obtained for sale, but in which a supplemental bill would be necessary to pass a good title—we can well understand that in those cases parties having a decree will present their petitions to the new court, but we do trust for the prevention of fraud, for the prevention of injustice, orders for sale will not be made upon them "without further inquiry."

These are precisely the cases in which a strict inquiry should be made whether all proper parties were before the Court of Equity in the causes which have been transferred.

It would be a very singular state of things if it should turn out, that this statute, which was designed to extirpate the present race of incumbered proprietors, should, in many instances, be found a means of giving them back their properties discharged of half the pre-existing incumbrances; yet this is not at all an improbable or unlikely event. It may be effected thus: A friendly early incumbrancer may present his petition, and procure an order for sale, obtain leave to bid—the property just reaches his incumbrance at its present diminished value; the next day he reconveys to the inheritor, and takes a mortgage for the amount of his old, and now sole claim upon the lands.

In this point of view, the real sufferers will be the pious incumbrancers; and that class, in the present convulsion of national property, will require the exercise of extreme vigilance for the conservation of their perilled rights. In the first place, if we have not misinterpreted the rules, the property may be directed to be sold without notice to them, and in the next it may be sold at "a clearly inadequate value," if there be no fraud or contrivance.

Baron Richards' invitation "to those who intend practising in the court, to communicate freely with us, in case of any difficulty arising in their minds in regard to any of those rules," was likely to be so freely accepted, that their Honours would have been overwhelmed with questions; and, accordingly, the next day the invitation was limited to those questions arising out of, or relating to a petition before them.

And his Lordship gave suitors a piece of advice, in the latter part of which we cordially concur, "that, with regard to the construction of the Act, parties must rely upon themselves, or consult counsel."

The public are, by this time, tolerably well convinced of the truth of the old adage, "that the man who is his own advocate has a fool for his client."

Court Papers.

COURT FOR THE SALE OF INCUMBERED ESTATES.

Saturday, 27th Oct. 1849.

There was no business before the Court arising from petitions.

The Chief Commissioner, The Right Hon. Baron Richards said:—That most of the business of that court would be disposed of in the offices; that when petitions were lodged with their Secretary, it was the duty of the Commissioners to read them, and make such rules as they thought fit; that their Court business would not arise, until cause was shewn against the conditional order, either by the party himself, or some other person. That six petitions had been presented, on five of which rules had been made, and one would shortly be on the sixth; that it would not be necessary for the court to sit *de die in diem*, they had not business requiring it. The court would, therefore, adjourn till Friday the 9th of November, when they would sit in the court of Nisi Prius Exchequer. By a rule approved of by the Privy Council, if there was a necessity, the Commissioners had power to appoint an intermediate day. There had been some difficulty in finding a place for their sittings; their officers at present occupied the Court of Admiralty, and his chamber could be used as far as it would suit. The Board of Works had taken premises in Henrietta Street, which would be ready for our office business in a short time, and, until a court was prepared, the Commissioners would sit, after the offices were removed to Henrietta Street, in the Prerogative Court.

The second Commissioner M. Longfield Esq. said:—That the Commissioners were desirous of putting the public to the least possible inconvenience; that which, in the present instance, was of an inconvenience, if repeated might become one. It would be desirable to have the petitions named with the greatest possible accuracy. In one

of the petitions presented, the form of the petition by an owner for a sale, was mistaken; the petition stated that it was in the matter of W. Howard, &c. adopting the fictitious title prefixed to the form of our precedent. It was intended, in framing these forms, that the petition should be assimilated to them as nearly as was possible, but not to follow them in names and dates. In another petition the petitioner states himself to be owner, he being possessed only of a leasehold estate for 120 years, and seeks a sale as an owner of land. I have altered it to a petition by the owner of a leasehold. In another case where the petitioner is seized of an interest in an undivided third of an estate for lives renewable, he states himself to be possessed of the whole estate, describing it so as to the names, headrents, value. There is nothing to show that he was merely owner of a third, and that the creditors have only so much for their security. This may lead incumbrancers to believe their security adequate for their demands, it being in reality very inadequate. In another case there are two petitions for a sale of the same estate; one by a party who had the carriage of proceedings in Chancery; the other by a creditor. We think the estate could be sold to much more advantage, if the carriage of these proceedings were given to the creditor. In making orders we shall never consider the imaginary right of parties to have the conduct of their own suits; we will give the carriage to the party who will appear to be most likely to conduct the proceedings for the benefit of the incumbrancers; and in this view a great anxiety to have the conduct will not be a recommendation to us. A question has been asked as to the form in which we should wish to have documents made up for the purposes of our offices; we should prefer them bookwise; but if they have already been prepared otherwise for other purposes, we will not put parties to the expense of recopying them.

Court was adjourned till Friday, 9th November. at Nisi Prius Exchequer.

PETITIONS PRESENTED TO FRIDAY, NOVEMBER, 2, 1849.

Name of Petition.	Owner.	Petitioner.	Solicitor.
In the matter of Joseph Walker, John O'Connell and Morgan O'Connell,	Ib.	Joseph Walker and others, Patrick D. Moylan,	Jackson and Bond. T. and D. Fitzgerald.
Robert D. Browne, M. P.	Ib.	P. C. Ingham,	James D. Meldon.
William Alexander W. Kerr,	Ib.	P. M. Foster,	Hardman and Miller.
Thaddeus O'Callaghan,	Ib.	Ib.	Ib.
Alexander O. G. Rose,	Ib.	P. D. Henderson,	Garde and Atkinson.
E. Garde, widow,	Ib.	James K. Bailey,	R. Miller.
W. Blake,	Ib.	James Driscoll and others,	R. C. M'Nevin.
James Balfie and R. Bodkin,	Ib.	R. Kerrison,	Cooke and Larkin.
J. Purdon Scott,	Ib.	Isabella Williamson,	J. W. Williamson
Thomas Doyle,	Ib.	Peter Henrion,	Thaddeus O'Callaghan.
George Keane,	Ib.	Thomas Keane,	Cullen and Kimton.
John Westropp,	Ib.	Michael Cullin,	Ib.
Charlotte Donellan,	Ib.	W. F. Eyre,	J. B. Kennedy.
H. Brabazon Brabazon,	Ib.	Hercules Sharpe and others,	W. Cullen.
William Biggs,	Ib.	John Waring,	Wardle and Stirling.
Richard H. Levinge,	Ib.	W. L'Estrange,	Garde and Atkinson.
Robert Haughton,	Ib.	Daniel Curtin,	Ib.
Hyacinth Darcy,	Ib.	Coote Carroll,	Joseph S. Moore.
Eathaniel Alexander,	Ib.	Helen M'Manus,	E. Crookshank.

Chancery.*Adjourned Causes.*

Anderson v. Walker	Donnelly v. M'Clintock
Campbell v. Hackett	Ahern v. Daly
Lupton v. Stevenson	Lewis v. E. Charleville
Montgomery v. Stevenson	M'Creight v. M'Creight
Greene v. Stoney	Barton v. Phelan
Kelly v. Murphy	Stewart v. Marquis Donegal
Marquis Donegal v. Dunbar	Brabazon v. Lord Lucan
Kelson v. Lewis	O'Keeffe v. Lanigan
Verschoyle v. Hamilton	Maher & Lenigan v. Maher & Smith
Brooke v. Horner	Bentley v. Burke
Booker v. Murphy	Cane v. Lord Fitzgerald
Stuart v. Buchanan	

Queen's Bench.*Demurrers.*

Bruce v. Bellis & others	Lowry v. Somerville
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Motion to set aside verdict.

Lynch v. Fitzgerald.

*Nisi Prius, Monday 5, 12, 19.***Common Pleas.***Demurrers.*

Knaggs v. Hunter	Davis v. Davis
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*Nisi Prius days, Saturday 3rd, Monday 12, 19.***Exchequer of Pleas.***Demurrers.*

Cornelius M'Manus v. Bartholomew Delany & others.
 Executors James Mitchell v. Edmond Mooney.
 Charles Lopdell v. William Leake.
 Edward Ward & others v. James Redmond.
 Alexander Boyle v. Thomas Farrell & others.
 Andrew Giffney and another v. Francis Synge.
 The hon. William Henry Hare v. Pierce Mahony.

Bills of Exceptions.

Anne Fitzgerald, administratrix of Patrick Fitzgerald, v. Samuel Anderson.
 Lessee Sir Robert Henry Gunning v. Henry Corr.
 Lessee Corporation of Drogheda v. Joseph Holmes.

Motions to set aside verdicts.

John Jack, lessee of Thomas Talbot & others, v. John Guilmartin.
 John Ruck v. Henry Brownrigg.
 John Horan, lessee of Edward Spaight Ferriter, & another v. Luke Littleton.

Motion to set aside Non-suit.

Rev. Joseph Morton v. Bridget Mahon, administratrix of Rev. Edward Mahon.

Special case.

Samuel Keogh & others v. Michael Power.

Rejoinder of Nul Tiel Record.

Catherine Dillon, administratrix of Daniel Dillon, v. Michael Dillon.

Plea of Nul Tiel Record.

The Attorney-General v. John Killelea.

Nisi Prius days, Saturday, November 3rd, 10th, 20th.

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A CARD.

CHARLES SHARPE cannot omit this opportunity, at the termination of another season, of returning his sincere thanks to the public (amongst whom he may number many of his warmest friends) for their kindness in having entrusted to him, within the last thirty-four years, various important and valuable libraries, as well as other kinds of property, for sale by auction, and for having so often testified their approbation of his manner of conducting their sales and settling their accounts. He begs to assure them that integrity and promptitude shall ever remain prominent features in his professional character; and he is, therefore, not without hope that he may continue for many years to experience that distinguished favor which he has hitherto enjoyed.
Anglesca-street, November, 1848.

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CHARLES SHARPE begs to announce that he will have the honor of submitting to Auction, at his Literary Sale Room, Anglesca-street, on Wednesday next, November 7th, 1848, and following days, the extensive and valuable Law Library of the late M. Baker, Esq. & C., embracing every Book requisite for Practise at Law or in Equity, (Lawyers' notes as well as modern, the Statutes (ante and post union,) Howell's State Trials, &c., all in the best possible condition.

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IN CHANCERY.

Hugh Boyd, executor of Isaac Warren, deceased, plaintiff.
 William Bailie, Rev. John Bailie, Robert Bailie, Hugh Campbell and James Carlow, and others, defendants.

PURSUANT to the decree made in this cause bearing date the 9th day of April, 1848, I require all persons having charge and incumbrances affecting the mortgage lands and premises in the pleadings in this cause mentioned, that is to say, all that and those that part of the lands of Aunaghvaeky, containing 43 acres, 3 roods, 3 perches of the late Irish plantation measure, be the same more or less, situate in the upper barony of Dundalk, manor of Roseth and county of Louth, situate all that and those the lands of Treu, otherwise Tray, containing 77 acres late Irish plantation measure, situate in the manor of Roseth and county of Louth aforesaid, the estate of the defendant William Bailie, to come in before me at my Chambers, Inns Quay, in the city of Dublin, on or before the 6th day of January next, and proceed to prove the same, otherwise they will be precluded the benefit of said decree.

Dated this 6th day of September, 1849.

For Master MURPHY,
 E. LITTON

Alexander Dudgeon, Plaintiff's Solicitor,
 83, Talbot Street, Dublin.

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TERMS OF SUBSCRIPTION—(payable in advance):
 Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 4, FLEET-STREET, in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, November, 3, 1849.

THE Irish Jurist

No. 54.—VOL. I.

NOVEMBER 10, 1849.

PRICE { Per Annum, £1 10s.
Single Number, 9d.

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Common Pleas.....	{ ROBERT GRIFFIN, Esq. and W. G. CHAMNEY, Esq. Barristers-at-law.
Admiralty Court.....	{ ROBERT GRIFFIN, Esq. and W. G. CHAMNEY, Esq. Barristers-at-law.

DUBLIN, NOVEMBER 10, 1849.

THE Commissioners for the Sale of Incumbered Estates held a public sitting yesterday, and disposed of some business; a full report of which, together with the list of the further petitions presented, will appear in our next.

THE importance of the recent statute for the Sale of Incumbered Estates,* and the natural anxiety pervading the public and professional mind as to its provisions and practical working induce us to resume its consideration.

In a previous number we stated that the inducement to purchasers were an indefeasible title, and no expense in investigating it.

It has been since intimated to us that we laid down these propositions much too broadly, that there is no case in which a purchaser can buy with safety without investigating the title, as there may be many instances in which the conveyance by the Commissioners will not pass one that is indefeasible. The argument is put thus: The Commissioners have a limited jurisdiction—they can only sell in certain specified cases—if they exceed their powers the excess is without authority, and any act done by them, unauthorized by the statute, is inoperative and void. By the 19th section, land is not to be deemed subject to an incumbrance, so as to warrant an application for a sale, except in certain enumerated cases; outside the defined limit the Act has no operation, and it is contended that a good title can only be passed when the incumbrance for which

the land is sold is one of those defined in the statute. If this be so, the Act is rendered almost nugatory; thus, in every case, an investigation of title becomes necessary, the purchaser buys with more or less of risk, and the possibility of a bad title being given, shakes to its foundation the confidence of the public.

Let us state and test the argument. By way of illustration we select the following example, premising that land—adopting the distinction made by the Act between “land” and “lease”—is declared not to be subject to an incumbrance for the purpose of authorizing an application for a sale, except it shall affect the inheritance, or have been created by the owner of an estate of inheritance. Suppose an incumbrance to have been created by a devisee, believed to be absolute owner of the land, but who, on the true construction of the will under which he derives, had only a life estate, if the fee were sold for this incumbrance, which it did not affect, it is contended that the assurance under the Act would not bar the true owner of the inheritance? The statute dealt with the case of incumbrances which *did* affect the inheritance—not with those which *did not*. It gives absolute authority to the Commissioners in the former instance; it confers none upon them in the latter; and if they assume to exercise it, their conveyance is inoperative. It being clear that the jurisdiction is limited, the subsequent sections only apply to those cases which fall within the range of the statute. This is the key to their interpretation, and restrains the generality of their language. Thus the 23rd section enacts that “where a sale shall be made *under this Act*, the Commissioner shall ascertain the tenancies, &c.” the 24th, that “the land or lease (*i. e.* the land or lease subject to the provisions of the Act) shall be sold under the controul and direction of the Commissioners, &c. and the conveyance or assignment of the land or lease shall be made by the Commissioners under their seal,

* The Act further to facilitate the Sale of Incumbered Estates in Ireland, with Explanatory Notes. By John Lyons, Esq. Barrister-at-Law. Dublin: Milliken.

&c.;" and the 27th that, "every *such* conveyance (i. e. of the land subject to the provisions of the Act) executed by the Commissioners upon the sale of land, shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed, subject to such tenancies, leases, and under-leases as shall be expressed or referred to therein as aforesaid; but save as aforesaid, and as hereinafter provided, discharged from all former and other estates, rights, titles, charges and incumbrances whatsoever of her Majesty, her heirs and successors, and of all other persons whatsoever." Those words, though extremely large, must be taken in connection with the 19th section, and apply only to the cases therein provided for—in which an indefeasible title no doubt is passed, and a good title is also always passed against incumbrancers, but not against owners of estates. To hold the opposite construction, would be to make the statute thoroughly confiscatory, and opposed to every principle of the British law; for thus, a man's inheritance might be sold by mistake, and he would be wholly remediless—it might be sold, and will be sold, fraudulently; and if the purchaser be not implicated in the fraud, and the Commissioners pass an indefeasible title, the defrauded inheritor will be without redress. Thus one man's estate may be sold for another man's debts, and a wholesale system of legal plunder accomplished by means of this statute.

We have thus endeavoured to state the argument; though not with the ability with which it might be put—though, we trust, with sufficient intelligibility to make it understood. It has been advanced on very respectable authority. Though a good deal impressed with its force, we cannot yield to it; but we thought it our duty to lay it before the public, as it unquestionably raises a doubt of great magnitude, and which should be set at rest as speedily as possible.

The latter part of the argument is altogether one of inconvenience. The policy of the legislature is oftentimes a key to the interpretation of a statute; and, in the present instance, we apprehend the Legislature meant to work as little private injustice as possible, consistently with the policy of giving "facility to the sale and transfer of incumbered estates in Ireland." With this object they created a new tribunal; invested it with extraordinary powers, for the investigation of all patent and latent rights and interests whatsoever; they intended to relieve the lands that were sold from all past debts; the purchaser from all past liability, or future risk. It is admitted that such, their intention, can be effected in those cases which fall within the jurisdiction of the Commissioners; but it is added that an enquiry is always necessary, by a purchaser, as to whether his case be, or be not within that jurisdiction. If such an inquiry were necessary, the absence of it would always involve a risk, and the security would only be a very modified one. All responsibility was intended to be shifted from the purchaser to the Commissioners; whether the statute has carried out that intention, is a subsequent question; and as to the comparative injustice of such a proceeding, we admit it. The measure was a political experiment, which sprung from a national necessity; with the machinery provided of a pub-

lic court, and of public proceedings, to deal with a species of property, which had a tangible and visible existence, and every matter affecting which was one of publicity, and of record, all the probabilities were against much private injury being effected, and the case of one man's property being sold for another man's debt, if not absolutely hypothetical, was very unlikely.

But whatever may have been the intention of the Legislature the point must turn upon the expression of that intention in the statute, and its 27th section contains no restrictive words: "every such conveyance shall be effectual to pass the fee simple and inheritance of the *land* thereby expressed to be conveyed, discharged from all former and other estates, rights, titles whatsoever, and of all persons whatsoever;" and to guard against the case of a mistake on the part of the Commissioners, or an erroneous conclusion either as to the land, or an incumbrance upon it, affecting a purchaser, the 49th section provides "that every conveyance and assignment respecting land for partition, or for exchange, or for division or allotment made by the Commissioners under their seal shall for all purposes be conclusive evidence that every application, proceeding, consent and whatsoever which ought to have been made, given and done previously to the execution of such conveyance or assignment, or the making of such order respectively has been made, given and done by persons authorized to make, give, and do the same and no such conveyance, assignment or order shall be impeached by reason of any informality." The point of the objection being that an unauthorised application might be made, is answered by the section which we have quoted; so far as the purchaser is concerned everything is declared to be *res est*.

We have nowhere concealed our opinion that the statute is a great violation of the rights of property, *sed ita lex est*. That it confers an indefeasible title we believe to be the generally-received opinion, and to be that of the Commissioners, as we collect from the statement of Mr. Baron Richards.

Mr. Lyons also inclines to that interpretation, though he does not state it confidently: "It is presumed that even if the Commissioners have come to an erroneous conclusion relative to the title, and that in point of fact it is a defective or a bad one, the purchaser cannot be prejudiced, but he will have a good title as against all the world under the Act of Parliament."

It is a question on which there should be no doubt, and if there be a well-founded one it ought to be set at rest by a short supplementary Act; the influx of property into the new court is already great, and the consequences would be alarming if the received interpretation, to which the public faith is in some degree committed, were erroneous.

Mr. Lyons has started a question of some nicety on the construction of the 19th section. He observes, "Suppose a lessee for lives, renewable for ever, under-leases for a term of 500 years, and the under-lessee creates an incumbrance affecting the entire term, is such incumbrance within the meaning of the Act? It should seem not. The incumbrance in such case affects a derivative interest only, and is not created by the person enti-

led to the entire estate." In such case, the lease for 500 years could not be sold under the statute, which exempts from its operation an incumbrance where it shall affect a derivative estate or interest only, except created by the person entitled to the whole estate or interest.

We cannot arrive at the same conclusion as the commentator; three species of leases fall within the scope of the Act, a lease in perpetuity, (comprehending under-leases in perpetuity,) a lease for a term of not less than sixty years shall be comprised, and any church or college lease. The term "derivative"—the word which has led to what we think a misapprehension—is applied to an estate or interest derived from each of these species of leases, depending on each, but yet less than the fee. Thus in the case of a lease in perpetuity, it is granted to A. and his heirs, and he limits the same lease to B. for life, that is a derivative estate; but if A. were to grant a lease to C. for 99 years, that is not a derivative interest in the sense used by the Legislature, it is a distinct leasehold interest of which C. is unqualified owner during its existence, and any incumbrance created by him would be an incumbrance, for which, in our judgment, that leasehold could be sold. If Mr. Lyons's construction of the word "derivative" is correct, no lease in Ireland could be sold; for in every sense every lease is derivative from a greater estate. If an owner in fee were to grant a lease for 99 years, that would be derivative from his fee; but yet we apprehend that Mr. Lyons would not intend that such a lease might not be sold. The position is the same as to a lease created by the owner of a lease in perpetuity, owner of the fee, or owner of an estate tail. Enough for the purposes of the statute if an incumbrance affect a term of 60 years, and be created by the person entitled to the whole interest in the term. Thus, if the 500 years be limited to C. for life, remainder to D., both their interests are derivative; for C.'s incumbrance, a leasehold could not be sold, whilst for D.'s, when he was in possession, it could, as he was then possessed of the whole interest created by the lease—the object of the legislature being the sale of the entire interest in the subject matter of sale, and not a fragment of it. It may be suggested that the case of leases derived from the fee are not derivative within the meaning of the word as used in the statute, and that they are properly within its purview, as having been created by an "absolute" owner. But this is a slender argument, and the term of fifty years is confined, in the previous part of the section, to incumbrances on land, not on leases, and applies to cases where the absolute owner of an estate created mortgages for terms of years, or to similar cases.

The chief use of a commentary such as that of Mr. Lyons is that it contains the statutes and the orders in a collected and convenient form, and this title work, which is compiled with neatness and care, fulfils that use. Whilst the law and practice which are to be administered by the Commissioners are so new, the opinions of a text writer are indeed valuable as the result of thought, but they more frequently suggest difficulties than help to remove them. The present work, however, very

seasonably supplies the immediate wants of the profession.

Court Papers.

Chancery.

LIST OF CAUSES—MICHAELMAS TERM, 1849.

The following abbreviations are used to save space: R. H. *Rehearing*, P. P. *Pleadings and Proofs*, R. M. *Report and Merits*, R. E. M. *Report Exception and Merits*, O. P. C. *Order pro Confesso*, R. J. C. *Return of Judge's Certificate*, B. A. *Bill and Answer*.

Reilly v. Fitzgerald, R H	Hagan v. Kirkwood, } P P O
Fraser v. Meredith, } R H	Same v. Molloy, } P C
Same v. Stewart, }	Johnson v. Tottenham, P P
Ritchie v. Cowan, P P for dis.	O P C
Cockburne v. Molloy, R M	Crilly v. Harding, P P
Jessop v. Clarke, } R E M	Slack v. Molloy, B A O P C
Same v. Same, }	Duff v. Bunn, P P O P C
Gurney v. Oranmore, R M	Boyle v. Boyle, P P
Minchin v. Sleeman, R M	Hamilton v. Macartney, B A
Hutchinson v. Hutchinson, R E M	Hedges v. Aldworth, R E M
Giveen v. Mennons, R M	Nugent v. Archer, P P D
Byrne v. Carew, R M	Watson v. Giles, R M
Bevan v. Massy, P P O P C	Atkinson v. Lopdell, P P
Cummins v. Reddy, R M	Esdaile v. Macan, R M
Hunter v. Earl of Limerick, P C	Skelton v. Gerard, P P O P C
<i>Et contra</i> , R J C	Sandres v. Percival, P P O
Plunket v. M'Mahon, P P	Courtenay v. Wilson, P P O
Chute v. M'Gillouddy, R E M	P C
M'Mahon v. M'Mahon, P P B A	O'Sullivan v. Sullivan, R M
Coulson v. Williams, R M	Roche v. Deasy, P P O P C
Soden v. Bourne, R M	Buist v. Tenant, R E M
Hughes v. Power, } R E M	Collins v. Irwin, R E M
Hughes v. Hughes, } B A	Ormsby v. Earl of Limerick, P P O P C
Allman v. Crofts, P P	Ormsby v. Same, P P O P C
Abbott v. Plunkett, P P O P C	Jones v. Bates, P P
Kenny v. Darcy, R M	Moorehead v. Rutherford, P P
Fitzpatrick v. Knaresborough, R E M	B A O P C
Vincent v. Lamphier, R M	Same v. Molloy, P P P A O P & P C
Lupton v. Marshall, B A	Edgeworth v. Edgeworth, and other causes, R H P P O P C
Montgomery v. Marshall, B A	Whyte v. Whyte, P P
M'Laine v. M'Dowell, P P	Irvine v. Dane, P P
Dub. & Livpl. Steam Co. v. Austin, P P	Cleary v. Stoney, P P
Pigott v. Glengall, P P	Pigott v. Burrell, B A
Young v. Glengall, P P	Acton v. Campion, P P
M'Dermott v. O'Connell, P P B A O P C	Twigg v. Pim, P P
Walsh v. Wilson, P P	Bolton v. Ormsby, P P B A O P C
Cormick v. Cormick, R M	Mahony v. Mahony, P P
Leatham v. Allen, P P	Borough v. Butler, R M
Ottley v. Mason, R H	Davies v. Adams, R M
O'Bierne v. Lodge, P P O P C	Decie v. Roche, P P
Murphy v. Figgis, R M	Lord Carberry, v. Preston, P P
Small v. Lloyd, R M	Stopford v. Preston, P P
Smith v. Kearney, P P	Hinds v. Hinds, P P B A O P C
Heron v. Macnevin, P P	
Leslie v. Young, P P	
Moriarty v. Mullins, R M	

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THE ACT further to facilitate the SALE OF INCUMBERED ESTATES IN IRELAND, (12 and 13 Vic. chap. 77.) with explanatory comments, the Rules and Orders under the Act, as confirmed by the Privy Council, and a General Index.

By JOHN LYONS ESQ., Barrister-at-law.

Dublin: EDWARD J. MILLIKEN, Law Bookseller and Publisher, 15, College-green.

COUNTIES OF DUBLIN AND TYRONE.

BLESSINGTON ESTATES.—

Reduction of Reserved Price.

The attention of capitalists is directed to the sale of these estates, which will take place on the 13rd of November next. They are the most favourably circumstanced of any Irish estates ever offered for sale, being situated in the North of Ireland, in the centre of a Protestant county, with a thriving and industrious tenantry, where disturbances are unknown. The lands are let at such old and low rents that a large premium is commonly paid, on change of tenants, to the outgoing tenant. A reduction of upwards of 20 per cent. will be made on the reserved price at which these estates were offered for sale at former sales. The Freehold Ground Rents in Dublin, also for sale, are the most secure investment in Ireland.

Particulars may be obtained of Mr. Anderson, 2 King's Inns Quay, Dublin.

IMPORTANT SALES OF
LORD BLESSINGTON'S ESTATES.

TO MANUFACTURERS AND BUILDERS.

IN CHANCERY.

Charles John Gardiner,
Plaintiff;
Margaret
Countess of Blessington and
Others,
Defendants.

Lady Harriet
Countess of D'Orsay,
Plaintiff;
John Mitchell and Others,
Defendants.

Same,
Plaintiff;
James Scott Molloy,
Defendant.

Same,
Plaintiff;
James Scott,
Defendant.

And in the Matter of the Blessington Estates Act 9 Vic. c. 1.

PURSUANT to the final decree in these causes, bearing date the 20th of June 1845, and to said Act of Parliament, and to the order of the 29th of June 1846,

I WILL,
on Thursday the 22nd day of November 1846, at one o'clock in the afternoon, at my chamber, on the Inns Quay, in the city of Dublin, set up and

SELL
to the highest and fairest bidder or bidders, all that and those parts of the

MANORS
of Newtownstewart and Raah, that is to say, the Town and Lands of Newtownstewart, Deepark, Rakelly, Grange, and Croshballinree; the

TOWNLANDS
of Carrigana, Gortinagan, Killynure, Duntaseig, Corronary, Killybrack, Lignabrad, Killymore, Aldroughall, Pubble, Upper Gallion and Lower Gallion; and also the

FEE-FARM RENT of £15 10s. 2d.

payable out of the Lands of Lislap, Lurganboy, and Betsany—all which manors, towns, and lands, and premises are situate in the baronies of Strabane and Omagh, in the county of Tyrone; and also all that and those parts of the Lordship of St. Mary's Abbey, and the Lands of the Grange of Clonsilla, in the county and county of the city of Dublin, and comprising

PLOTS OF GROUND AND PREMISES,
situate in the following streets and places

in the **CITY AND COUNTY OF DUBLIN,**
viz.—Berkeley-street, Bolton-street, Blessington-street, Britain-street, Capel-street, Great Charles-street, Circular-road, North, Clonsilla, Cross-lane, Dorset-street, Denmark-street, Drumcondra-road, Eccles-wireet, Fitzgibbon-street, Upper Gardiner-street, Lower Gardiner-street, Lower Gloucester-street, Mary's Abbey, Marlborough-street, Mountjoy-street, Russell-street, Rutland-street, Richmond-street, Sackville-street, Sherrard-street, Summerhill, Paradise-row—otherwise Wellington-street, Mill-lane, and St. George's-place; and also that

PIECE OF STRAND

containing 100 feet in front to the quay, now called Bachelor's walk, in the city of Dublin—all which said estates, manors, lordships, lands, hereditaments, and premises are particularly described in said decree, and Act of Parliament, and will be sold for the purposes in said Act of Parliament mentioned.

Dated this 6th day of September, 1846.

E. LITTON.

MATTHEW ANDERSON, solicitor.

Two of the townlands mentioned in the foregoing posting adjoin the eastern division of the demesne of Mountjoy Forest, in the vicinity of Omagh; others are intersected by the mail-coach road from Dublin to Londonderry; but the greater number are situate around and in the immediate neighbourhood of Newtownstewart. They contain in all upwards of 9800 acres. Some of the townlands are beautifully situated, and in the very highest state of cultivation, and are all respectably tenanted. The town of Newtownstewart is situate on the west bank of the river Mourne or Strule, a little below its confluence with the Glenelly river, which is a carrier of various mountain streams. It is surrounded by town parks, which, for fertility and richness of pasture, cannot be excelled. It is a market and post town, distant about seven miles from Omagh, and seven from Strabane; it consists of six streets, and about 350 houses; it contains about 1600 inhabitants, and is well supplied with water, which is conveyed in pipes to the principal houses. This town offers very great inducements to an improving landlord, but particularly to one who would add the encouragement of manufacture to that of agriculture; for there cannot be found a situation presenting greater facilities for the erection and working of a manufactory than at Newtownstewart. The inhabitants are peaceable, well-conducted, and industrious. In the immediate vicinity there is a sufficient quantity of the best flax annually grown to keep the largest factory at work; and in the valley at the entrance into the town, (being part of the townland of Croshballinree, now also offered for sale), there is an eligible site for the erection of a manufactory on the verge of the river Mourne, commanding a never-failing supply of water to any extent. There is in the town a large and handsome church, besides several other places of worship for Presbyterians, Methodists, and Roman Catholics. The Londonderry and Enniskillen Railway, now completed as far as Strabane, will pass by the town. It is intended to sell in the same lot with

the townland of Newtownstewart, the several townlands immediately surrounding it, viz.:—Grange, Deepark, Rakelly, and Croshballinree; in that the purchaser of the town shall not be dependant on any adjoining estate for turbary, townparks, or land, but shall have within himself sufficient to secure food and fuel for all the inhabitants. The whole of this lot contains upwards of 2000 acres, and produces a present rent exceeding £1000 a-year but by Government Valuation it is worth £2500 a-year. There will be sold with the town,

ALL THE RIGHTS AND PRIVILEGES OF
LORD OF THE MANOR.

The magnificent mansion and demesne of Baroncourt the seat of the Marquis of Abercorn, are close to the town; and there are within the townland, and in the immediate vicinity, the residences of several country gentlemen and opulent farmers. There are large and valuable limestone and freestone quarries within the lands comprised in this lot, and but a short distance from the town, which are capable of being easily, extensively, and profitably worked. On the whole, therefore, the purchase of Newtownstewart and the adjoining townlands will have an estate truly equalled within the same limits in a rural district for beauty of situation, compactness of arrangement, respectability of neighbourhood and of tenantry, richness of soil, industry and good order of inhabitants, internal sources of improvement, and a water-power sufficient for the working of any machinery, and all under the control of the purchaser himself, as Lord of the extensive Manor in which Newtownstewart is situate, in which character he will be entitled to preside personally, or by his Deputy, in the Court of the Manor.

The Dublin lots now offered for sale comprise several of the most eligible sites for building that can be found on the north side of the city. They also comprise the extensive and beautiful demesne and mansion of Clonsilla, bounded on the north by the river Tolka, having all the advantages of immediate proximity to the city, without liability to any municipal taxes, and yet being as retired as if there were several miles distant from a town. The land is in a high state of cultivation. The house, offices, and gardens are in perfect order, and immediate possession can be given to the purchaser. The House lots in the city of Dublin are held for long terms of years, or for lives renewable for ever; and the rents reserved are chiefly valuable ground rents, which, from the extent of buildings erected, will ensure to the purchasers the utmost certainty of the regular payment of the rents; and the tenants, and others interested in the premises will be enabled to redeem or extinguish the ground rents now payable thereout.

As the lands are to be sold under an Act of Parliament the purchaser can get immediate possession without the expense of investigating title. Maps of the various lands and premises to be sold can be seen at the office of Mr. Anderson (as below), who will be happy to give every information, personally or by letter, respecting the property.

For rentals, conditions of sale, and all further information and particulars, apply to Matthew Anderson, solicitor for Lady Harriet D'Orsay, having the carriage of the decrees and of the proceedings, under the Act of Parliament, and order for sale, No. 2, King's Inns Quay, Dublin; and also to Alexander Werthington, Esq., one of the Trustees under the Act, 29, North Frederick street; Alexander Norman, Esq., receiver of the Dub. Bn Estates, 21, Upper Temple-street; Henry Leslie Freestone, Esq., receiver of the Tyrone Estates, Colston, Meina, and Collin, solicitors for C. J. Gardiner, Esq., 21, Upper Marlborough-street; John Colman, Esq., solicitor for James Scott, Esq., 70, Talbot-street; Hugh Simpson, Esq., solicitor for Tyrone receiver, Aughnacloy; and Thomas Baker, Esq., Parliamentary Agent, 29, Spring Gardens, London.

MATTHEW ANDERSON, Solicitor,
No. 2, King's Inns Quay, Dublin.

18 and 15 VICTORIA, CAP. 68.

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JUST PUBLISHED,

THE LAW AND PRACTICE relating to the Sale and

Transfer of ENCUMBERED ESTATES in Ireland, as regulated by Statutes 12 and 13 Vic. c. 77, (the Encumbered Estates Act), with Introduction, the Act, Explanatory Notes, Forms, the new General Rules for regulating proceedings for Sale of Encumbered Estates, Schedule of Fees, and a very copious Index.

By JAMES O'DOWD, ESQ., Barrister-at-Law.
London: JOHN CROCHFORD, Law Times Office.
Dublin: HODGES AND SMITH.

All communications for the IRISH JURIST are to be left, addressed to the Editor, with the Publisher, E. J. MILLIKEN, 15, COLLEGE GREEN. Correspondents will please give the Name and Address, in the columns of the paper cannot be occupied with answers to Anonymous Communications—nor will the Editor be accountable for the return of Manuscripts, &c.

Orders for the IRISH JURIST left with E. J. MILLIKEN, 15, COLLEGE GREEN, or by letter (post-paid), will ensure its punctual delivery in Dublin, or its being forwarded to the Country, by Post, on the day of publication.

TERMS OF SUBSCRIPTION—(payable in advance):
Yearly, 30s. Half-yearly, 17s. Quarterly, 9s.

Printed by THOMAS ISAAC WHITE, at his Printing Office, No. 25, FLEET-STREET in the Parish of St. Andrew, and published at 15, COLLEGE GREEN, in same Parish, by EDWARD JOHNSTON MILLIKEN, residing at the same place, all being in the County of the City of Dublin, Saturday, November, 10, 1846.

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THE
IRISH JURIST.

VOL. I.—REPORTS.

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND
COMMON LAW.

WITH A DIGEST

OF THE CASES REPORTED IN THE FIRST TEN VOLS. OF THE IRISH LAW REPORTS,
IN THE JURIST FOR THE YEAR ENDING MICHAELMAS, 1849;

AND

AN INDEX TO THE CASES IN EQUITY,
REPORTED IN THE JURIST DURING THE SAME PERIOD.

DUBLIN:
EDWARD J. MILLIKEN, 15, COLLEGE GREEN.

MDCCCXLIX.

DUBLIN: PRINTED BY THOMAS L. WHITE, FLEET STREET.

JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

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RIGHT HON. THOMAS BERRY CUSACK SMITH, M. R.

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HON. PHILIP CECIL CRAMPTON,

RIGHT HON. LOUIS PERRIN,

RIGHT HON. RICHARD MOORE.

Common Pleas,

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HON. ROBERT TORRENS,

RIGHT HON. NICHOLAS BALL,

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COURT OF CHANCERY.—EASTER TERM.

In re CHRISTOPHER WALL.—April 15.

Practice—Privilege of Bankrupt surrendering from arrest.

A Bankrupt is privileged from arrest under sec. 136 of the 6 Wm. 4, c. 14, only when actually "coming to surrender," and therefore where a Bankrupt returned from Liverpool on the 20th inst., with the intention of surrendering on the 24th inst. was arrested on the 23rd—the Court refused to discharge him.

Stephens, B. moved, that the bankrupt be discharged from custody, under the following circumstances. From the affidavits it appeared that the bankrupt, in March last, proceeded to London on private business, and that he left London on the 15th of the same month for Liverpool, for the purpose of completing some family arrangements; that on the 18th he saw *Saunders's* paper, wherein he was declared bankrupt; that being of opinion from the statements in the said paper, that he was bound to surrender on the 21st, he left Liverpool on the evening of the 19th inst., to be in time; that having arrived in Dublin on the 20th inst., he took up a temporary residence with a Mr. Price, formerly a clerk of the bankrupt, with the intention of surrendering on the first day of surrender, which he afterwards learned from the Commissioner's order was the 24th of March; and that early on the morning of the 23rd, (being the day before his surrender) he was arrested under a *Fiat* from the Lord Chief Baron, founded on the affidavit of one Bowyer, who was the petitioning creditor. The affidavit further stated that Bowyer and one Taylor, who had obtained a verdict against the defendant in the court of Exchequer, and to which verdict the defendant had taken exceptions, were virtually the same parties, and that the bill on which the Commission issued was obtained collusively.

COUNSEL submitted that the bankrupt was entitled to his discharge, as being privileged under the 136 sec. of stat. 6 W. 4, c. 14, and cited (*Cooke Bank. Law*, 135), and *Kenyon v. Solomon*, (Cowp. 156.)

Fitzgibbon, Q.C. with *Craighoun*, contra.—The whole question is one of privilege. The case in *Cowper* is in our favour. In the present case the bankrupt was lying by from the 21st to the 24th. The act says "coming to surrender;" therefore to be privileged from arrest he must be actually on the way. *Ogle's case*, (11 Ves. 556.)

LORD CHANCELLOR.—This motion must be refused. The words of the act are "coming to surrender." The bankrupt may have returned from Liverpool with the intention of surrendering; but he is not privileged from arrest if he thinks proper to remain at large afterwards. I am bound to suppose, in the absence of any statement as to when he received the summons, that he was served on his arrival from Liverpool. There was ample time given him to have called upon the Commissioners before the 24th, to accept his surrender. This privilege from arrest cannot be claimed except *bonâ fide*. On the same grounds, if the surrender was a month later, he might have claimed exemp-

tion. As another branch of the case remains over, I will reserve the costs of this motion.*

EX PARTE KELLY.—June 11.

Practice—Application pending error—Oath prescribed by 4 Geo. 4, c. 61.

Where a quo warranto had been brought in the Queen's Bench, to try the right to an office in the Court of Chancery, and the question decided in favour of the Relator, and a writ of error was issued on that decision.—Held that the Relator was not admissible to the office pending the writ of error.

This was an application on behalf of the petitioner Kelly, the relator, in *Reg. v. Sugden*, that he might be admitted to the office of assistant registrar of the court, or at least might be permitted to take the oaths required by the 4 Geo. 4, c. 61, notwithstanding the writ of error issued in *Reg. v. Sugden*.

The Attorney-General, with whom was Corbett, appeared for petitioner.

Tombe and *Hamilton Smythe* for respondent, Henry Sugden. They cited *Reg. Rel. Kinahan v. Mayor of Dublin*, (Jebb v. Burke, 39, S. C. 4 Ir. L. Rep. 147;) *Marston v. Halls*, (2 Mee. & W. 60.) Corbett replied.

LORD CHANCELLOR.—I have no doubt whatever that this case is governed by that of *Reg. v. Mayor of Dublin*. This is the same case as if the petitioner had gone to the court of Queen's Bench for a *mandamus*. If this had been an inferior court, he would have applied to that court to suspend the proceedings. Till the writ of error is disposed of, the right of Mr. Kelly must be considered a question still pending, and it is not for me to pronounce an opinion on it one way, or the other. I could not grant this application, without superseding the operation of the writ of error. As to admitting Mr. Kelly to take the oath prescribed by the 4 Geo. 4, which is as follows: "I, A. B. do solemnly swear, that I will, to the best of my knowledge, skill, and judgment, perform such of the duties of assistant-registrar of the court of Chancery in Ireland, as I shall personally execute, and that I will well and faithfully pay every deputy, &c. &c., and that I will, in all things relating to my said office, conduct myself according to the rules and regulations which shall from time to time be in force for the regulation of such office and of the business thereof,"—it is quite plain that he can-

* Sec. 136.—"And be it enacted, That the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the 42 days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall upon producing the summons under the hand of the Commissioner, to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain such bankrupt after he shall have shown such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of Record at Dublin, in the name of such bankrupt, with full costs of suit."

not take that oath without being *de facto* registrar. I do not understand this proposal of swearing in an officer as it were *de bene esse*. As to costs, the application is the same as in *Reg. v. Mayor of Dublin*, and must be treated as governed by the same law. *Motion refused with costs.*

ROLLS COURT.

GEORGE CARR, BY W. P. CARR HIS NEXT FRIEND,
v. OSBORNE.—*June 22.*

Receiver—Person of weak mind—No commission of Lunacy.

The Court will grant a receiver upon answer, where a person not an idiot, or lunatic, but of weak mind, files a bill by his son and next friend without a commission of lunacy having issued, the property being small.

The Attorney-General is not a necessary party to such a bill.

In this case the bill was filed to recover the arrears of an annuity of £50 per annum, charged upon the lands of the defendant. The plaintiff was described as George Carr, of —, being a person of unsound mind and feeble understanding, but not an idiot or lunatic, by William Carr, his son and next friend. The bill stated that the plaintiff was not a lunatic, but a person whose memory had become weak from advanced age and other causes. The usual accounts and a receiver were prayed. The defendant in his answer admitted the title of the plaintiff to the annuity, but submitted that the said George Carr, for more than a year last past, has been, and now is of unsound mind, and a proper subject for a commission of lunacy; that no such commission had issued for the protection of his estate, or person, and that there was no person capable of giving a valid discharge for said annuity, if the same were paid, and that a payment made to the said pretended next friend of the said George Carr, would not protect defendant against being obliged to pay the same over again in the event of a commission of lunacy against the said George Carr being hereafter issued; and that the rights of the said George Carr are now, and were at the time of filing of said bill, in consequence of his said lunacy, vested in the Crown, until the same shall be delegated by a commission of lunacy.

Brewster, Q.C. with *J. W. Dean*, moved for a receiver.—In such a case as the present the Lord Chancellor would not grant a commission; the plaintiff having no other property but this £50 per annum. Cited (*Shelford on Lunacy*, 216); *Steed v. Calley*, (2 My. & Keen. 52); *Conduit v. Soane*, (5 My. & Cr. 111.)

Christian, Q.C., with *E. Trevor* for the defendant. The defendant up to this time has been in no default, as there is only one year of the annuity in arrear, and it is admitted that the plaintiff has been for a longer period of unsound mind. The proper course should have been by information at the suit of the Attorney-general. (*Shelford on Lunacy*, 215.) If the Court were even of opinion that at the hearing a receiver should be granted, they will not interfere summarily on motion at this stage of the proceedings.

MASTER OF THE ROLLS.—The bill is filed in this case by the son and next friend of a person not an idiot or lunatic, but of weak mind, praying a receiver for the arrears of an annuity. I find that the case of *Eyre v. Wake*, (4 Vea. 795), has been followed by Lord Cottenham in the very recent case of *Conduit v. Soane*. Following these authorities, and bearing in mind that a commission of lunacy would swallow up two or three years maintenance, I will grant the order for a receiver. With regard to the objection that the Attorney-general should be a party, I find Lord Redesdale lays down that such a bill as the present is maintainable. (*Mit. Eq. Pl.* 32.)

M'GREHAN v. RANKIN.—*June 23.*

Practice—Conveyance to purchaser—Heir at Law out of jurisdiction.

The Court has no jurisdiction under the 28 Geo. 3, c. 35, to order the Master to execute a conveyance to a purchaser, where the heir of the donor is a minor, resident out of the jurisdiction.

Hunter, on behalf of the purchaser, applied for an order on the Master to execute the conveyance of the lands decreed to be sold in this cause.

The bill was filed by a judgment creditor against the heir-at-law and administratrix of the donor to raise the amount of the judgment. The affidavit stated that the "heir at law was a minor, and resided out of the jurisdiction, somewhere in North America."

COUNSEL submitted that under the 28 Geo. 3, c. 35, s. 1, the Court had jurisdiction to grant the application.

July 5.—The **MASTER OF THE ROLLS** on this day, having commented on the distinction between this case and *Prendergast v. Eyre*, (Lloyd & G. T.S. 11,) decided that the Court had no authority to order the Master to execute the conveyance.

* 28 Geo. 3, c. 35, s. 1, *lr. enacts*, "That in such cases as his Majesty's Court of Chancery, or his Court of Exchequer hath or have decreed or ordered, or shall decree or order, a sale of any lands, tenements, or hereditaments, or of any term or interest therein, and conveyances thereof, to be made to or for the purchaser or purchasers thereof, in case any difficulty shall arise respecting the execution of any deeds or conveyances by any proper and necessary party or parties to such deed or conveyance, the party or parties interested in having such deeds or conveyances executed, may apply by motion or petition to such court respectively, stating such difficulty, whereupon such court shall and may inquire into the same; and in case it shall appear that any necessary party or parties to such deeds or conveyances, bound by such decree or order as aforesaid, and who ought by virtue thereof to execute the same, cannot be found, or by being out of the reach of the process of the court, cannot be compelled in the usual and ordinary way to obey such decree or order as aforesaid, or such order as the court shall make for executing such deeds and conveyances, whereby the title of such purchaser to the lands, tenements, or hereditaments, or any term or interest in the same, may be rendered defective, the said court of Chancery in cases in that court, shall and may order one of the Masters of the said court, and the said court of Exchequer shall and may order the Chief Remembrancer of the said court to execute all such deeds and conveyances as aforesaid."

EQUITY EXCHEQUER.—TRINITY TERM.

KELLY v. BONYNG AND OTHERS.—June 5 and 6.

Purchase by Receiver.

A Receiver, during the life-time of the father, purchased a younger child's portion, not payable until the father's death, but which was charged on the estate over which the Receiver was appointed; there was no evidence of under-value. On bill filed after 13 years, by the inheritor, who, during the interval had been principally out of the jurisdiction, against the personal representative of the receiver, the Court set aside the purchase.

The bill in this case was filed to set aside the purchase by a receiver of a charge on the estate over which he was appointed. The facts were—Patrick O'Kelly the elder, on the marriage of his son Patrick O'Kelly, settled his estates on himself for life, remainder to his son for life, remainder to the first and other sons of Patrick O'Kelly the younger, in tail male, subject to a term of 500 years, to secure a portion of £1,500 for his younger children, not to be raised till the death of Patrick O'Kelly the younger. By the settlement, a power was reserved to Patrick O'Kelly, the elder, to charge the same estates with £2000 for his younger children, Mary, William, and Lucinda O'Kelly. In 1809, on the marriage of Lucinda with a person named M'Inerheny, Patrick O'Kelly, the elder, settled on them a sum of £666 13s. 4d., being their portion of the £2000 reserved for his younger children, Patrick O'Kelly, the younger, had three children by his marriage—Mary, Ann, and the plaintiff. In 1824 M'Inerheny and wife filed a bill to raise their portion of the £2000; to this bill Patrick O'Kelly the younger, the plaintiff; and his sisters Mary and Ann, (both of whom had married), were defendants. In 1825, Pierce Carrick was appointed receiver in that cause, and in 1833, purchased the reversionary interest of Mary and Ann, and their husbands, in the £1,500. In 1835, the estate was sold, subject to the £1,500. Patrick O'Kelly, the younger, died in 1843, leaving the plaintiff his heir at law. Pierce Carrick died in 1846, having appointed the defendant, Bonyng, his executor, who proved the will. In 1846, the plaintiff filed his bill against the defendant Bonyng, the personal representative of the receiver, and the defendant, Kelly, the purchaser of the estate, praying that the £1,500 might be decreed to be well charged on the purchased lands, and that the plaintiff might be declared entitled to the £1,500, on payment of the purchase money, with interest to the personal representative of the receiver.

Green, Q.C., Fitzgerald, Q.C., and Mockler, for the plaintiff.—There is no dispute as to the facts of the case; it is admitted that the defendant, Bonyng, purchased the charge, as the trustee of Carrick, the receiver, and with his money, and that he is his personal representative. There is no principle of law more clearly established than that which prohibits a party acting as agent to purchase for his own benefit a charge on the property of his principal. The receiver of the court purchasing an interest in the estate over which he is appointed, is in this position, and consequently is incapable of retaining his purchase. *Anonymous*, (1 Salk. 155);

Boddington v. Lady Langford, (MSS. T. T. 1845, Canc.)

Henn, Q.C., and Creagh for the defendant, Bonyng. The cases cited only establish the general principle, that agents or trustees cannot purchase from their *cestui que trust*—a rule which must be taken in connection with another equally well settled, that the *cestui que trust* must within a reasonable time exercise the option allowed him of setting aside the sale. *Cumbell v. Walker*, (5 Ves. 678); *Kilbee v. Sneyd*, (2 Mol. 214.) The reason of the rule against purchasing is, that the trustee has means of acquiring a knowledge, which ought to be applied for the benefit of his principal; the leave of the court is therefore necessary to validate the purchase. *Alven v. Bond*, (Flan. & Kel. 196.) The present case does not involve that mischief; it is a mere incumbrance, which is a fixed quantity, and the purchase of which cannot prejudice the owner of an estate liable to it. If the receiver were a mere stranger, he would be entitled to the full benefit of his purchase, *ex parte Lacay*, (6 Ves. 628.) Then does the receiver hold a fiduciary character, with respect to the creditors of the estate? If not, no injury can be done, no more than if the charge were purchased by a stranger. This case possesses a further peculiarity; it must, in the absence of evidence to the contrary, be admitted that the receiver gave full value at the time of his purchase; the charge was not capable of being raised till after the death of Patrick O'Kelly, the younger, and if he had lived to old age, the purchase might have been a bad one. In *Boddington v. Lady Langford*, there was evidence of under value.

Christian, Q.C., and Maley, appeared for other parties.

J. D. Fitzgerald, Q.C., with Mockler, in reply.—It has been contended that the plaintiff, by his acquiescence has deprived himself of relief. In all the authorities acquiescence has been treated merely as evidence that the relation has been abandoned. *Morse v. Royal*, (12 Ves. 374.) In the present case the inheritor was out of the jurisdiction. With respect to the question of purchase, the case stands on grounds different from those of purchases outside the court; it cannot be too distinctly announced, that officers of this court shall not deal with property under their charge. (*Richards, B.*—A receiver purchasing a judgment over which he was appointed, would not be permitted to retain it.) Here he is appointed over the life estate and inheritance, and has derived thence peculiar means of knowledge. *Robinson v. Pett*, (8 P. W. 249, note); *Williams v. Springfield*, (1 Vern. 476); *Morret v. Paske*, (2 Atk. 51)—Lefroy, B. Lord Hardwicke, in *Morret v. Paske*, said that *Williams v. Springfield* was a creditor's case, and had never been acted on. The decision there was, that "where there were subsequent incumbrances or creditors in the case, then a man that buys in a prior incumbrance shall be allowed only what he really paid, though there was in truth a greater sum due." (*Storey on Agency*, p. 199, sec. 210); *ex parte Bennett*, (10 Ves. 385.)

PIGOT, C.B.—The Court is of opinion, that upon the settled principles of law the plaintiff is entitled

to a decree; the familiar language of the authorities is, that no man should be suffered to hold a position which would require him to serve two masters, a principle the Court feels itself strictly bound to enforce. To apply it to the present case, the receiver, the admitted purchaser of the charge, was not either a trustee, or an agent in the ordinary acceptation of the term, but he held the position of a person appointed by the Court for the general management of the property, in whom a large degree of confidence was reposed, if then he were to purchase incumbrances affecting the estate, and that he were sanctioned in so doing, what would be the position in which such a privilege would place him? Suppose a receiver purchasing incumbrances; it would be his direct interest to represent the estate to be as unproductive as possible, in order to purchase at perhaps a nominal value; to allow a receiver to do this, or to place him in a position to do it, would be creating in his mind a desire to benefit himself at the expense of the owner of the estate. In the present case a distinction was taken, that the value of the reversionary interest was doubtful; that was certainly so, but, it appeared to the Court that it would be inconsistent to limit the application of so important a principle, that though it was improbable that the reasons he had referred to would operate as to reversionary interests, cases might arise in which a receiver intending to purchase would be interested in depreciating their value, the Court should not give an opportunity for the existence of such a state of things, and would, therefore, adhere to a rule which would prohibit the purchase of any incumbrance. The defendant's counsel suggested another defence, that there had been an acquiescence. If that had been proved, the party acquiescing would undoubtedly be bound by it. That was not the case; the plaintiff never interfered, nor was he in any way privy to the proceeding instituted in 1833; he was not represented either by counsel, or attorney, was out of the jurisdiction the greater portion of the thirteen years which had elapsed since the purchase, and the commencement of the present suit, and his interest only accrued in 1843. For these reasons the Court was of opinion that the plaintiff was entitled to relief.

PENNEFATHER, B.—The principle as to purchases by trustees and assignees is clear. It was with reference to receivers the question before the Court arose, and to these, Sir Edward Sugden, C. in a case before him analogous to the present, extended that principle; that decision applied strongly to the present case, although it was a purchase of a charge not affecting the life estate, as it involved the principle the Court was called upon to uphold, namely, that a receiver should not be placed in a position which might induce him to make an estate appear incumbered for self-interested motives. To allow him to purchase would clearly give him that opportunity. There was one part of the case which struck him much, not on the principle of acquiescence, but that a party impeaching a transaction should not lie by and take his chance of the purchase turning out advantageous or otherwise, a doctrine always applicable to purchases of reversionary interests. The plaintiff here, however, does not appear to have had this view in contemplation.*

LEFROY, B. said, that cases involving a fiduciary character admitted of no doubt, the difficulty in the present case was to find a sound principle upon which the Court could carry out the same doctrine. He thought the Court had been supplied with such in the judgment of Lord Eldon in *ex parte Bennett*. There could be no doubt but that a receiver might injure property, if he was placed in a position to take advantage of circumstances, by lending money, or purchasing incumbrances; Lord Eldon's judgment referred to the case of an officer filling a situation in the court of Bankruptcy, and he had furnished the Court with a rule on which it might act, his Lordship, page 397 of his judgment says: "Upon the assignment, the Commissioners take from the assignees to themselves a covenant with all convenient speed, to use their utmost endeavours to recover and get in the estate, and to dispose of it for the most money, and to account, with a great variety of other covenants, the question would be very singular to be agitated between the Commissioners and assignee in these cases; to ascertain whether there was a breach of this covenant, whether the assignee had sold for the best price, and with all convenient speed, the estate being sold to the Commissioner—does not the duty of the Commissioner require him, at the instigation of the creditors, or even without it, to rest his view upon this most substantial question, whether the period is come, at which, according to the Acts of Parliament, the assignees ought to have collected the effects, and to make a dividend, and payment of the surplus? That is a duty the due execution of which cannot be hoped, if the Commissioners are to involve themselves in private pecuniary views, and interests, with reference to the property; if, for instance, the Commissioners, as is usual, take conveyances, the payment to be at a future day; are they to blame the assignees for not having sold the Commissioners for the money as purchasers?" It was quite clear that the receiver could not be allowed to purchase any part of the estate under his management, would the Court allow him then to purchase an incumbrance affecting it, which would personally give him an interest in that property, and thus tempt him to exercise the knowledge acquired through his official capacity for his own, and not the benefit of the estate; on the authority of Lord Eldon, he was of opinion the Court should not warrant their officer in such a purchase, the Court should therefore set it aside.†

QUEEN'S BENCH.—EASTER TERM.

QUEEN v. MITCHEL.—May 8 and 10.

Indictment—Nolle Prosequi—Plea in abatement—Demurrer—Discontinuance.

Indictments for sedition—after the bills were found, a Nolle Prosequi was entered by the Attorney-General, and Informations filed for the same offence—Plea in Abatement to the first information that the Indictment was still pending—De-

* Richards, B., was absent during the argument.

† See *Champion v. Rigby*, 1 Russ. & My. 539, S.C. on appeal, 9 L. Jou. n. s. 211 Chas. Held, that a purchase for full value by a solicitor from his client was good.

demurrer—Held that the pendency of the Indictment was no answer to the Information.

Like plea to second Information.—Replication that there was no indictment pending. Held that the plea being bad, an informality in the replication could not be taken advantage of.

The demurrer by the Crown to the plea concluded praying Conviction, and the replication prayed final Judgment. Held that there was no discontinuance.

Semble—There can be no discontinuance by the Crown.

Indictments for the publication of a seditious libel in the form of a letter to the Lord Lieutenant, and for the publication of a certain article in the paper called the United Irishman, entitled "Striking Terror." After the bills had been found by the Grand Jury, Pleas in abatement were filed, "That one of the Grand Jury was a Town Councillor, and disqualified from serving on any juries except Commissions of Assize, and Gaol Delivery." The indictments were then withdrawn by the Crown, and *ex officio* informations filed for the same offences. Plea to the first information, That the Court ought not to take cognizance of the information, in as much as on the 15th day of April last, a bill of indictment for the same offence had been presented to the Grand Jury and duly found, that the traverser had been arraigned upon this indictment and proceedings had thereon, that on the 26th day of April the Attorney General came into Court and entered a *Nolle Prosequi*, to that indictment, that John Mitchel, against whom the indictment had been found, was the same person against whom the information had been filed, and that it was the same offence for which the indictment had been preferred and the information filed.—Demurrer by the Crown.—Joinder in demurrer.—To the second information. Plea in abatement, stating the pendency of the indictment. Replication by the Crown, that on the 26th day of April a *Nolle Prosequi*, had been entered to the indictment, and further proceedings stayed thereon. Demurrer: that the Attorney-General did not by this replication traverse the matters set forth in the plea, nor plead in confession or avoidance.—Joinder in demurrer.

J. Perrin, in support of the demurrer by the Crown to the first plea.—A plea of indictment pending is no plea to an information for the same offence, even if it is a good plea the indictment has been put an end to by the *nolle prosequi*, (2 *Hale*, P. C. cap. 34, s. 1.) which has the effect of quashing an indictment as well as an information, (*Com. Dig. information A*; *Bac. Abr. information A*.) (*Hawkins*, cap. 26, sec. 63.) lays it down, that "a suit on a penal statute actually depending may be pleaded in abatement," that alludes to *qui tam* informations only, *Sir W. Withipole's case*, (Cr. Car. 147), *Swan v. Jeffries*, (Fost. 105-6. S.C., 18 St. Trials, 1198); *Reg. v. Goddard*, and *Carleton*, (2 Lord Raym. 920.) In a prosecution by the Crown the Court will not interfere, the Attorney-general can enter a *nolle prosequi*, and need not come into court for that purpose. *King v. Strachan*, (3 Burr. 1565); *King v. Mayor of Plymouth*, (4 Burr. 2090.) The pendency of a former indictment is no bar

to sending up another. *Queen v. Burnby*, (5 Q.B. Rep. 348); *King v. Webb*, (3 Burr. 1468); *King v. Alexander*, (Archbold Crim. Pl. 72-8; 1 Chitty Crim. law, 461); *King v. Doctor Purnell*, (1 W. Bl. 37.) Even if a plea of indictment pending is good, the *nolle prosequi* puts an end to any further proceedings upon the indictment. In the year 1801 a *nolle prosequi* was entered by the Attorney-General Lane, and an information filed for the same offence, also in 1812, Plumer, Attorney-General entered a *nolle prosequi* upon an *ex officio* information, and filed another information for the same offence. If the king, by his Attorney-General, enter a *nolle prosequi*, he cannot after proceed. *King v. Pickering*, (Hardress 83); *Goddard v. Smith*, (1 Salk. 21, S.C.; 6 Mod. 261; Hard. 126; 1 Sand. 207, note.) This plea is so framed that it is doubtful whether it is in bar or abatement.

Holmes, with *Sir C. O'Laghlin*, in support of the plea. The question in this case is whether the Attorney-general can proceed by *ex officio* information having already proceeded by indictment, whether he has not thereby lost his privilege, this demurrer is also bad in form, it concludes in bar while the plea is in abatement, that is a discontinuance, and the Crown is therefore out of court. The demurrer instead of praying judgment of *respondens ouster*, concludes by praying judgment, and that the traverser may be convicted; this amounts to a discontinuance. *Carter v. Davis*, (1 Show, 255, S.C.; 1 Salk, 218; 2 Sand. 210 N. 2; Com. Dig. Pl. w. 2); *Alice v. Gale*, (10 Mod. 112); *Bowen v. Shapcott*, (1 East. 542); *Biss v. Harcourt*, (Carth. 187, 59, S.C. 3 Mod. 281.) The rule is the same in both civil and criminal cases, and where there is a discontinuance no judgment will be given on the demurrer. *Cochrane v. Fitzpatrick*, (8 Ir. L. Rep. 187.) As to the form of the plea, whether the substance is in bar, or abatement, the Court must hold it to be in abatement, if so pleaded. *Alice v. Gale*, (10 Mod. 112); *Madina v. Sloughton*, (1 Ld. Raym. 593.) It is the commencement and conclusion of a plea which determine the nature of it. *Godson v. Good*, (6 Taunt, 587.) The matter of this plea is in abatement, "That cognizance ought not to be taken of the matter unless by indictment by the oaths of twelve men," it is the same as a plea of privilege. *Challand v. Thornley*, (12 East, 544.) An *ex officio* information is not so constitutional a proceeding as an indictment, and there is no precedent of an Attorney-general proceeding by a good and valid indictment, and afterwards filing an information for the same offence, for in the Rattle and Bottle case the bills were ignored, and the Attorney-General then proceeded by information.

Attorney-General in reply.—The cases relied upon by the counsel for the traverser are all civil cases founded on that in *Shower*, and do not apply, no matter what the prayer of the demurrer is, the Court will give the right judgment, but the demurrer concludes properly, and is according to the forms which have been in use from the earliest times. (1 *Went. pl. Abatement*, 24.) In the case of the *Queen v. O'Connell* there was a demurrer, similar to the present, and the prayer was for judgment of conviction, a *nolle prosequi* has no greater effect than a *non suit* which does not prevent the

Crown from proceeding for the same offence. *Goddard Smith*, (6 Mod. 262.)

J. O'Hagan, in support of the demurrer to the replication of the Crown.—In this case a plea in abatement has been filed; the Attorney-general by the form of the replication, has treated the plea as one in bar, and has thereby worked a discontinuance. Besides the plea avers "that the indictment is still pending," and this averment is neither traversed nor confessed, nor avoided. *Bourne v. Taylor*, (10 East. 189); *Taylor v. Cole*, (3 T. R. 292.) The replication by the Crown is also bad as being argumentative. It states the indictment is not pending as a *nolle prosequi* had been entered. If the Attorney-general means to deny the pendency of the indictment, he should have replied *Nul Tiel record*. The replication is therefore bad in that respect. *Bourne v. Taylor*, (10 East. 189); *Knight's case*, (2 Ld. Raym. 1014); *Green v. Watts*, (1 Lord Raym. 274); *Green v. Purdon*, (2 H. and Br. 277; 8 Cobbett's, St. Tr. 284–50); *Gould v. Lasbury*, (1 Cr. M. & R. 254.) An information never can be filed pending an indictment for the same offence, and the indictment having been commenced, and being a higher proceeding should have been proceeded with.

Attorney-General and J. Perrin, contra.—In (4 *Chil. Crim. Law*.) there is a precedent of a replication similar to the present. The Crown could not have pleaded *Nul Tiel record*, as upon the trial the record could have been produced; besides, even if the replication is bad, we are entitled to fall back on the plea, and if that cannot be supported we are entitled to judgment on the whole case, and the authorities already cited are sufficient to show that a plea such as this is no answer to the information. *Withipole's case* is decisive on that point.

O'Loghlen, in reply.—The plea is in abatement, and the replication in bar, that is a discontinuance; there is a double discontinuance by the Crown, by the replication in this case, and by the demurrer in the other. The Attorney-general should have either traversed, and introduced new matter with an *absque hoc*, or confessed and avoided, but neither of these courses has been taken. This indictment is in full force notwithstanding the *nolle prosequi*. *King v. Benson*, (1 Sid. 420.) Therefore the plea is good; a *nolle prosequi* has the effect of putting an end to an information, but not to an indictment. The Attorney-general can only let the party go without a day, the effect of which is that new process must be issued before the party can be proceeded against. *Goddard v. Smith*, (6 Mod. 262.) In cases of appeal, the pendency of one appeal is a complete answer to another. (Hawk 23, sec. 126.) It is laid down that an indictment shall not abate, for it is the king's suit. *King v. Robinson*, (1 W. Bl. 542.)

May 10.—BLACKBURN, C.J.—In this case an information was filed by the Attorney-general. A plea has been put in, to the effect that the Court ought not to take cognizance thereof, because an indictment was preferred against the traverser in this court, for the same offence, and after certain proceedings the Attorney-general entered a *nolle prosequi*; that the traverser is the same person who was indicted, that the offence is the same, and that according to the law of this realm he ought to be free from answer-

ing before any court, except upon indictment, or presentment, which he is ready to verify, and prays judgment. To this plea the crown has demurred; that the matters averred thereby are not sufficient, and concludes by praying judgment of conviction. This is objected to as informal, and a discontinuance. The Attorney-general contends that the plea is bad, and if so, we are bound to give judgment according to the whole right. The question is, whether a plea of indictment pending is a bar to an information for the same offence. Now there is neither the authority of any case, nor the opinion of any judge in support of this; on the other hand, there are authorities which shew that this plea is bad. In *Sir W. Withipole's case*, (Cro. Car. 147,) it is laid down that this is no cause of plea, for when a traverser is not acquitted, or convicted he may be arraigned, and there are several other authorities to the same effect, (2 *Hale*.) In *Hawkins*, c. 34, *Pleas in Abatement*, there is a most explicit statement of the law; the word information in the passage cannot mean informations for a misdemeanour, for *qui tam* informations are meant, and the chapter upon them is referred to, and there can be no manner of doubt that this passage is a distinct authority against this plea. The case of *Swan v. Jeffrey*, (Foster's C. Law, 104), decided in 1701, was an indictment for murder; a second was found, and to it, was pleaded the pendency of the first; upon demurrer the court held that the plea of *autrefois arraign* was no plea. In the case of the *King v. Stratton*, (Douglas, 239,) it was held that the pendency of another indictment for the same offence cannot be pleaded, as it may be in an information for penalties. Without doubt the authority of the principles laid down in *Hale*, *Hawkins*, and *Foster* shew that this plea is not maintainable. There is an objection taken to this demurrer, that the plea is in abatement, but that the demurrer concludes by praying judgment, not of *respondent ouster*, but of conviction, and the case of *Biss v. Harcourt*, (3 Mod. 281) is relied on. Now it is to be observed, that all the cases in support of this proposition are cases of civil actions. It is plain that a party pleading in abatement can call for such judgment only as the plea demands; but the question in this case is, whether the prayer of judgment of conviction, in the first case upon the demurrer, and in the replication in the other, is a discontinuance. I question whether in pleading there can be any discontinuance on the part of the crown; but as to whether it is, or not, there is no case to show that it is; there are two to show that it is not. In *Hardress*, 504, in a *quo warranto* it was moved in arrest of judgment that there had been a discontinuance, for issue was not joined by the crown, and it is laid down that before judgment there is no discontinuance in the king's case, (*Com. Dig. Tit. Pleader, W. 2*.) But supposing there may be a discontinuance, we are to consider how the precedents and authorities are on that subject, and I find that demurrers to pleas in abatement always conclude with prayer of final judgment. *Queen v. O'Connell*, *King v. Taylor*, (3 B. & Cr. 52; 2 Saund. 210, note m.) These authorities are quite decisive; we are bound to give judgment on the whole record in favour of the crown. In the second information the defendant

demurred to the replication. In this case also, we consider there ought to be judgment for the crown. As to the form of the replication, it is manifest that is of no moment, if the plea is bad. It is to be observed this plea alleges matter on which issue may be taken; and I apprehend the Crown is entitled to pray final judgment, as it may be so entitled if issue were joined. *Medina v. Stanton* (Lord Raymond, 594); *Biss v. Harcourt*, (Carth. 137.) Judgment was there given for the defendant, because the plea was good, in this case it is bad. In *Bonner v. Hall*, (Lord Raymond, 338,) in the replication judgment was demanded for the plaintiff, and damages; it was admitted the plea was ill, and being so, the replication was attacked on the ground of discontinuance, and the case of *Biss v. Harcourt* relied on; but Lord Holt said, "This case differs from *Biss v. Harcourt*, for there the plea was good, and then when the plaintiff replied new matter, he should have made his conclusion accordingly; but where the plaintiff traverses the plea in his replication, and offers an issue, he may pray judgment *de debito et de damnis*, because if it be tried, peremptory judgment ought to be given, but in this case the first fault is with the defendant, for the plea is ill." Every word of this judgment is applicable to the present case; the first fault is with the defendant, as the plea is bad. On all points of this case, therefore, it is our opinion, that by the authorities all doubt is removed, and the traverser must plead forthwith.

EXCHEQUER OF PLEAS.

REILLY v. JESSOP.—May 26 and 30.

Pleading—Bill of Exchange—Indorsement by firm.

Declaration by the indorsee of a bill of exchange against the acceptor. The first count averred "for that whereas Hugh F., carrying on business under the name, style, and firm of F. & Co., made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay the DRAWERS, or THEIR order, £—two months after the date thereof; and then proceeded to aver that the said H. F. then and there indorsed the same to the plaintiff—Held sufficient on special demurrer.

ASSUMPSIT.—The first count of the declaration was as follows: "For that whereas heretofore to wit, on &c., at, &c., Hugh Ferguson, carrying on business under the name, style, and firm of Ferguson & Co., made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay the drawers, or their order, £—two months after date thereof," &c. The averment of the indorsement to plaintiff was as follows: "And the said Hugh Ferguson then and there indorsed the same to the plaintiff," &c. Special demurrer to this count on the ground of its being repugnant and insensible, and disclosing on the face of it no sufficient cause of action.

Rollestone for the demurrer.

The court having observed that there was no junior counsel retained on behalf of the plaintiff, declined to hear the case argued.

May 30.—*J. D. Fitzgerald, Q.C.*, and *F. Smith* for the plaintiff, contended that the count was sufficient. *Bass v. Clive*, (4 Camp. 78, S.C. 4 M. & S. 13.) The declaration here is at most, ungrammatical, and that is not sufficient to vitiate it. (*O'Connor v. Fiely*, argued in this court on the 13th of June, 1845.) In that case the declaration was by indorsees against acceptors, and the promise was laid in these words—"and the defendants promised the plaintiffs (in the plural) to pay him." The court overruled the demurrer. There is no repugnance here; it is consistent with this averment that the pleader followed the words of the instrument, and that Hugh Ferguson was the sole member of the firm of Ferguson & Co. The case of *Ball v. Gordon*, (9 M. & W. 845,) has no application to this case; besides it was overruled in *Tigar v. Gordon*, (9 M. & W. 346.)*

Rollestone contra.—*Bass v. Clive* does not apply. (*Pigot, C.B.*—The question, there, did not turn upon the pleadings. *Pennefather, B.*—On the supposition that Hugh Ferguson was the sole member of the firm of Ferguson & Co., there is no inconsistency, for he might have drawn the bill as alleged, and made it payable to the firm, in which view the use of the plural would be correct.) But even on that supposition the declaration is insufficient; for an instrument by one member of a firm passes no property, unless made in the name of the firm, of which there is no averment.

PIGOT, C.B.—It is a rule of pleading, that ambiguous expressions must be taken most strongly against the pleader; but there is another rule equally well established, that if the ambiguity can be explained away by reasonable intendment, the Court will adopt that intendment. My brother, *Pennefather*, has suggested a view which removes the apparent inconsistency. Judgment for Plaintiff.

JONES v. POPE.—June 14.

Demurrer—Indorsement on bill—No time.

Declaration on bill of Exchange—The Indorsement stated "the said defendant indorsed to the plaintiff," omitting "then and there."—Held, on special demurrer, that time being a material traversable fact, the omission of it vitiated the declaration.

ASSUMPSIT.—This was an action brought by the indorsee of a bill of exchange against the indorser. The averment of indorsement was as follows: "And the said A. B. then and there indorsed the same to the defendant, and the said defendant indorsed the same to the plaintiff." Demurrer—that there was no venue, or time alleged when and where the defendant indorsed the bill to the plaintiff, and also that the said averment deviated from the precedent and forms prescribed by the judges.

Curtis for the demurrer.—There is no venue laid. (*Pennefather, B.*—If there is a venue in the margin it suffices.) Waiving that ground of demurrer, the declaration is bad, as not laying any time. This is a material traversable averment, and must be laid with day, month, and year. *R. v. Holland*, (5 T. R. 607); *Comyn's digest* pleader,

* Before *Pigot, C.B.* and *Pennefather, B.*

c. 19; *Ring v. Roxborough*, (2 Cr. & J. 418); *Bowdell v. Parsons*, (10 East. 359.)

Lawson with *Harris* in support of the declaration.—We do not dispute the general proposition contended for on the other side; but there is a time sufficiently alleged here. The word “there” in the averment that drawer indorsed the bill to defendant, may be carried on so as to overrule the averment objected to. The two averments are coupled with “and”—the *nec non* of the old pleaders. (*Pigot C. B.*—How do you distinguish this case from that of *Potter v. Ryan*? (Smythe 22) This case turns on the grammatical construction of the sentence. Counsel also referred to (*Comyn's digest pleader*, c. 19); *Denison v. Richardson*, (14 East. 291); *Skinner v. Gunton*, (1 Saund. 229 a); *Harden v. Magenis*, (6 Ir. L. Rep. 345.) As to the second ground of demurrer, there is no form prescribed by the judges for indorsee against indorser. (*Pennefather, B.*—We do not go so much on the ground of its deviating from the judge's forms, as of its violating the rules of pleading.)

Cur. adv. vult.

Pigot, C. B. now delivered the judgment of the Court.—We are reluctantly obliged to give judgment for the defendant in this case. The plaintiff derives title as indorsee of a bill of exchange, and the averment in the declaration is, “And the said A. B. then and there indorsed the same to the defendant, and the said defendant indorsed the same to the plaintiff.” In the latter averment, neither time or place are laid. No allegation of place is necessary, but this being a material traversable fact, must be laid with certainty of time. It is too late now to question a rule, which has prevailed so long, and has been recognised in all the authorities from *Cro. Jac.* and *Cro. Car.* to the most recently reported cases. So stringent were the rules, as to time and place, that the legislature had to interfere, and the statute of *Joofails* became necessary to relax them. By the statute of Anne the strict rule as to place was in part abrogated, and as a further modification of these rules, the “then and there” were let into the averments of the pleader. Recent decisions have sanctioned the omission of “place,” because of the venue in the margin, but no similar indulgence has been extended to the omission of time; on the contrary, the very recent cases of *Ring v. Roxborough*, and *Bowdell v. Parsons*, referred to in argument, shew the disinclination of the courts to deviate from this rule. But it is said that we are at liberty to continue the “then and there” in the preceding averment, and incorporate them with the allegation complained of; and to sustain that view counsel has referred us to a case in *Comyn's digest pleader*, c. 19, p. 47. That was a case of trespass, *quare clausum fregit*, and upon looking at it, it seems impossible to apply that construction here. In trespass all the statements are coupled with the *continuo*, and are thereby referred to the same point of time; and that was the decision of *Webb v. Turner*, (2 Strange, 1095.) The judgment in that case indicates the principle of that class of authorities. The different averments in that case cannot be severed, as they must necessarily be in the present. The decision in *Wilson v. Chambers*

(*Cro. Car.* 202) shows very strongly the stringency of the rule. That case was in *Trover*, and the Court held that the finding, as well as the conversion must be laid with time. That case is as fresh now as it was at the period of its decision. But there is a distinct authority in this country, in support of this demurrer—the case of *Potter v. Ryan* in the Common Pleas. Looking to the averments in that case, and the judgment, no two cases can be more like than that and the present. But it is said that *Potter v. Ryan* has been overruled by the later case of *Barden v. Magennis*, (6 Ir. Law Rep. 7.) The later decision turned on the omission of “place,” and followed the case of *Welland v. Brown*, (1 Hayes & Jones, 46.) *Demurrer allowed.*

VANCE AND ANOTHER, EXECUTORS OF FALLS, v. BRASSINGTON.

Scire Facias by the Executors of the Cognisee, The defendant was called on to shew “wherefore the plaintiffs should not have execution against him,” according to the form of the recovery, without an allegation that the plaintiffs did so “as executors;” Profect of Letters Testamentary was made. Held sufficient on special demurrer.

Scire facias.—On a judgment in debt by the Executors of the Consee against the Consee, the *scire facias* followed the ordinary form. The statement objected to being as follows: “And the said plaintiffs, after the death of the said consee, duly proved said will in the Court of Prerogative in Ireland, and obtained probate thereof, yet execution of the said judgment for the debt and damages aforesaid as yet remains to be done, as from the said Andrew and John, executors as aforesaid we have received information. And we being willing that what is right and just in our court should be done, and a due execution, command you, as we formerly commanded you, that by honest and lawful men of your bailiwick, you make known to the said defendant, that they may be before our Barons of the Exchequer at, &c., on &c., to shew if she have or know anything to say for herself wherefore the said Andrew and John ought not have execution against her for the debt and damages aforesaid, according to the form of the aforesaid recovery, &c.” concluding with profect of the Letters Testamentary. Special demurrer, on the ground that the defendant was called upon to shew cause why the plaintiffs should not have execution of the said debt and damages in their own right without naming them as executors.

Butt, Q. C. with *Mills*, for demurrer.—The objection on which we rely is that the *scire facias* does not contain any proper averment to show that the plaintiffs bring the writ in their representative capacity. The *scire facias* must be construed as a declaration, *Malcomson v. Gregory*, (1 H. B. 15.) *Laverty v. Duffin*, (Al. & Na. 29.) In a declaration by executors the omission of “as” is fatal, *Henshall v. Roberts*, (5 East. 150.) *An.* (1 Dow. P.C. 97. and notes.) *Esors. of Frevor v. White*, (1 Dow. N.S. 586.) In debt on judgment by the executor of consee, the executor must show that he acts in his representative capacity, the judgment being a duty which accrued in the testator's life-time. Counsel also referred to (*Ferguson's forms*, 332.)

Shagoy, contra.—One case only need be referred to as maintaining the *scire facias*, *Hanyngton v. Cairnes*, (5 Ir. L. Rep. 333,) where precisely the same objections were taken and overruled. (*Pennfather, B.*)—That case appears to have been rightly decided, the plaintiffs could not sustain the *scire facias*, except as executors, and in making proferet they established their title.)

Butt, in reply.—It has been held not to be sufficient for a plaintiff to term himself executor, it must appear that he sues as executor, *McSweeney v. Longfield*, (2 H. B. 194.)

*PENNFATHER, B.**—A *scire facias* is only to be regarded as a declaration in a qualified sense—the object of it is to bring a third party into privity with the record of the judgment. The form here pursued has had the sanction of half a century, and it would be most injurious to the cause of justice to adopt the strict analogy of declarations in writs of *scire facias*. *The demurrer must therefore be overruled.*

COURT OF CHANCERY.

KIERAN v. CORR.—October, 21.

Practice—3 & 4 Vic. c. 105.—*Sale subject to incumbrances.*

In a judgment creditor's suit under 3 & 4 Vic. c. 105, a sale may be decreed, subject to incumbrances, which plaintiff is not entitled to redeem.

The bill in this cause was filed to raise the amount due on a judgment of Easter Term, 1822, obtained by the testator of the plaintiff, against the defendant, Henry Corr. It prayed an account and sale, offering to redeem such incumbrances as the Court should think proper. It appeared that by an indenture of the 27th of Aug. 1797, Henry Corr had conveyed a portion of his lands to trustees, to the use of himself for life, and after his decease upon trust to provide an annuity for his intended wife, who was dead at the time of filing the bill, and by sale or mortgage to raise the sum of £1000 for the children, if any, of the then intended marriage, to be paid to them in such shares as Henry Corr should appoint. It also appeared that some of the defendants held incumbrances which affected the entire lands of H. Corr, amongst them Lord Lorton, who had a judgment of Trinity Term, 1827, and Maria Corr, who had one of Michaelmas Term, 1810, both against Henry Corr. The defendant, Henry Corr, by his answer, and at the bar insisted on the benefit of the saving in favour of creditors and purchasers, contained in the 3 & 4 Vic. c. 105, s. 22. The same objection to the bill was also taken by the children entitled to the charge of £1000.

Christian, Q. C. and *F. W. Walshe* for the plaintiff. *Kirwan v. Portarlington*, (8 I. E. R. 593,) does not apply, as there was there no offer to redeem. Even if not entitled to redeem, *Carlton v. Farlar*, (8 Beav. 525,) decides that the defendant's interest may be sold, subject to incumbrances. *Neate v. Marlborough*, (3 M. & C. 407,) *Crofts v. Pos*, (1 Jones, 50.)

Hughes, Q. C. for the defendants, the children of Henry Corr, objected to being redeemed, the time

for raising and paying the portions not having arrived, and for H. Corr contended that no sale subject to an incumbrance could be made consistently with the policy of the 3 & 4 Vic. c. 105, s. 22.

Walter Burke for defendant, Maria Corr; *Burroughs* for Lord Lorton.

F. Walshe for plaintiff, submitted to redeem them.

LORD CHANCELLOR.—The plaintiff has admitted he can have no relief against the younger children. I must dismiss the bill against them. The next question is, can the estate be sold subject to this charge upon it? I have no difficulty, in point of principle, in selling the estate subject to this charge. We all know that it is the every-day practice out of Court, to buy estates subject to incumbrances; why should they not be so sold, under the orders of the Court? As a matter of prudence, a sale of this sort may be questionable, but is not impracticable. The plaintiff is not entitled to redeem the charge in favour of the children, he must therefore sell the lands comprised in the settlement of 1797, subject to that incumbrance.

ROLLS COURT.

IN THE MATTER OF THE COMMISSIONERS OF WIDE STREETS, CORR, AND THE ACT OF 3 GEO. 4, c. 85.—June 14, and 16.

Statute of Limitations—Mortgagor—Acknowledgment in writing.

An acknowledgment by the Mortgagor, in writing, of the payment of interest on a mortgage, and not signed by him. Held sufficient, within the 40th sec. of the 3 & 4 W. 4. c. 27, to take the case out of that statute.

This case came before the court on objections to the Master's report. The facts were, That by indenture of the 1st of Feb. 1815. Robert Creed mortgaged certain premises in the city of Cork to Alicia Creed for £500, with interest at 6 per cent. Interest on the mortgage was paid by the mortgagor, up to the 1st day of Feb. 1827, which appeared by a memorandum in the handwriting of the mortgagor, but not signed by him, which was as follows: "On the 1st of Feb. and 1st of Aug. in every year, I pay my sister Alicia the sum of £15, being the half year's interest on £500, the above is paid to the 1st of Feb. 1827." Alicia Creed died on the 8th of June, 1829, having devised the mortgage to the petitioner, Elizabeth Creed, save £100 bequeathed to the mortgagor. The Commissioners of Wide Street in Nov. 1846. being desirous to purchase these premises, empanelled a jury to ascertain their value, as directed by the 3 Geo. 4. c. 85, who found the value of the premises as comprised in the Indenture of 1st of Feb. 1815, to amount to £—, and that the claimants for same were the petitioner in respect of the said mortgage, and the mortgagor. The mortgagor by his discharge said he had never made any payment on foot of the mortgage for principal, or interest since Feb. or March, 1826, or for two years previous to the death of Alicia Creed, and that all persons were barred by the statute of Limitations from recovering said mortgage, and that no acknowledgment in writing of the right to said mortgage was given by him, or his agent to any person entitled to receive

* Pigot, C. B., Richards and Lefroy, B.B. were absent.

said mortgage, and to give a receipt for the same as agent of such person within 20 years next before the 1st day of Jan. 1847. The Master, by his report, dated the 1st day of January, 1848, found that Elizabeth Creed was entitled, on foot of the mortgage, to the sum of £461 for principal and interest, from the 1st of Feb. 1827. To this report the mortgagor objected, on the grounds, that no sufficient evidence was laid before the Master to authorize him to report that the interest on the mortgage debt was paid up to and for the 1st day of Feb. 1827, and that the right of Elizabeth Creed to recover the claim on said mortgagee was barred by the 40th sec. of the 3 & 4 W. 4. c. 27.

Chatterton, for Elizabeth Creed, the petitioner.—The objection to the Master's report is, That there was no acknowledgment in writing as required by the 40th sec. of the 3 & 4 W. 4, c. 27. The question is, whether a payment, proved by a document in the handwriting of the debtor, but not signed by him, is sufficient to take the case out of the statute of Limitations. There are two distinct modes of taking the case out of the 40th sec. each complete in itself, and not to be governed by the other. The first is, "Unless, in the mean time, some part of the principal money, or some interest thereon shall have been paid." The second, "Or some acknowledgment of the right thereto shall have been given in writing, signed by the person to whom the same shall be payable, or his agent to the person entitled, or his agent." The cases of *Bailey v. Ashton*, (12 Ad. & Ell. 493,) *Maghee v. O'Neil*, (7 M. & W. 531,) and *Eastwood v. Saville*, (9 M. & W. 615,) decided upon Lord Tenterden's Act, and which were relied upon in the office, cannot be applied to the construction of this, the objects and language of which are wholly different; the words in the former are "no acknowledgment or promise by words only." *Frost v. Bengough*, (1 Bing. 266,) and *College v. Horn*, (3 Bing. 119,) were also referred to.

Hughes, Q. C., for the mortgagor, in support of the exceptions.—There is nothing in the document to show that it was written after 1827, and therefore if evidence at all, it is evidence of a payment to 1827, and is therefore not within twenty years. *Ld. Tenterden's act*, and the 3 & 4 W. 4. c. 27, were passed to remedy the same evils, and the words in which the debt was secured does not alter the danger that was contemplated. Cited *Willis v. Newham*, (3 Y. & J. 518.)

Chatterton in reply, submitted that the Court could not be called on to presume that this payment was made in advance, and cited *Dowling v. Foxall*, (1 B. & Beat. 193,) and *Bodkin v. Vesey*, (1 Jones, Ex. 139.)

July, 16.—MASTER OF THE ROLLS.—In this case there was a memorandum in the handwriting of the mortgagor, Robert Creed, of his having paid interest on a mortgage of Feb. 1816, up to the 1st of Feb. 1827. The memorandum was not signed, and the question arises, whether it is sufficient evidence of payment within the 40th sec. of the 3 & 4 W. 4, c. 27, to take the case out of that statute. The decisions cited in support of the objections, have all been decided under the 9 Geo. 4, c. 14. *Willis v. Newham* establishes that a verbal acknowledgment of the payment of part of a debt is not

sufficient to take the case out of that statute. Supposing *Willis v. Newham* to be law, the question arises, whether the language used in 9 Geo. 4, is similar to the words of the statute of Limitations. I think the distinction taken is well grounded, that the clauses in the 40th sec. are distinct and separate, and that there are no grounds whatsoever to graft one upon the other. An acknowledgment of the right must be in writing, signed by the party to whom the same is payable, or his agent. But with respect to the fact of payment, I must consider the evidence with regard to the rules of common law, and therefore overrule these objections, with costs.

EQUITY EXCHEQUER.—TRINITY TERM.

COCHRANE v. FITZPATRICK.—June 20.

Practice—Receiver—Chancery jurisdiction.

If a receiver be appointed in a plenary suit in Chancery, the court of Exchequer will restrain a receiver, appointed in a petition matter in the latter court, from interfering further with the land over which he was appointed, till the Chancery suit be concluded.

Otway moved that the receiver appointed in the petition matter be discharged. A prior creditor having filed a bill in Chancery, the Master of the Rolls directed a receiver to be appointed in that court, when the receiver in this was discharged.

Pennefather, J. contra.—The court of Chancery has no jurisdiction to remove the receiver here. If good cause for his retention can be shown, the order in Chancery must fail. *Bruen v. Brown*, (6 Ir. Eq. Rep. 214); *Mills v. Mills*, (9 Ir. Eq. Rep. 1.) Counsel was instructed to shew cause in Chancery, but by reason of some fatality, was unable to attend. It still is in my power to shew a state of facts which would prove the necessity of retaining him here. The prior creditor has possession of a fund more than sufficient to pay him.

PENNEFATHER, B.—Conformably with the opinion I formerly gave, I think that where a receiver is appointed in a plenary suit, by a prior creditor, the receiver in a petition matter must be discharged.

RICHARDS, B.—The cause, if any, should be shewn in Chancery. There is great difficulty in not allowing the competent court to adjudicate on the equities of the parties; the Master of the Rolls has given his opinion, and we have not the power of contradicting it.

LEFROY, B.—The court, where the suit is instituted, can best deal with the case; parties can be added, and by a consent, justice can be administered for all, and the clashing of jurisdictions prevented. If the court of Chancery had ordered that the petition creditor should consent, or that he should be restrained from proceeding in this court, there would be no doubt as to the mode of proceeding. This amounts virtually to that. The order of the Master of the Rolls is a courteous mode of saying that an order to discharge the receiver here should be granted, in pursuance of his order. Instead of discharging our receiver, it will be better to restrain him, as supposing a sufficient portion of land sold in the court of Chancery to pay off prior debts, it

might be convenient to allow the receiver to act with respect to the remaining portion.

*Per Cur.**—Let the receiver account, and be restrained from further interference, and on accounting, let him have his costs.

ANDERSON v. NEWRY AND WARRENPOINT RAILWAY COMPANY.—June 27.

Injunction—Railway Company entering without leave, or Lodging Money in Bank.

Where a Railway Company having agreed to purchase lands, entered and carried on their works without the leave of the vendor; or having lodged in Bank, or paid the purchase money.—The court granted an injunction to restrain them until the money be paid.

This was an injunction suit against the Newry and Rostrevor and Warrenpoint Railway Company. The bill, after setting forth the title of the plaintiff to certain lands, and the formation of the Company by their act of incorporation, and the Company's clauses, Land clauses, and Railway clauses acts, stated, That on the 10th October, 1846, a notice, signed by the directors, and the solicitor of the Company, was addressed to the plaintiff and others, to the effect that the Company would require, and that it was their intention to purchase and take for the purposes of said Railway, certain lands (describing them, and referring to the plans lodged in office of the clerk of the peace, &c.) a portion of the lands which were the property of the plaintiff—That the plaintiff was anxious to facilitate the defendants in the purchase of said lands, and for that purpose empowered Mr. Dobbin, his solicitor, to treat with the Company—That it was ultimately agreed between plaintiff's solicitor, and the solicitor of the Company, that £1000 should be given for the estate and interest of the plaintiff in the lands required by the Company—That the Company proceeded to acquire a title to the said lands, by the verdict of a jury inquisition, and judgment thereon—That in pursuance of the warrant of the Company, the sheriff summoned a jury for the 7th of May, 1847, who, on the 13th of the same month, in presence of the solicitors for the parties concerned (plaintiffs and defendants), awarded to the plaintiff, in respect of said premises, the sum previously agreed upon—That no judgment had been signed by the sheriff on the said inquisition—That by a letter dated the 24th of May, 1847, the solicitor of the Company requested plaintiff's solicitor to furnish him with a concise abstract of plaintiff's title, as he was anxious to save the Company costs, and merely wanted such information as would enable him to prepare a proper conveyance—That on the 25th of the same month, plaintiff's solicitor furnished the required abstract—That no reply was given thereto till the 4th of July following—That some time in the month of June in the same year, the Company, without the knowledge or permission of the plaintiff, or his solicitor, entered and took possession of said lands—That plaintiff had done no act, or other thing, to sanction or

acquiesce in said possession—That on the 2nd of July, in the same year, plaintiff's solicitor wrote to the solicitor of the Company, offering any further information in his power—That after much delay a case on behalf of the Company was laid before counsel, in the month of February, 1848, by their solicitor, and that counsel advised that the money should be paid into court—That the solicitor of the Company told plaintiff's solicitor, in a personal interview, that he was ready to pay the money to the plaintiff or his trustees, and would that night write to London to procure payment thereof—That on the 24th of February, plaintiff's solicitor wrote to the solicitor of the Company, remonstrating on the non-fulfilment of his promise; to which the solicitor of the Company replied on the 26th, "I did really write to London at the time I told you, as to the purchase money in this matter, and sent a copy of the opinion; upon reading which it is not unlikely the directors reckoned on further delay. I now send you a copy of case and opinion of counsel, from which you will see that the trustees of Mr. Anderson's settlement (meaning the plaintiff) could not give the Company a legal discharge for the purchase money; and if this be so, I would, on the part of the Company, advise that interest at 5 per cent. be paid Mr. Anderson" (the plaintiff)—That until the receipt of this letter, plaintiff was not apprised of the contents of said opinion—That plaintiff having declined this offer, his solicitor, on the 24th of March, 1848, wrote to the solicitor of the Company, requiring him to pay the purchase money, with interest thereon, from the date of the inquisition, at 5 per cent. to the plaintiff, or otherwise to lodge the same in bank, pursuant to the provisions of the Land consolidation clauses act—That the tenants of the said purchased lands had refused to pay their rents without an abatement in respect of the land taken by the said Company—That the Company since their entry had made various works, ditchings, &c., with a view to the completion of said Railway, and had otherwise dealt with said lands without the sanction or acquiescence of plaintiff. The bill then prayed that the Company might be ordered and decreed to deposit in the Bank of Ireland, in the name, and with the privity of the accountant-general of the court, the sum of £1000, to be placed in pursuance of the provisions of the lands clauses consolidation act, to the credit of the plaintiff, and forthwith pay to the plaintiff lawful interest from the first day of May, 1846, to the day of lodgment, and that the said Company, their agents, servants, and workmen be, in the meanwhile, restrained by injunction from digging, cutting, &c., the said land on which they have entered, or from proceeding with any work on said lands, or from spoiling, or holding possession, or entering thereon, &c.

The defendants admitted the agreement, and the finding of the inquisition stated in the bill; but the affidavit stated that shortly after the inquisition, the Company, through their solicitor, applied for liberty to enter into possession, on lodging the purchase money in a private bank, in the names of mutual trustees—That no reply was given to that application, and believing that the parties interested, even without the lodgment of the money, would have no

* Before Pennefather, Richards, and Lefroy, B. B., Pigot, C.B., at Nisi Prius.

objection, the Company—having settled with all other parties—entered into possession, and carried on their works from that time to the present—That they had made considerable advances, and would be much injured if an injunction were to issue—That counsel had given an opinion that a valid title could not be made without certain releases being made, and that it was hoped arrangements could be made to obviate the necessity of lodging the money—That the plaintiff and his solicitor knew the Company were in possession, and that the Company would not have entered, if they had been aware of the plaintiff's objection.

Warren, Sergeant, with M. Mehan, for the plaintiffs.—The defendants have in no respect complied with the provisions of the act of parliament. The 38th section of the 8 Vic. c. 18, requires all companies to pay to the vendors, or lodge in bank to their credit the amount of the purchase money agreed upon. In the present case the defendants, without the plaintiffs knowledge or consent, entered on the land, and commenced their works. Under such circumstances, a court of equity will grant an injunction where irreparable mischief will happen, although the wrong doer may also be liable in trespass. *Crockford v. Alexander*, (15 Ves. 138.) Our remedy at law, in the present instance, is deficient and difficult to be attained. (*Pennefather, B.*—*Alexander v. Crockford* was decided on the ground that the waste was irreparable; the court there exercised a very proper interference. Is there any case where an injunction has been granted on the ground that the purchase money was not paid?) In *Hyde v. Great Western Railway Company*, (1 Rail. C. 280), the court, on an *ex parte* motion, granted an injunction restraining the company from proceeding with their works, until payment of the purchase money, they having entered without leave. The principle of courts of equity is to aid the provisions of the legislature, by preventing the company from exceeding the power given them. The plaintiff does not seek to undo what has been done, but merely to restrain them from committing further injury. The Company entered without leave, and there has been no acquiescence in that possession. The 89th sec. imposes a penalty of £25 each day, for the entry the Company admit they have made, and this court will restrain by injunction what a court of law will repress by penalties. They referred to *Armstrong v. Waterford and Limerick Railway Company*, (10 Ir. Eq. Rep. 60); *Colman v. East Counties Railway Company*, (4 R. C. 524); *Rigby v. Great Western Railway Company*, (4 R. C. 75); *Jainay v. Lucan and Ely Railway Company*, (4 R. C. 615); *Innocent v. North Midland Counties Railway Company*, (1 R. C. 256); *Attorney-General v. Manchester and Leeds Railway Company*, (1 R. C. 45.)

Hughes, Q. C., with *R. Moore*, contra—If the Company have entered illegally, they are trespassers, and as such the plaintiff has his legal remedy against them. No irreparable waste has been committed in this case. *Deere v. Guest*, (1 M. & Cr. 516); *Sandys v. Murray*, (1 Ir. Eq. Rep. 29), (*Drury on Injunctions*, 164.)

PENNEFATHER B.—I do not think there is any force in the objection as to acquiescence, which can

be only material when its effect is to encourage a party to do that, which he would not otherwise have done. The Company in this case do not pretend to resist the payment of this demand, and they admit the rights of the plaintiff. How then can they assert that they have suffered in having been permitted to do that which they would in any event have done? The question comes to this—Can a Railway Company, having taken possession of land under the provisions of the legislature, set themselves up as trespassers, for the purpose of resisting the jurisdiction of this court, and contend that they are at liberty to enter and dig up another person's land, without his consent or having paid for it? When I consider the nature and constitution of these companies, that their incorporation renders them inaccessible to law process—that they are prohibited from taking possession, except on certain terms—that in this case the Company has not denied the justice of the demand—it appears to me a strong case for the interference of this court. I will grant an immediate injunction to be dissolved on the money, with interest at 5 per cent. being lodged in bank, and notice thereof given to plaintiff's solicitor, and the costs of the motion being paid.*

QUEEN'S BENCH.—MICHAELMAS TERM.

HUNTER v. MACAN.—November 3.

Demurrer—Letters of Administration—Inconsistent Date.

A declaration by an Administratrix stated a debt to the intestate, and a promise to pay him in his lifetime, laying the day on the 14th of April, 1845. The letters of administration were afterwards stated to have been granted to the plaintiff, "since the death of the intestate, on the 21st December, 1844." Held on special demurrer, that this date was repugnant, and if rejected, the declaration would be bad, for want of alleging the day, on which a material fact had taken place.

ASSUMPSIT by the plaintiff, administratrix of Arthur Hunter, deceased. "For that whereas the defendant on the 14th of April, 1845, at &c. was indebted to the said Arthur in his lifetime, &c." in the common form. "Yet he hath disregarded his promise, and hath not paid any of the said monies, or any part thereof, to the said Arthur in his lifetime, or since his death to the said plaintiff, to whom since the death of the said Arthur, on the 21st of December, 1844, administration of the intestate's goods was granted, to the damage of the plaintiff as administratrix of £300." Profect of the administration, in form aforesaid. Demurrer, showing for cause, that the said defendant promised to pay the said Arthur Hunter, the several sums of money in the said declaration mentioned on the said 14th of April, 1845. Whereas it appears in and by the said declaration, that letters of administration had been and were granted to the said plaintiff of the estate and effects of the said Arthur Hunter on the 21st of December, 1844, &c.

Dix, with him *Napier, Q.C.* in support of the

* Pigot, C.B., Richards, and Lefroy, B.B. were absent.

demurrer.—The question raised by this demurrer, has been already decided by the Court of Exchequer in England, in the case of *Ring v. Roxbrough*, (2 Tyr. 468). Where it was held, on special demurrer, that the date of the letters of administration was repugnant and inconsistent, and if it could be rejected, the declaration would be bad, for not alleging the day on which a material and traversable fact had taken place. It is impossible to distinguish that case from the one now before the court.

T. O'Hagan and T. K. Lowry, in support of the declaration. The repugnancy relied on is, that the day upon which the promise is alleged to have been made, is subsequent to that afterwards laid as the date of the letters of administration; but, in *assumpsit*, the day upon which the promise is laid in the declaration is not material, and may be rejected, *Inkersalls v. Somms*, (Cro. Car. 130); *Hanbury v. Ireland*, (Cro. Jac. 618). (*Moore, J.*—You have averred that the intestate sold goods in 1845, and that letters of administration were granted to the plaintiff in 1844.) *Perrin, J.*—Administration granted in a man's lifetime is void. An administrator is entitled to sue from the time of the death of the intestate, *Thorpe v. Stallwood*, (6 Scott, N.R. 715); *Foster v. Bates*, (7 Jur. 1093); *Patten v. Patten*, (Al. and Nap. 493). (*Blackburne, C. J.* *Quoad* the property, undoubtedly, the title of the administrator refers back to the death of the intestate). The first date is right, and we can reject the second, *Hughes v. Williams*, (2 C. M. & Ros. 351); *Skinner v. Andrews*, (1 Saund. 169). (*Perrin, J.*—In *Skinner v. Andrews*, the date was averred under a scilicet, here there is none.) (*Moore, J.*—There being no scilicet, we are bound to take it that the intestate was alive on the day stated in the declaration, namely, the 14th April, 1845, it being averred that the intestate on that day sold goods.)

Napier, Q.C. was not heard in reply.

BLACKBURNE, C. J.—The allegations in this declaration are plainly inconsistent. The defendant's promise is stated to have been made to the intestate on the 14th April, 1845, and the letters of administration to have been granted to the plaintiff on the 21st December, 1844, and these dates are not laid under a videlicet. *Ring v. Roxbrough* is exactly in point. The demurrer must be allowed.

Judgment for defendant.

EXCHEQUER OF PLEAS.—TRINITY TERM.

SHARP AND OTHERS v. SHEARMAN.—May 22, and June 2.

Demurrer—Executors—Omission of Profert—Costs.

A Declaration containing only the money counts, and commencing and concluding in the usual form by an Executor, but omitting profert of the letters testamentary—Held bad on general demurrer, on the grounds, that though the other counts might be upheld as disclosing causes of action personal to the plaintiffs, the count on an account stated could only be sustained by them in their executorial capacity—therefore there was a misjoinder.

Held that the special demurrer on the ground of the omission of profert taken by the defendant to the entire declaration was too large.

The ground of general demurrer not having been noted in the paper books, no costs of demurrer were allowed.

Assumpsit.—On the common counts by the plaintiffs, “as Executors.” The declaration stated the several causes of action, to have accrued to them “as Executors,” the promise in the conclusion and breach followed the same form. There was no profert of the letters testamentary. Special demurrer on the ground of omission of profert.

Lynch, with Curtis, for the demurrer. This declaration is clearly bad, it is quite settled that the omission of profert in a declaration by executors, is a good ground of special demurrer. It will be contended on the other side, that the words “as executors,” may be struck out as surplusage, as it was not necessary for the plaintiffs to sue in their executorial capacity. Admitting that as to the other counts, it does not hold good as to the count on the account stated. (*Pennefather, B.*—If you can shew any count necessarily requiring profert the declaration is bad.) *Jenkins and Ux v. Plombe*, (6 Mod. 93,) decided that an *insimul computasset* between a testator and defendant is not a cause of action personal to the executor; *Ashby v. Ashby*, (7 B. & C. 444). (*Pennefather, B.*—If you can shew that there is a misjoinder of causes of action, the declaration is bad on general demurrer.) *Webb & Ux. v. Cowdell*, (14 M. & W. 820) is *pari passu* with this case, there such a declaration was held bad for misjoinder. *Cowell & Ux. v. Watts*, (6 East. 405); *Cornor v. Shew*, (3 M. & W. 350.)

Harris in support of the demurrer.—It appears on the face of this declaration that the plaintiffs had a good cause of action, without resorting to their executorial capacity. The cases of *Crawford v. Whittall*, (1 Dougl. 4, note) and *Ellis v. Bowen*, (For. 98) are conclusive, that in such a case profert is unnecessary. As to the count on an account stated, the plaintiff might have sued on it in his own right. (*Williams on Exor.* 514); *Needman v. Croke*. (*Freeman*, 538.) (*Lefroy, B.*—Do those authorities go beyond this, that the plaintiff has his election to sue either in his personal right, or as executors?) The demurrer here is too large, being to the whole declaration, and the defendants admit all the counts to be good, except that on an account stated. (*Pennefather, B.*—But here is a misjoinder, which is fatal on general demurrer.) That point is not noted, and defendant cannot therefore now rely upon it.

Lynch in reply.—Had we relied on the misjoinder, the plaintiffs would have contended that though the other counts in the declaration might be sustained by the plaintiffs in their personal capacity, yet as they profess to declare as executors, their is no misjoinder. (*Pennefather, B.*—If your objection as to misjoinder must be waived, your case fails, as the demurrer is too large, being to the whole declaration.) Our case is that there is no misjoinder, the plaintiffs declaring as executors throughout, and concluding accordingly; and therefore profert is necessary.

PER CUR.—The case referred to (*Webb & others*

v. *Cowdell*,) governs this—the demurrer, therefore, must be allowed; but as the defendant has not complied with the practice of the court requiring him to note the points for argument on general demurrer, let the plaintiffs be at liberty to amend, and let there be no costs as to the demurrer.*

MURTAGH v. CRAWFORD.—*June 13 and 16. Statute of Limitations, (9 Geo. 4. c. 14.)—Acknowledgment in writing by co-contractor—Evidence. An acknowledgment by one maker of a joint and several promissory note, indorsed on the note, that interest had been paid thereon. Held not to be evidence against his co-contractor, either as an acknowledgment of the fact of payment, or, after the indorser's death, as an entry made by a deceased person against his interest.*

This was a motion to change the verdict had for the plaintiff into a non-suit, in pursuance of the leave reserved. The action was Assumpsit by the payee against the surviving maker of a joint and several promissory note, as follows:

"Twelve months after date, we jointly and severally promise to pay Mr. William Murtagh of Lissagun, the sum of £100 sterling, with interest at 6 per cent. per annum, until paid, for value received on account.

"Dated 8th day of Dec. 1838. C. Crawford.

"James Lee, (present). J. Crawford."

The defendant pleaded the general issue, and the statute of Limitations. At the trial before the Lord Chief Baron, in the sittings after Hilary Term, 1847, the plaintiffs offered the following indorsement on the note as evidence to take the case out of the statute of Limitations: "Interest on the within bill has been paid to the 8th of Dec. 1844, therefore it is good for six years more from this date, and I will give a renewal as soon as my son John comes to the country. (present,) James Lee. C. Crawford." The defendant's Counsel objected to this evidence, on the grounds, that as an acknowledgment against a co-contractor, it was expressly excluded by the 9 Geo. 4. c. 14, s. 1, and secondly, it was not evidence of the fact of payment. The learned Chief Baron admitted the evidence as an entry made by a deceased person against his interest; but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that it ought not to be admitted in evidence.

Brewster, Q.C. with Napier, Q.C. and J. Robinson.—The question rests entirely on the admissibility of this memorandum, as evidence of payment of interest. The acknowledgment must be signed by the party to be charged with the debt, and the signature by an agent is not sufficient. *Bayley v. Ashton*, (12 Ad. & El. 493,) *Clarke v. Alexander*, (8 Scott, N. R. 147,) *Eastwood v. Saville*, (9 Mee. & W. 615.) If the fact of payment be proved *aliunde*, an acknowledgment, not signed, is admissible to shew that fact has been correctly proved. *Bevan v. Gething*, (3 Ad. & El. N. C. 740.) But it is settled that there must be proof of actual payment, and that no mere acknowledgment of the fact will suffice. *Willis v. Newham*, (3 You. & Jer. 518.) *Maghee v. O'Neil*, (7 Mee. & W. 531.) *Waters v.*

Tompkins, (2 Cr. M. & Ro. 722.) (Taylor on Ev. 727.) *Waugh v. Cope*, (6 Mee. & W. 824.) *Ashby v. James*, (11 M. & W. 542.) *Hyde v. Johnson*, (2 Bing. N.C. 776.) *Moore v. Strong*, (1 Bing. N. C. 441.) *Beuley v. Power*, (Hayes and Jon. 368.) *Bateman v. Pinder*, (3 Q. B. 574.)

S. Ferguson, and O'Hagan, contra.—The question is whether a written acknowledgment of payment by a deceased joint contractor will take the case out of the statute with respect to the survivor. A written acknowledgment of the debt by a joint contractor undoubtedly is within the Act. The question in *Willis v. Newham* rested wholly on its being an oral statement, there is consequently no analogy between that case and this. (*Lefroy B.*—No acknowledgment however solemn will take the case out of the statute as against the co-contractor.) No solemnity of acknowledgment of a debt will do so. This is a solemn written admission of the fact of payment; the judgment of Baron Garrow in *Willis v. Newham* is rested wholly on the ground of its being a loose verbal statement—no court has yet decided that the law applicable to oral statements of payment is to be extended to written acknowledgments of payment. The *obiter dictum* of Tindal, C. J. in *Clarke v. Alexander* is no decision. In *Maghee v. O'Neil*, (7 M. & W. 535,) Lord Abinger, speaking of *Bayley v. Ashton*, (12 A. & E. 493,) says, "If the question were *res integra*, and the Court, for the first time, were called on to put a construction on the Act, I should certainly say, that the mode of payment of principal or interest, was left by Lord Tenterden's Act to be proved as at common law." In *Maghee v. O'Neil*, (7 M. & W. 531,) Parke, B. expressed his opinion that the cases had gone too far. Seeing the reluctance with which the courts have adopted *Willis v. Newham*, this Court will be slow to apply it to the present case, if there be a real distinction. The oral admission of payment relied on in that case is absent from this, the words of the Act are, "That no joint contractor shall lose the benefit of the said enactments, (21 Jac. c. 16, and 4 Anne, c. 16, Eng.) or either of them so as to be chargeable in respect, or by reason of any written acknowledgment or promise, made and signed by any other." But "that nothing therein was to lessen the effect of any payment made by any person," leaving the evidence of payment to be made as before the passing of the Act. In *Waters v. Tompkins*, the Court admitted an oral admission in order to show to what account the wife had paid the money. *Bevan v. Gething*, (3 Q. B. 740.) *Moore v. Strong*, (1 Bing. N. C. 441.) (*Pennefather, B.*—Undoubtedly where payment is proved *aliunde*, oral evidence may be given to show upon what account it was paid.) The proviso of the section is clear, "That nothing shall lessen the effect of any payment," here the debtor has put into words the payment he admits he has made. The view the Court is inclined to take, will create a strange anomaly—this indorsement, if made by a deceased stranger against his own interest would be evidence against the defendant; is the plaintiff to be in a worse position because this admission of payment has been made by a deceased co-contractor? The question is whether from the terms of the indorsement you should consider it as taking the case out of the statute. The manifest intention of

* See *Blakesley v. Smallwood*, 8 Q. B. Rep. 538.

the deceased contractor was to give evidence against himself for six years. *Cur. vult adv.*

JUNE 16.—*PIGOT, C.B.* now delivered judgment. The question is, whether the indorsement on the note in this case will take the debt out of the statute of Limitations. The plaintiff's counsel rested their arguments on two grounds, First, that being an acknowledgment of payment it was evidence against the surviving contractor; and Secondly, that being an entry made by a deceased person against his interest, and containing an admission of the payment of six years interest, it was evidence of the fact of payment. This case was endeavoured to be distinguished from *Willis v. Newham*. The words of the Act on which that question arose were, "That nothing therein contained shall alter, or take away, or lessen the effect of any payment, of any principal, or any interest, made by any person whatsoever," and the Court distinctly ruled that evidence of payment could not be made by a parol acknowledgment of the fact, but there must be evidence of actual payment. The evident import given to the word, acknowledgment, so as to take a case out of the statute, is, that it must be an admission of a subsisting debt, or instead, there must be evidence of the fact of payment. In this case we are called on to give effect to a written acknowledgment of the payment of interest, although it is conceded that such an acknowledgment of the debt by the same co-contractor would not take the case out of the statute as against the other. It was contended that the mischief relied on in *Willis v. Newham* did not exist here, and that the courts have struggled against the doctrine laid down in that case; and that the words in the subsequent part of the section, as to joint contractors, are to receive the same construction as those in the preceding; and, that the indorsement in this case contained two distinct things, first, an acknowledgment of the debt, and secondly, of the payment of interest. Although the two are coupled in some degree, it is impossible not to adopt the construction of the Act given by the Court in *Willis v. Newham*. The consequence is that this acknowledgment does not take the case out of the statute. On the second ground I entertained considerable doubt; the words of the statute are, "that one co-contractor is not to be made chargeable by reason only of any written acknowledgment made or signed by any other, provided that nothing herein contained shall alter, or take away, or lessen the effect of any payment, of any principal, or interest by any person whatsoever;" from this it appears that an acknowledgment, in order to have the effect of taking the case out of the statute, must be in writing, but that the mere fact of payment, if proved, will be sufficient. From the cases, I take this to be such an entry, as far as regards the party making it, as would make the endorsement evidence against the whole world. It doubtless was written for the purpose of taking the note out of the statute, and contains two statements, one against, the other in favour of the interest of the person making it. The authorities, *Williams v. Geaves*, (8 Car. & Pay. 592,) *Turner v. Cross*, (2 Stra. 826,) *Clarke v. Wilmot*, (1 You. & Col. V. C. 53,) *Pickering v. Bishop of Ely*, 2 You. & Col. V. C. 258,) clearly establish, that when an entry is partly for, and partly against

interest, so much as is against may be used in evidence. This indorsement would then be evidence against the deceased contractor if alive; and the question then is, has it against the co-contractor the same effect as in other cases? I am of opinion, giving the Act its full operation, that this indorsement cannot be relied on to take the case out of the statute as against the co-contractor, although it would be evidence against strangers.

PENNEFATHER, B.—The Act 9 Geo. 4. cap. 14, contains two provisions, the first respecting promises made by the party himself; with regard to that it is express that no parol acknowledgment shall be sufficient to take the case out of the statute. The second applies to joint contractors, and is, "that no promise or acknowledgment by one, shall have the effect of taking the case out of the statute with respect to the other." There is an exception, that a payment by the party who has made the promise, or by his joint contractor, will take the case out of the statute. The question then is, what is evidence of payment? It appears to me, considering both the words of the Act, the decisions thereon, and the object of the Legislature, that the fact of payment must be proved by evidence *abunde*, that is, that parol, or written acknowledgments of payment by the joint contractor are not sufficient evidence of that fact, it must be proved by evidence different from the acknowledgment, otherwise the statute is wholly got rid of. If the acknowledgment of the debt be insufficient, it appears to me that the acknowledgment of the payment is likewise so; it was the object of the Legislature to protect one joint contractor from the acts of his co-contractor. This view is in accordance with all the decisions, therefore, without considering whether an acknowledgment against the parties own interest would not be in some cases evidence, I am of opinion this verdict must be set aside.

RICHARDS, B.—The Court in expounding this statute, must work out the objects of the Legislature. The language of the Act is express, that no parol acknowledgment of the debt shall be sufficient to take the case out of the statute of Limitations. In *Willis v. Newham* the Court held that no admission of part payment would take the case out of the statute. That authority is binding in the present case. It was contended that as the fact of payment might be proved by a parol statement, that this indorsement being a written statement of that fact, when taken in connection with, and identified by the document itself, was written evidence of the fact of payment. I am clearly of opinion that it is no more than a parol acknowledgment by a co-contractor, and consequently will not take the case out of the statute. It was then argued that this indorsement being an entry by a deceased co-contractor against his interest, is admissible as evidence of a part payment. If I could make up my mind that this entry was admissible for that purpose, I should have some difficulty in saying that it would not take this case out of the operation of the statute. I think it is not an entry against the interest of the writer, and therefore not admissible.

LEFROY, B.—I cannot conceive how this case can be taken out of the statute by this promise. The Act treats of two classes of persons, first of indivi-

duals—with them we have nothing to do; secondly, of joint contractors; the words are, “that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of any principal, or interest made by any person whatsoever.” It is clear that one joint contractor cannot be made liable to a debt by the written acknowledgment of his co-contractor; the fact of that acknowledgment being against the interest of the co-contractor cannot make any difference: will then an acknowledgment of payment? Generally speaking, such an acknowledgment would be admissible as against third parties, here it is not so, because the statute has expressly forbidden it. If the Court were to agree to the plaintiff’s argument, it would be arriving at a means of taking this case out of the statute as against the co-contractor. *Verdict set aside.*

MICHAELMAS TERM.

SCULLY v. FIGGIS. ELLIS v. FIGGIS.—Nov. 3.

Practice—Interpleader Act—Costs of Sheriff.

The court will not allow the Sheriff the costs of his application under the Interpleader Act, unless there has been gross neglect on the part of the other parties; but where an execution creditor waives in court his claim upon the goods seized, being already apprized by affidavit, of the justice of the other party’s demand, the court will allow the Sheriff and the claimant the costs of their attendance that day against the execution creditor.

Coates, on behalf of the Sheriff of the county of the city of Dublin, applied for a rule that the claimant and execution creditor should interplead. The affidavit stated that a *Fi Fa*, at the suit of the plaintiff Scully, had been delivered to deponent on the 11th of September, under which he seized a large quantity of furniture and other effects, lying in the Custom-house stores, and pointed out to him by the execution creditor as the property of the defendant. On the 14th of September, the Sheriff was served with a notice by the Trustees of the defendant’s marriage settlement, claiming as the property of defendant’s wife, under the trusts of the settlement, the greater portion of the effects seized. Under these circumstances, the sheriff applied for the protection of the court.

J. A. Curran, appeared for the trustees.

R. Armstrong, for the execution creditor, admitted the title of the defendant’s wife, and waived all claim to that portion of the effects which belonged to her.

PIGOT, C.B.—If so, you should have withdrawn your claim long before this, and not have put all parties to the expense of coming before the court for what might have been as well done out of it.

Coates for Sheriff.—We are entitled to our costs. *Scales v. Sargeson*, (4 Dow. P. C. 331); *Cotter v. Bank of England*, (3 M. & Scott, 180. The execution creditor has taken it upon himself to point out to the sheriff the goods to be seized, and if the sheriff had not seized them, he would have been liable to an action.

PIGOT, C.B.—If an execution creditor points out to the sheriff goods which he knows at the time not

to belong to the defendant, and the sheriff then comes here for protection, we can understand how he should be entitled to his costs. But if the sheriff, acting *bonâ fide*, is under the impression that the property belongs to the defendant, and if the execution creditor acts under a similar impression, neither of them is to blame, and it is not a case for visiting any party with costs. We are of opinion, however, that the sheriff is entitled to the costs of his attendance here to-day—that attendance having been rendered necessary by the pertinacity of the execution creditor in not withdrawing his claim when he ascertained the rights of the claimants, and in that respect the sheriff stands on the same footing as the claimant, and both are entitled as against the execution creditor to the costs incurred since the 5th day of October, when the rights of the claimants were ascertained.

MACNEIL v. MACNEIL.—Nov. 3.

Practice—Enlarging time for making an award under 3 & 4 Vic. c. 105, s. 63.

The court has jurisdiction under the 3 & 4 Vic. c. 105, s. 63, to enlarge the term for arbitrators making their award after the time has expired, even though the deed of submission contains a clause empowering the arbitrators to extend the term from time to time.

J. Pennafather moved, on behalf of the plaintiff, to enlarge the time for making the award under the following circumstances. A declaration had been filed, in Michaelmas Term, 1846—the cause of action being to the amount of £26,000, and involving complicated accounts. It was agreed to refer the matter to arbitration. After the time for making the award expired, the arbitrators on consent, extended the time to August. It appeared that various delays occurred, chiefly on the part of the defendant, who, when that time expired, refused again to enlarge it. Counsel relied on 3 & 4 Vic. 105, s. 63.

Hickey contra.—The court has no jurisdiction to enlarge the time under the section referred to. That section does not apply to cases where the power is reserved by the deed of submission to the arbitrators to extend the period from time to time. The deed of submission contains full powers to the arbitrators to extend the time for naming their award, and the act applies only to mere naked deeds, which are without any such provision. *Lambert v. Hutchinson*, (2 M. & G. 859); *Doe v. Powell*, (7 Dow. P. C. 539.)

Pennafather in reply.—Under the 63rd section, the plaintiff, having signed the submission, has no power to proceed, unless the court extends the time; and therefore if the court has no jurisdiction, his claim is effectually barred. (*Lefroy, B.*—That is not so, for the restriction on the plaintiff’s proceeding continues only while the submission is pending.) But this very point has been expressly ruled. *Carberry v. Newenham*, (7 M. & W. 378); *Lewis v. Richardson*, (12 Jur. 473.)

PIGOT, C. B.—That authority enables us to dispose of the case at once. In almost every deed of submission there is a similar clause, empowering the arbitrators to extend the time, and if we were

to narrow the operation of this section, as contended for, it would be in effect to render the section inoperative.

LEFROY, B.—I confess, if this matter were *res integra*, I should be disposed to agree with Judge Patterson, that the court has no jurisdiction in cases like the present; but there are two later authorities the other way; and though I cannot see my way to the construction of the act of parliament, I can see it very clearly to follow those authorities.

COURT OF CHANCERY.

KELLY v. BENNISON.—Oct. 25th.

Evidence—defendant in similar interest with plaintiff—6 & 7 Vic. c. 85.

The evidence of a defendant, who might have been made a co-plaintiff, is admissible for the plaintiff under the provisions of the 6 & 7 Vic. c. 85.

The testator in the cause devised certain lands to his daughters Rebecca Matilda, and Anna Maria Sproule, the latter, in the testator's lifetime, being about to marry the defendant, Morgan, the testator, by a codicil to his will, settled her portion of the land to her separate use; after his death Rebecca Matilda married the plaintiff Harpur. The bill was filed by the plaintiff Kelly as the trustee of Mrs. Harpur, against the defendant Bennison, who had been the agent of Mrs. Morgan and Mrs. Harpur over these lands, for an account of the rents and profits received by him in that capacity. Mrs. Harpur and her husband were plaintiffs, and Mr. and Mrs. Morgan defendants. Mrs. Harpur and Mrs. Morgan took as tenants in common under the will. To prove the reception of the rents and profits of the lands by the defendant Bennison, the evidence of James Morgan, the husband of Mrs. Morgan, was tendered by the plaintiffs and objected to.

Monaghan, Att.-G. with Christian, Q. C. and F. L. Smith, for the plaintiff, cited Wood v. Rowcliffe, (6 Hare, 189.)

Green, Q. C. with Martley, Q. C. for the defendant, Bennison, cited Monday v. Gayer, (1 D. & G. and Mon. 182.)

LORD CHANCELLOR.—I will receive this evidence on the authority of *Wood v. Rowcliffe* decided by Sir James Wigram, V. C., I think less harm will be done, by receiving than by excluding it, but if the parties wish I will give them an opportunity of sending it, if they be so advised, to obtain the opinion of the highest tribunal on the construction of this Act. When I consider its language and intention, I can put no other construction on it than that of V. C. Wigram. It applies to proceedings both at law and in equity. If the section stopped at the word "respectively" in the first part of the proviso, the effect of that might have been to exclude the practice of this Court with respect to the examination of parties to the record as witnesses. But to prevent that operation it is provided "That in courts of Equity any defendant to a cause pending in any such court, may be examined as a witness on behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions." If it stopped there,

there would be more difficulty, but it goes on to say "And that any interest which such defendant so to be examined may have in the matters, or any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness." Now what interest could a defendant have in matters in the cause when examined for the plaintiff? It cannot mean an interest to defeat the plaintiff's case, for in that case the evidence would be receivable against the party who examined him. It must mean an interest similar to that of the plaintiff. Then, if we admit the evidence of a defendant in a similar interest, where can we draw the distinction? In the present case, although the witness has not an interest in the actual monies to come to the plaintiff, he has an interest on the same side as the plaintiff, for the bill prays the payment to him, or to his wife which is the same thing, of monies to be found due on taking the account prayed in the bill; but I cannot read the Act in any way save as read by Sir J. Wigram. Perhaps if a case like this had been suggested to the Legislature, they would have prevented any such arrangement of the record, to use no harsher term, being made available for the purpose of admitting evidence which would have been excluded by its natural and proper frame. But the case not having been provided for, and the authorities upon this point being balanced, I will give the preference to V. C. Wigram's construction—I shall receive this evidence.

IRWIN v. ROGERS.—Nov. 14.

Evidence—Stat. 6 & 7 Vic. 85—Co-Defendant. A defendant claiming under a deed impeached by the bill, may be examined in support of that deed on behalf of co-defendants.

This was a bill filed to set aside, or declare revoked, a voluntary conveyance by which, amongst other provisions an annuity of £20 per annum was granted to the defendant Byrne. Byrne was examined on behalf of Catherine Hopkins, another defendant, in support of that conveyance.

J. D. Fitzgerald, Q. C., with F. Fitzgerald, offered the depositions of the defendant Byrne.

Brewster, Q. C., with Christian, Q. C. and Drury, opposed the admission of this evidence. This is, in fact, the defendant being examined for himself. When your lordship decided Kelly v. Bennison, Clark v. Wyburn, (12 Jur. 613), was not cited.

LORD CHANCELLOR.—The proviso as to courts of Equity overrules all the prior saving. If the act be defective, Parliament alone can remedy it. As I said in *Kelly v. Bennison*, I must take the words as I find them. I will receive this evidence.

ROLLS COURT.

TOMLINSON v. COX.—Nov. 3.

Demurrer—Misjoinder—Parties—Departure—Amendment.

A bill against an executor, to carry into execution the trusts of a will, and for payment of an annuity thereby granted, stated that an agreement had been

entered into by the defendant with one E. R., by which he was to pay the said annuity, and that certain premises had been assigned to secure the same. That after the death of E. R., S. M. R. procured from defendant an assignment of said premises. The defendant by his answer stated, that the annuity had been assigned to him by the plaintiff. The bill was then amended, and prayed this assignment should be declared fraudulent and void. Held upon demurrer that the case made by the amended bill was no misjoinder, nor was there any departure from the case made by the original bill, it being competent for a plaintiff to put forward facts which avoid the defence. Held also, that upon the statements in the bill S. M. R. was not a necessary party, although she might be so when the evidence came to be read at the hearing.

The bill stated that John Tomlinson, the testator in the cause, by will bearing date the 30th May, 1835; bequeathed to the plaintiff Patrick, as much of his personal property as would purchase an annuity of £60; and by a codicil, appointed the Rev. William Cox (the defendant) sole executor. That the testator died on the 29th of June, 1835. That the will was duly proved by the defendant, and that plaintiff was informed that the defendant had entered into an agreement with one Edward Richardson, whereby Richardson was to pay said annuity to the plaintiff, and as a security for payment had assigned certain houses to the defendant. That on the 13th of December, 1837, after the decease of said Edward Richardson, Sarah Maria Richardson his widow obtained an assignment of said houses, and that some small sums had been paid on account of the annuity. The bill prayed that the trusts of the will of John Tomlinson might be carried into execution. That an account might be taken of the sums due to plaintiff. That the defendant might admit assets, or that an account might be taken of the personal estate and effects of the testator, and his assets applied in a due course of administration. The defendant in his answer, stated, that by an indenture dated the 17th of April, 1837, and made between plaintiff of the one part, and defendant of the other; the plaintiff assigned the said annuity to the defendant, who, in consideration thereof covenanted to pay for the board and lodging of the plaintiff. The answer also set forth an account as between plaintiff and defendant, by which a large balance appeared to be due to the latter. The bill was then amended, stating that the annuity given to the plaintiff was in said will directed not to be sold or disposed of by him, as from infirmity of vision and understanding, plaintiff was without knowledge of the world. That the defendant had applied to his own use, the money received from Sarah Maria Richardson. That the plaintiff was induced to execute the assignment to defendant by fraud, and that the same was void, having been obtained by a trustee for his own benefit, and in violation of the testator's will. The amended bill then prayed, that the said indenture of the 17th day of April, 1837, and the said account might be declared void as against the plaintiff; and that notwithstanding said indenture of assignment, and the account, that the plaintiff might

be declared entitled to said annuity, and that the defendant might be compelled to pay, and to secure to him an annuity of £60 per annum, pursuant to the directions contained in the will of the testator, John Tomlinson. To the amended bill, the defendant demurred. "For that the relief sought by the bill, to carry into execution the trusts of the will of John Tomlinson, and the accounts and directions therein prayed, and the further relief sought by the amended bill, that the indenture of the 17th of April, 1837, and the account set forth in defendant's answer, should be declared fraudulent and void, appear to relate to several and distinct matters, and which ought not to have been joined together, and that Sarah Maria Richardson should be a party to the said bill, inasmuch as it is stated therein, that she obtained the re-assignment in bill mentioned. That the case made by the amended bill was a departure from that in the original bill, inasmuch as the defendant is there sued as executor, whereas in the amended bill he is sued as trustee."

Martley, Q.C. and Dobbs for demurrer.—In its original form, the bill was simply that of an annuitant, praying for payment of his annuity; by the amended bill a totally different case is made, and relief is sought against the defendant as trustee. The bill prays that the assignment to him from his *cestui que trust* may be set aside, this is a clear misjoinder, *Salvidge v. Hyde*, (5 Mad. 146); *Compell v. Mackay*, (1 My. & Cr. 619); *Ward v. Duke of Northumberland*, (2 Anstr. 469). The bill states that the annuity was reconveyed by the defendant to Sarah Maria Richardson, now she must have been aware that the relationship of trustee and *cestui que trust* existed between the plaintiff and defendant, and if the defendant was not able to pay this annuity, she could be decreed to pay it, she is therefore a necessary party to the amended bill.

Hughes, Q.C. and H. Smythe, in support of the bill, cited *Darcy v. Beytagh*, (F. and K. 481) on the point of multifariousness.

MASTER OF THE ROLL.—The bequest to the plaintiff directed that the annuity was not to be sold, or disposed of by him, as from imperfect vision and understanding he was without knowledge of the world, so that on the face of this pleading, the trusts which Mr. Cox as executor undertook to carry into execution, and the incapacity of the plaintiff with respect to want of knowledge of the world are clearly set forth, yet with full knowledge of this fact, the executor fraudulently and by misrepresentation—such being the statement in the will, which, on the argument of this demurrer I am entitled to assume to be true—procures to himself a conveyance of this annuity. In the amended bill there is no departure from the case made by the original bill, it merely gets rid of the defence set up by the answer, and if a fraudulent instrument be set up, it is competent for the plaintiff, by amendment, to put forward any facts that will avoid the defence. I am entitled to look to the answer, for the purpose of ascertaining if it has overruled the demurrer; but I can only look to it for that purpose, and I must take the statements in the amended bill, with respect to the assignment to Sarah Maria Richardson, without

regard to those contained in the answer. The argument on the part of the defendant is, that the trusts of the will have been fulfilled by the purchase of the annuity by him, and that if the plaintiff accepted of this arrangement in satisfaction of his legacy, it deprives him of his right to it. I do not consider that the existence of this second instrument amounts to a satisfaction of the plaintiffs claim under the first, there were some dealings between him, Richardson, and the defendant, when the annuity was purchased, but this does not seem to have been with the assent of the plaintiff, and I cannot conceive how the trusts of the will can be considered as fulfilled by this transaction to which the plaintiff was no party. I do not see, therefore, any facts on the face of this will, to shew that these trusts have been carried into execution, and if not, there is no ground for the objection of misjoinder, as to the objection for want of parties, putting out of consideration any passage read to me from the answer. I find no statement in the bill, to shew that Mrs. Richardson is a necessary party, the course taken by the defendant is very incorrect, for I am forced to decide this demurrer, knowing there are other facts in the case, but which being contained in the answer are not properly before me, besides the prayer of the bill is simply to carry into execution the trusts of the will, and no relief is prayed against her. I do not now offer any opinion, as to whether, when the answer is read, Mrs. Richardson may not be a necessary party, but upon the vague statements in the bill I do not think she is.—*Demurrer overruled.*

TOWNSHEND V. BARRY.—Nov. 6.

Practice—Appointment of a receiver.

Pending a creditors suit; a petition was presented by a judgment creditor, a defendant in the suit, for a receiver over the lands in the pleadings mentioned. Held, that the pendency of the suit was not sufficient cause against the appointment of the receiver, and that the petitioner was entitled to his costs.

Sherlock in this case shewed cause against a conditional order for the appointment of a receiver. The petition was presented on the 12th of June last, on the 7th of March previous, a bill had been filed for a receiver over the same lands. To this suit the defendant was a party, and had been served with notice of the proceedings. It is not stated in this petition that the cause was pending, nor is there any allegation that it was not properly conducted; A consent was entered into, in the suit, that if the answers were not filed before the 20th of October, the bill should be taken as confessed, and a receiver appointed, and accordingly on the 4th of November, the answers not having been filed, the bill was taken *pro confesso* and a receiver appointed over these lands. The petitioner should have informed the court, that the suit had been instituted.

C. Kelly, contra.—The answers were not filed on the 19th June, when the petition was granted, and we had no means of compelling the plaintiff to proceed in the cause.

MASTER OF THE ROLLS.—I do not think I can

refuse the costs of this petition; when a suit is pending, if another creditor should file a bill, I could not stay proceedings until a decree is obtained, it would be very desirable that some alteration should be made in the practice. In the incumbered estates act, there is a provision, I believe, that pending any proceedings under it no suit can be instituted. I must, however, take the case as I find it. The only order I can make is to extend the receiver already appointed in the suit to the petition matter.

READ V. DUBLIN, DUNDRUM, AND RATHFARHAM COMPANY.—Nov. 7.

Practice—Evasive answer—Side bar rule to elect.

If a plaintiff proceeds at law and in equity, a defendant cannot, immediately after a short or evasive answer, enter a side bar rule, calling on the plaintiff to elect, such a rule is entered at the peril of the defendant, and if upon exception the answer is found not to be full, the rule will not be effectual.

This was a motion shew cause against a side bar order to elect entered by the defendant. The bill in this case was filed, to compel the specific performance of an agreement, for the sale of certain premises. On the 7th of April, 1848, the defendants filed their answer, to which the plaintiff excepted for insufficiency, on the 13th of June a further answer was filed, and on the same day a side bar rule was entered by the defendant, that the plaintiff should elect whether he would proceed at law, or in equity. On the 16th of June, notice of motion was served by the plaintiff, to set aside this order for irregularity, and on the same day, notice of exception to the second answer was served. This exception was allowed, and a further answer put in, before the notice of the 16th of June came on to be moved; on that motion his Honor directed that the plaintiff should be at liberty to serve a notice of motion, and shew cause against the side bar order; instead of serving this notice, the plaintiff, by mistake,—served notice of an application for a reference to the master, to enquire whether the case was a proper one to put the plaintiff to his election.

Brewster, Q.C. with H. West.—The practice in England is to enter a side bar rule. That the plaintiff shall elect within eight days after serving notice, (1 Dan. Ch. Pr. 791). The practice in this country, as settled by *Hollyer v. Hedges*, (9 I. E. R. 37), is to enter a rule forthwith after answer, that the plaintiff shall elect in eight days, this rule is to be entered at the peril of the defendant, and if the answer should be insufficient, the rule is a nullity, for until full answer, it is impossible for the plaintiff to know whether he will elect. In the present case, if no farther answer was put in, the case would be as if there were none, how then can it be said, that because a party afterwards files an answer, the side bar rule is to be continued as if the answer was full in the first instance.

Butt, Q.C. and T. Darley, contra.—A sufficient answer is now filed to support this side bar order, according to the case of *Hollyer v. Hedges*, there is no condition annexed to the entry of the rule.

The notice is irregular, by the notice of 29th July, plaintiff asks for a reference, and complies with the side bar order, and if this order is now set aside, he would be entitled to enter it again without any objection. This is a clear case to put the party to his election, the proceedings at law and equity are for the same matter.

MASTER OF THE ROLLS.—The former practice in England having been found inconvenient, was altered by the general orders of 1839, since adopted in those of 1845. At the end of eight days after answer, a defendant may now enter an immediate rule calling on the plaintiff to elect. The question I had decided in *Hollyer v. Hedges*, was, whether the side bar rule to elect could be entered in eight days after answer, or was to be postponed for six weeks, the time the plaintiff had to except, and there was no case on the books in which the point had been expressly decided, and I considered it more convenient to make the practice here and in England as nearly in conformity as possible, but it never was intended that a party was to be at liberty to put in an evasive answer, and call upon the plaintiff to elect. The plaintiff should not be obliged to do so, until he sees what defence is made. A defendant ought to know if answer is short, and, whether it is or not, the rule is taken, at the peril of the defendant. I will not now decide whether it is necessary to enter a new side bar rule for the effect of the notice of motion by the plaintiff's calling for a reference is to treat the answer as sufficient, and it would not be reasonable to allow an amendment of that. On this notice of motion for the purpose of setting aside this rule, which raises the real question between the parties, I will act upon the plaintiff's own construction of the order, and treat it as if the eight days commenced upon the 9th of July. I will make the order of reference in the words of the case of *Mills v. Fry*, (3 Ves. & B. 9,) and after the report I will dispose of the costs of the motion. It is not necessary to decide whether a second side bar order is necessary, that objection having been waived.

RICHARDSON v. ANSTEN.—Nov. 13.

Practice—Receiver.

A bill filed to raise the amount of a judgment was taken pro confesso; motion for a receiver granted, although the bill did not pray for a receiver.

Johns moved for a receiver.—The bill in this case was filed to raise the amount of a judgment and had been taken, *pro confesso*, against John Ansten, the principal defendant. An answer had been filed by him since the order was made.

Pitt Kennedy, for John Ansten, the inheritor.—This motion should be refused; there is an answer on the file, and if it is not regular the plaintiff should apply to have it taken off for irregularity.

Cheyne for M'Carthy, a mortgagee.—In this case a receiver cannot be appointed as the plaintiff does not pray one by his bill.

Johns.—The case of *Malcolm v. Montgomery*, (2 Moll. 500,) decides that it is not necessary to pray for a receiver.

Kennedy.—The case of *Meredith v. Wise* (1 Moll. 26, note,) decides the contrary.

MASTER OF THE ROLLS.—In this case I must grant a receiver. The bill prays for a sale, and the inheritor has no right to oppose the application; as for the mortgagee, it will be for his benefit to secure the rents.

MOLONY v. O'BRIEN.—Nov. 13.

Practice—Witness—Re-examination.

Where by mistake of the examiner, a witness was not examined to two interrogatories, a re-examination was allowed after publication had passed, and the cause was set down for hearing.

Gayer, Q.C. applied that Mr. Rolleston, a witness for the plaintiff, might be examined as to two additional interrogatories, publication having passed. By mistake of the examiner, the witness had been examined to the eighth and ninth interrogatories only, and the error was not discovered till after publication had passed, on the 2d of October. On the following day the cause was set down for hearing and, on the 24th of October, notice of the present application was served. A consent had been prepared by the plaintiff, but the defendant had refused to sign it.

Gayer, with H. Richards.—This is a proper case for the court to permit the witness to be examined. If the mistake originated with the examiner, it is the duty of the court to grant the application, *Paine v. Curtis*, (1 Yo. Ex. C. 343).

J. Greene contra.—It is stated that the witness told the examiner that it was not necessary that he should be examined to those interrogatories; and, although this is denied by Mr. Rolleston, the examiner should be sent for to ascertain how the fact is; this was the course adopted in *Ingram v. Mitchell*, (5 Ves 297.) In all the cases in which a re-examination has been allowed, it has appeared by affidavit that the depositions have not been seen.

MASTER OF THE ROLLS.—In this case the plaintiff and his solicitor are free from all blame. The list of witnesses was handed to them, and amongst them Mr. Rolleston, who was to be examined to the tenth and eleventh interrogatories; his not being examined was clearly a mistake. I consider the case of *Ingram v. Mitchell* does not apply. This application does not require any authority in support of it. I have no hesitation in making the order, except so far as the notice seeks costs against the examiner; for in a case such as this I will be slow to make the officer pay costs. The examiner, however, should be careful not to take any directions from the witnesses, for, if any witness refuses to answer, it is the officer's duty to report the matter to the court, and the witness would be liable to attachment. I cannot make the defendant pay costs because he would not sign the consent, however, I will not give him any costs of appearing on the motion.

KELLY v. FOX.—Nov. 14.

Practice—Witness—Order pro confesso.

A defendant against whom an order has been made to take the bill pro confesso, may be examined as a witness on the part of the plaintiff.

This was an application on behalf of the plaintiff for liberty to examine a defendant against whom the bill had been taken *pro confesso*.

Pilkington.—There is no direct authority in support of this motion, but it falls within the principle of the rule as laid down by Lord Langdale, in the case of *Holmes v. Mayor of Arundel*, (4th Beav. 155, 335.) By allowing the bill to be taken *pro confesso*, the defendant in point of fact admits the truth of the allegations contained in it, and it cannot now in any way affect him to be examined as a witness to those statements.

MASTER OF THE ROLLS.—I have made one order of this kind since I sat here, and I then felt the difficulty of there being no authority on the point; however, as I consider this application falls within the principle of the case referred to, I will make the order.

EQUITY EXCHEQUER.—Nov. 7.

In the matter of A. B. seeking to put in suit the libel bond entered into by C. D., (late proprietor of —) and E. F., G. H., for the recovery of the damages and costs recovered by the said A. B. against the said C. D., for the printing and publishing of a libel of, and concerning the said A. B. in said paper.

Practice—Course of proceeding under 1 W. 4, c. 73, s. 3. Under the above act the court will only grant a conditional order in the first instance, which must be served on the Attorney-general.

Edward Galway moved for liberty to put in suit the libel bond of C. D. and his sureties, under 1 W. 4, c. 73, s. 1. The affidavit stated that A. B. had obtained, as of Trinity Term, 1848, a judgment in the Queen's Bench against C. D., late proprietor of a certain newspaper, for £500 damages and costs, in an action for libel against C. D. That A. B. had issued a *Fi. Fa.* accordingly, and there was a return of *nulla bona*; that defendant had no goods or chattels to satisfy the condition, and that deponent had received letters purporting to have been written by the defendant, stating that the defendant was unable to satisfy the judgment, and that deponent believed defendant to be in insolvent circumstances, and the amount of judgment would be lost unless the libel bond was put in suit against C. D. and his sureties.

PER CURE.—Take a conditional order, to be served on the Attorney-general, C. D., and the sureties.

QUEEN'S BENCH.—MICHAELMAS TERM.

ATLMER V. CONLAN.—Nov. 7.

Pleading—Covenant against Alienation—Penal rent—Liability of assignee—11 Ann. Ir. c. 2.

Declaration stated, that J. K. covenanted with G. A. not to assign certain premises, without his consent in writing, and in case of such assignment, that it should be lawful for G. A. to re-enter, "or to charge J. K. double the reserved yearly rent." Held on special demurrer, that the assignee of J. K. was not liable upon the covenant, as set forth in the declaration.

COVENANT by lessor against assignee of lessee. Declaration stated that by indenture of release bearing date, &c., "the plaintiff demised certain lands to one John Kelly, his heirs and assigns, for a term of two lives and 21 years, at the yearly rent of £70,

payable half yearly. "The declaration then stated a covenant "by the said John Kelly, his heirs, executors, administrators, and assigns, that he or they should not during the said term demise, or assign the said lands without the consent in writing of the said plaintiff, his heirs, or assigns, and in case such letting or agreement should be made, that the lease was to be void, and that it should be lawful for the plaintiff, his heirs or assigns, to re enter upon the demised premises, or to charge the said John Kelly double the said reserved yearly rent, to be recovered in like manner as the said reserved yearly rent, at the option of the plaintiff." The declaration then stated, "that John Kelly devised his interest in the premises to the defendant and died; that the defendant entered, and that such assignment was made without the consent in writing of the plaintiff. By virtue of which said premises, the plaintiff became entitled to double the said reserved yearly rent." The defendant demurred, and assigned for cause; First, that it appears upon the said declaration, that the double rent in the declaration mentioned, was to be charged against John Kelly, and not against his assignee; secondly, that according to the terms of the said indenture, the said John Kelly alone was to be charged with the said double rent.

Joinder in demurrer.

Kernan and J. D. Fitzgerald, Q.C. in support of the demurrer.—The declaration in this case, does not aver, that a covenant was entered into by the assignee himself, or by any one on his behalf. It is a rule of pleading, that all those parts of the contract, which are material for the purpose of enabling the court to form a just idea of what the contract actually was, should be stated with certainty and precision, *Blakey v. Dixon*, (2 Bos. and Pull. 321); *Andrew v. Whitehead*, (13, East. 102) The declaration states a covenant to charge John Kelly, and not the assignee of John Kelly; the plaintiff was bound to aver in his declaration a covenant on the part of the defendant. The assignee is not liable upon the lease as stated in the declaration; in fact no breach is averred, and it is not stated for what time the double rent was to last.

Hamilton Smythe, and Napier, Q.C. contra.—It must be admitted, that it ought to appear in the declaration, that the covenant was entered into on behalf of the assignee. The covenant is clearly binding upon John Kelly, his heirs, executors, and administrators, and the assignee becomes liable by the operation of the 11th Ann. Ir. c. 2, s. 6, enacts "that all and every person and persons, who, from and after the 25th of march, 1712, shall take any assignment of all the residue of any term of years, or life or lives, their executors or administrators, shall be liable to all the covenants whereunto the lessees, their executors, and administrators, were liable by or by virtue of the said leases," a statute peculiar to this country. The legal effect of the lease is to charge the lessee, and the assignee is charged by force of the statute. If, therefore, the assignee is liable to all the covenants, the assignee's liability is co-extensive with the lessee's, *Earl of Lucan v. Gildea*, (2 Hud. and Br. 635). This statute came under the consideration of this court the case of *Grogan v. Magun*, (Al. and N. 366; s. c. 2, Jones, 307), and it was there held, that the

statute made the assignee liable to all the covenants contained in the lease, to which the lessee was liable. It is for the court to construe the covenant. (*Moore, J.*—We have not the materials to enable us to construe the covenant, you might have set out the deed in *hæc verba*. *Blackburne, C. J.*—Have you not rendered it ambiguous, to say the least of it, by the manner you have pleaded the deed, is it sufficiently certain?) In *Tatem v. Chaplin*, (2 Hen. Bl. 193, the assignee was held bound though not named; *Cockson v. Cock*, (Cro. Jac. 125). is to the same effect.

J. D. Fitzgerald Q.C. was not called on.

BLACKBURNE, C. J.—We think the special demurrer well founded; we are not at liberty to put any other construction upon this contract than what is set out upon the pleading, and reading it simply as we find it, are to decide upon the meaning of the covenant. John Kelly, the lessee, binds himself not to assign the premises, unless with the consent in writing of the plaintiff, the lessor, and in the event of a particular breach of this covenant, the parties have provided, that it shall be lawful for the lessor to re-enter, or to charge John Kelly with double the rent; are we to infer that this was to charge John Kelly, his heirs, executors, and administrators? The words John Kelly stand here alone, and it is quite possible that the party may have intended only to charge John Kelly; there is nothing in law to prevent his entering into such a contract. We give no opinion as to whether this penal rent was to be payable during the term.

Judgment for the defendant.

FAY V. MORPHY.—Nov. 8.

Taxation of costs—Fees to counsel.

This was an application on behalf of the defendant, that the officer may be directed to review his taxation, on the ground, that, in taxing the plaintiff's costs, as between party and party, he allowed the fees of the three counsel of the inner bar, engaged in the case, and disallowed the fee of the counsel of the outer bar.

Wright in support of the motion, submitted that as it was indispensable that a member of the outer bar should be employed, the officer in taxing the costs, ought to have included his brief, and should not have allowed the fees of the three Queen's counsel.

J. D. Fitzgerald, contra.—The taxing officer, in his report, has certified, that from the importance of the trial, and the number of witnesses examined, he did not consider that the fee, paid to the third Queen's counsel was too large for the junior counsel employed in the case, and he therefore increased the fee on his brief to that sum.

Per Curiam.—We cannot accede to the principle upon which the officer has acted. According to the course of the court, the plaintiff would have had a right to charge for a counsel of the outer bar, and the officer when taxing the costs, ought to have included his brief, and only allowed the fee marked thereon. We do not say that the officer would have acted wrong, if, in the exercise of his discretion, he had also included the briefs of the three counsel of the inner bar. Let the brief held by

the junior counsel in this case, be produced before officer, and let the amount be reduced to the fee marked thereon.

LESSEE CARROLL v. DEVELIN.—Nov. 10.

Practice—11 & 12 Vic. c. 28—Arrest.

The plaintiff is entitled to issue a capias ad satisfaciendum for the costs of an ejectment, where they exceed £10, although nominal damages are included in the judgment.

Townsend MacDermott, on behalf of the lessor of the plaintiff, moved that the officer of the court be directed to issue the writ of *Ca Sa* in this cause. It was an ejectment on the title in which the plaintiff obtained judgment, and the costs had been taxed to £55. The damages being nominal (6d.) The officer refused to allow the execution to issue, alleging that under the 11 & 12 Vic. c. 28, sec. 1, the defendant could not be arrested where the sum recovered by the plaintiff, exclusive of costs, was under £10. Counsel contended that the officer's construction of the act could not be sustained; the latter clause of the first section provided that no writ, or process to arrest a party for costs should issue, where they did not exceed £10. The first clause could not have been intended to apply to the case of an ejectment where the *Ca Sa* issues substantially for costs, the damages being only nominal. The construction attempted to be put upon this section is quite inconsistent with the policy and objects of the act, and would lead to results never contemplated by the legislature.

MOORE, J. having conferred with the other members of the court—*Order granted.*

EXCHEQUER OF PLEAS.

BARKER v. FIGGIS AND ANOTHER.

Bill of Exchange—Averment of Indorsement by Firm—Ball v. Gordon, 9 M. & W. overruled.

The declaration alleged that "A. B. directed his bill of Exchange to certain persons trading under the name, style, and firm of F. & Co., &c., and that the said certain persons trading under the name, style, and firm of Figgis and Co., accepted the same." Held on special demurrer a sufficient description of F. & Co. as acceptors.

ASSUMPSIT on a bill of Exchange.—The declaration stated—"And whereas also one A. B., on the day of, &c., (venue), made his bill of exchange in writing, and directed the same to certain persons trading under the name, style, and firm of Messrs. F. and Co., and thereby required the said certain persons trading under the same name, style, and firm of Messrs. F. & Co. to pay to the order of the said A. B. £200 on the 8th day of Sept. inst., and the said certain persons trading under the same name, style, and firm of Messrs. F. & Co. then and there saw and accepted the same, and the said period has now elapsed, and the said A. B. then and there indorsed the said bill to the said defendants, and the said defendants then and there indorsed the said bill to the said plaintiffs, and the said certain persons trading under the name, style, and firm of Messrs. F. & Co. did not pay the said bill, although the same was presented to them on

the day when it became due, to wit, on, &c., at, &c., of all which the defendants then and there had due notice. Demurrer, because it was not stated who the said certain parties trading under the name, style, and firm of Messrs. F. & Co. are by name, or whether they have any Christian, or surnames, and that they ought to have been described by their baptismal, or surnames, and that it is not averred by what name, or style the said acceptors accepted the said bill, or who, by name, accepted it, or that it was accepted under the style of a co-partnership or invoice.

Mockler for the demurrer.—This declaration is clearly bad on the authority of *Ball v. Gordon*, (9 M. & W. 345). There is no averment that the bill was directed to them, or accepted by them, or by their style and firm. It is consistent with this count that the acceptance on the bill disclosed the different names of the persons composing the firm of Figgis & Co. Here is no averment to dispense with the rule of pleading that the Christian names and surnames of persons mentioned in the pleadings must be set out in full. *Applemans v. Blanche*, (14 M. & W. 154); *Esdaile v. Maclean*, (15 M. & W. 277), Stephens on Pleading, p. 353, 2d edit.; counsel also cited *Whitwell v. Bennett*, (3 B. & P. 559); *Le Sage v. Johnson*, (Forrest 23); Stephens on Pleading, 329, 4th edit. The case of *Tigar v. Gordon* (9 M. & W. 347) is distinguishable, for there it is averred that the endorsement was made by and under the name of the firm. (*Lefroy, B.*—Supposes a bill directed to an individual under a particular name, and an averment that he accepted it, would it not be intended that he accepted it under that name; so, where it is averred that certain persons were carrying on business under a certain style, and accepted the bill, is it not tantamount to an averment that they accepted it under that style.)

Wm. F. Darley contra.—In this case it was not necessary to the plaintiff's right to recover as against the defendant, to state any acceptance at all. The cases relied upon in the other side were those of declarations against acceptors. The case of *Tigar v. Gordon* was affirmed in *Smith v. Ball*, (10 Jur. 946); *Williamson v. Johnson*, (2 D. & R. 281).

Pigot, C. B.—It is a rule of pleading that all persons must be described by the names by which they are known, individuals by their Christian names and surnames, peers by their titles of dignity, so trading companies must be described by the names under which they are known to the world. I do not quite understand Lord Abinger's reasoning in *Ball v. Gordon*. *Cur. adv. vult.*

Pigot, C. B.—In this case a demurrer has been taken to the declaration. The objection is, that the acceptors are therein described "as certain persons trading under the name, style, and firm of Figgis & Co." without averring that they are so described on the face of the bill, and counsel for the demurrer rests his case on that of *Ball v. Gordon*. The objection there seems to have been that the Christian names of the parties should have been set out in full, and the general description of M'Leod & Co. was insufficient. The view which Lord Abinger took of the case appears from this passage in his judgment:—"The difficulty is this, that it is possible the persons using the name of M'Leod & Co.

may have drawn bills, and used another name or names." That appears to have been the only ground of difficulty suggested, and the plaintiff was allowed to amend. In *Tigar v. Gordon* the declaration stated that—"certain persons by and under the name, style, and firm of Gordon & Son indorsed the bill," and the averment was upheld. Baron Parke in his judgment in that case, as reported in 1 D. N. S. 656, refers to the form of the pleading in *Ball v. Gordon*, and states that, according to his experience, the declaration in *Ball v. Gordon* was sufficient." I refer to that observation because I think it most important to abide by the settled forms, and even though there may be an objection on strict principle to that form, yet it ought to be maintained. I have looked into Bailey on bills—a book of the highest authority, from the high position and reputation of the author—and I there find a precedent in exact conformity with what Parke B. stated to have been his recollection, and he gives the form of a count in an action on a foreign bill, and recommends the very averment to be struck out—of the absence of which defendant complains here—and approves of the form adopted in *Ball v. Gordon*. For that reason, and because this form has the sanction of long practice, I, for one, am unwilling to deviate from it, and, according to my own experience, it was usual to adopt the form of averment which occurs in *Ball v. Gordon*. In the older editions of Chitty on Pleading (2d vol. 106, Ed. 1825,) the alternative form is found. The expression "trading, &c." was that employed in *Bass v. Clive*, and *Williamson v. Johnson*, and conforms to the opinion of Parke, B., as stated in *Tigar v. Gordon*. These cases were reviewed in the recent case of *Smith v. Ball*, (10 Jur. 946). The declaration there stated "that certain persons under the name, style, and firm of C. & Co. drew their bill of exchange, and the defendant accepted the same, and the said C. & Co. then endorsed the same to the plaintiff." With the exception of the *dicta* in *Ball v. Gordon*, there is no authority calling upon us to pronounce this declaration bad. It is quite in analogy to treat as a sufficiently certain description the commercial names which parties assume, and to adopt a different view would be to fashion rules, and establish precedents in contradiction to the ordinary dealings of mankind. I have been informed that the Court of Common Pleas* have recently decided this very point, and that in two cases this form of pleading has been upheld on demurrer. It is of the utmost importance to the administration of justice that there should be uniformity in the practice of the courts. I am therefore of opinion that the demurrer in this case must be overruled.

PENNEFATHER, B.—I quite concur with the opinion of the Lord Chief Baron. The fair intendment is that the bill was drawn, and indorsed in the name of the firm. The case of *Ball v. Gordon* cannot be regarded as a decision on the point, and even if it were, I should not be disposed to bow to it.

LEFROY, B.—Concurred.

Judgment for Plaintiff.

* *Southey v. Magan*, 10 I. L. Rep. 250.

HEALY AND ANOTHER v. CAMPION—Nov. 4.

Pleading—Assumpsit—Replication de injuriâ.

To an action by indorsee against the maker of a promissory note, the defendant pleaded, "That the note was not indorsed to the plaintiffs until after the sum had become due, and that at the time the said note became due it was in the hands of the payee, and, whilst the payee continued to hold the same, and before the commencement of this suit, the payee was indebted to the defendant in the sum of £17 3s. 3d. for the use and occupation of a certain house of the defendant, &c., and that an account was settled and stated between payee and defendant, such account including said note, and the said payee had credit in such account for the full amount of the said note, of all which the plaintiff had full notice, and was well aware and informed that the said note remained in the hands of the said payee to secure the balance due to him on foot of the account. The declaration then averred an indorsement without consideration, after the note became payable. Replication de injuriâ.—Held on demurrer to the replication, that the plea disclosed matter of excuse, as between the plaintiff and defendant, and that de injuriâ was properly replied.

ASSUMPSIT by the plaintiffs as indorsees of a promissory note against the maker. Plea—"And as to the said supposed promises and undertakings in the said first count of the said declaration mentioned, save as to £30, parcel of said monies in the first count mentioned, that the note was not indorsed to the plaintiffs until after the same had become due and payable, according to the tenor and effect thereof, to wit, &c., and that at the time the said note became due and payable, according to the tenor and effect thereof, the said note was in the hands of the payee thereof, and after the said note became due, and whilst the payee continued to hold the same, and before commencement of this suit, &c., the said payee was indebted to the defendant in the sum of £17. 3s. 3d. for the use and occupation, &c. (Following common form of plea of set off). And that an account on the day and year, &c., was stated and settled between them respecting such accounts and debts, including the said note, and the said payee then and there had credit in such account for the full amount of the monies then due and claimable upon and in respect of the said note, and the amount or balance then found to be due to the said payee on foot of said note, deducting thereout the monies so as aforesaid due and owing to this defendant, amounting to the sum of £30 of the monies in first count mentioned, of all which the plaintiffs then and there had full notice, and were then and there well aware and informed that the said note remained in the hands of the said payee to secure the balance so as aforesaid found to be due to him on foot of the account so as aforesaid stated and settled between the payee and the defendant, and for no other purpose whatever." Averment of indorsement after note became payable, and that there was no consideration for the indorsement, and as to the said sum of £30, parcel of the said monies, the defendant confessed the action of the plaintiffs, and averred his readiness and willingness to pay the same.

Replication *de injuriâ*.—Special demurrer on the ground "that the replication *de injuriâ* was inapplicable to a plea in assumpsit, and, at all events, was bad in this case, as the plea did not consist of matters of excuse, but in discharge of so much of the sum originally secured by the said promissory note, and the monies founded thereon as are not by the said plea confessed."

James Green for demurrer.—Gave up the objection as to the applicability of the replication *de injuriâ* to the action of assumpsit. (Pigot, C.B.—That point cannot be argued, it is quite settled.) Waiving the first ground of objection, the replication in this case is at all events bad. The facts disclosed on the plea amount to discharge, not to an excuse. (Pigot, C.B.—The proposition in law is, that the replication *de injuriâ* is only proper in cases where the plea is in excuse, and not in discharge of the action. The plea in substance avers that only a portion of the money was due on the note when it was indorsed to the plaintiff, and that the residue was satisfied and discharged.) Jones v. Senior, (4 M. & W. 123.) The case made by the plea is, that since the bill arrived at maturity a portion of the money secured by it was paid off, which is matter in discharge only. Cripp v. Griffith, (2 C. M. & R. 159.) It avers that after the breach such a dealing was had as to discharge the action. Barnes v. Price, (1 C. B. 214) (Pigot, C.B.—This being an action on a negotiable instrument, the contract is to pay the payee or order, that is, in effect, to pay the plaintiff as indorsee. This contract is admitted by the plea, and, in excuse of its fulfilment, a certain transaction is stated. Here is no immediate dealing between the plaintiff and defendant, therefore there could have been no discharge as between them, but only an excuse, arising from dealings had between the payee and maker. There could have been no discharge here, as the breach was not completed between the plaintiff and defendant at the time of the transaction disclosed by the plea, as it is averred that it took place before indorsement).

Michael J. Fitzgerald contra.—The sole question is, whether this is a plea in excuse. The case of Mitchell v. Cragg (2 Dow. R.N.S. 252, 8 C. 10 M. & W. 367,) is precisely in point; at all events, the plea here is bad in substance, so that the plaintiff is entitled to judgment on the whole record. The account disclosed by plea cannot discharge the debt without a release. Mayor of Scarborough v. Butler, (3 Levinz. 237.) Counsel also referred to Lawes on Assumpsit, 646; Byles on Bills, 122.

Pigot, C.B.—The court are of opinion that the replication here is proper, and that the demurrer cannot be sustained. Independent of the authority of Mitchell v. Cragg, the court cannot hold that the transaction, as disclosed by the plea, was any thing beyond mere matter of excuse as between the parties to this action. The plaintiff sues as indorsee, and no cause of action accrued to him, or no breach could have been committed, as far as he is concerned, until after indorsement, therefore no transaction prior to that could operate as a discharge as between him and the defendant, and is therefore only matter in excuse.

Demurrer overruled.

* Coram Pigot, C.B., Lefroy, B.

COURT OF CHANCERY.

HACKETT v. OXMANTOWN.—June 22nd, 23rd.

Will—Construction—Vested interest—Codicil—Limitation over.

Bequest to A on attaining 21, or marriage, provided it were with consent; to B C and D in similar terms; further bequest to A and the others of the residue, with cross remainders, if any should die under age and unmarried. Held that A having married under age, without the consent required, was unmarried within the meaning of testator.

By codicil, in case of marriage without consent, the specific legacies were revoked, and it was directed that the interest only of such legacy should be paid to the legatee for life marrying without the required consent, and after the death of the legatee, they should go and be paid to, and for the use and benefit of all and every the child or children of the legatee marrying without consent, the same to be equally divided, to and among them share and share alike, if more than one, and to be paid to such children at 21, or marriage. Held vested interest in a child dying under 21 and unmarried.

The question in this case arose wholly on the construction of the will, and second codicil of William Hackett the testator, after a direction to call in all money due, on bills, bonds, or notes, and to invest the same in government or bank stock, he bequeathed the fund so created to his trustees and executors, "upon trust out of the said fund, to pay my eldest daughter, Eliza, the sum of £10,000 on her attaining her age of 21 years, or on the day of her marriage, if the same shall occur before she be of the age of 21 years, provided it be had with the consent of my said trustees, or the survivor of them, but not otherwise, and I do hereby direct my said trustees, to pay out of the interest of the said sum of £10,000, the annual sum of £200 for my said eldest daughter's support, maintenance, and education, till she attain her age of 21 years, or day of marriage, as aforesaid, the surplus, or residue of the interest of the said sum of £10,000, in the meantime, as the same shall become due, to be invested in the manner herein before mentioned for the use and benefit of my said eldest daughter, till she shall attain her age of 21 years, or day of marriage with such consent as aforesaid, and to be then paid to her." He in similar words bequeathed similar gifts of smaller sums to younger daughters, and some legacies, and then proceeded "As to all the rest, residue and remainder of my estate, whatsoever and wheresoever, and of what nature and kind soever; I do hereby give and bequeath the same to my said daughters, Eliza, Mary Anne, Bedelia, and Sarah, share and share alike, and in case any of my said daughters shall happen to die before her or their attaining the age of 21 years, and unmarried, then I direct that as well the portion herein before bequeathed to her, as also her share of the said residue so bequeathed as aforesaid, shall go to and be divided, share and share alike, between the survivors of them, and that on the death of two or more of them before the age of

21 years, and unmarried, the portion and portions, and share and shares of her or them so dying, shall in like manner survive and accrue to the survivor or survivors, or other, or others of them, share and share alike, and that the surviving and accruing shares and portions shall in like manner be liable in similar events to the like right of accruing by survivorship; and in case all my said daughters but one shall die under the age of 21 years, and unmarried, then the whole of such residue to go solely and absolutely to such surviving daughter, her executors, administrators, and assigns." In a second codicil, the testator gave the following directions, "In case any or either of my said daughters, shall before their respective ages of twenty-one years, intermarry with any person or persons, against or without consent of my said trustees, or the survivor of them, then, and in such case, the interest only after the rate of $3\frac{1}{4}$ or 4 per cent., of such daughter or daughters, portion or portions, so marrying without such consent aforesaid, shall be paid to her or them during her or their respective lives, for her or their respective sole and separate use and benefit, exclusive of any husband, and that upon the death of the said daughter or daughters so marrying without such consent as aforesaid, the portion or portions so given or intended for such daughter or daughters, shall go and be paid, to and for the use and benefit of all and every the child or children of such daughter so marrying without such consent as aforesaid, the same to be equally divided to and among them, share and share alike, if more than one, and to be paid to such child or children, at his, her, or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen together with interest for the same, at the rate aforesaid, from the time of their respective mother's death until the same should become payable and paid, any thing in the said will to the contrary notwithstanding." The testator shortly afterwards died. His daughter Eliza, married the defendant, Pounden, without consent, and died under twenty-one, leaving one child, who also died under age, and unmarried. The defendant, Pounden, claimed the whole legacy, and the residuary share bequeathed to Eliza Hackett, both under a settlement executed after his marriage, by order of the court, and as administrator of his deceased child. The question was, whether Eliza Hackett, or her child, or either of them, were entitled absolutely to the legacy, and the residuary share of the testator's property.

Gayer, Q. C. Christian, Q. C. and H. Hamilton, for the plaintiff relied on, Dillon v. Harris, (4 Bli. N. S. 329), Machell v. Winter, (3 Ves. 236, 543), Hanson v. Graham, (6, Ves. 239), Leake v. Robinson, (2 Mer. 363), Chaffers v. Abell, (3 Jur. 577), this case is adverse, but counsel endeavoured to distinguish it. Davies v. Fisher (5 Beav. 201), Batsford v. Kebbell, (3 Ves. 363), Murray v. Tancred, (10 Sim. 465), Puleford v. Hunter, (3 Bro. C. C. 416), Bull v. Pritchard, (1 Russ. 213), Roper on Legacies, last edition, 577, Austen v. Halsey, (13 Ves. 125), Knight v. Cameron, (14 Ves. 389), Bright v. Rowe, (3 M. and K. 316.)

Warren, Sergeant, with Burroughs, for defendant, Pounden, Builer v. Lowe, (10 Sim. 317),

Skey v. Barnes, (3 M. 335), *Vize v. Stoney*, (1 Dr. & Warr. 337), *Watson v. Hayes*, (9 Sim. 500), *Vawdry v. Geddes*, (1 Russ. & My. 208), *Jennings v. Newman*, (10 Sim. 219), *Thornhill v. Hall*, 2 Cl. & Fin. 22), *Stackpoole v. Beaumont*, (3 Ves. 91), *Barker v. Lea*, (T. & R. 413).

THE LORD CHANCELLOR, after reading the will and codicil as above, proceeded:—The codicil makes this very prudent provision, that, if any of the daughters should marry under age, and without consent, that she should have only the interest of the fund for the remainder of her life, and, on her death, it should go to her children, payable at twenty-one, or marriage. It is important to see the direction of the will as to the investment of the property. It directs the trustees to call in all sums owing to the testator, and to invest them in government securities, or bank stock, so as not to leave them on uncertain security. The question resolves itself into this: is the direction to pay so incorporated with the description of the persons to take, that they must answer that description before they are entitled to receive. The codicil says:—And in case any, or either, of my four daughters shall, before their respective ages of twenty-one years, intermarry with any person or persons against, or without the consent, of my said trustees, or the survivor of them, then, and, in such case, the interest only, after the rate of $3\frac{1}{2}$ or 4 per cent, of such daughter's portions or portion, so marrying without such consent, shall be paid to her or them during her or their respective life or lives, for her or their respective, sole, and separate use and benefit." Now, as I take these words, they do not mean that the trustees are to cut down the interest, but they are merely a description of the interest which the trustees would probably receive on the investment directed. There is no discretion given to the trustees, and the words are not restrictive. The codicil then proceeds—"And that upon the death of the said daughters or daughter so marrying without such consent as aforesaid, the same was to be equally divided amongst their or her children, share and share alike, if more than one, and to be paid to such child or children at his or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen, together with interest for the same after the rate aforesaid, to go, and be paid to, and for the use and benefit of all and every their children, &c." There is here nothing restricting the time when these portions were to vest in the children. Having directed how the money was to go to them, he then directs how it is to be paid. I can make in this way a clear interpretation without incorporating the time of payment with the gift itself; in fact, it is nothing but the common case of a legacy given to be paid at twenty-one. *Skey v. Barnes* is very like this case; it is if anything stronger, the words there were: "to go to, and be equally divided between them, share and share alike, the portion or portions of such of them as shall be son, or sons, to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as shall be daughter or daughters, to be paid at her or their respective ages of twenty-one, or days of marriage first happening." In *Machell v. Winter*,

there were many special circumstances; in the first place, a certain provision, by way of maintenance, only was to be paid to the children. The words there were:—"The shares of her said grandsons, with the interest or accumulations thereof, after a deduction for their maintenance and preferment, to be paid to them respectively on their attaining their ages of twenty-one years, and the share of her said grand-daughter, with the interest or accumulation thereof, at the age of twenty-one, or day of marriage, which should first happen." Further, in that case there was the important clause of limitation over, which does not occur in the present will. In *Davies v. Fisher*, the trust was of a residue "to pay the income thereof unto Wm. Davies the younger, and, from and after his decease, in trust for the children of Wm. Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and, if but one, then the whole to such one child, the income to be applied during their respective minorities, by the guardian for the time being, of their children or child for their respective maintenance, support, and education." That was held to be a vested interest in the children, and in the direction to apply the whole interest, giving evidence of the intention. But indeed all the cases shew that a direction to pay interest marks an intention to vest the principal. In *Parker v. Golding* (13 Sim. 418), the direction was to pay the interest "to and for the education, maintenance, and support of all her children until they shall attain the age of twenty-one years, and then the principal to be equally divided amongst her said children." That was held to be a legacy vested in the children dying under twenty-one, and that was stronger than anything here. From the first the legacies in this case seem set apart for different legatees, but I do not think it depends on that; there is nothing to satisfy me that the time of payment is so incorporated with the gift as to make the legacy contingent. I do not know whether the intention of Hackett may be defeated or not by this construction; his only intention appears to have been to prevent improvident marriages, and I cannot construe the will by the state of facts which has arisen subsequently to the death of the testator. With reference to the share of the residue, my impression is in favour of the claim of the residuary legatees to that part. The codicil does not refer to anything more than the portions which he distinguished expressly from the share of the residue, having in the will contrasted these two shares, and therefore the distribution of those shares must depend on the construction of the will. The shares of the residue are given to the daughters without restriction, in the words of gift. It lies on those who seek to restrict them, to show how they are cut down by anything in the will. We must not endeavour to find an intention not expressed in the will, but we must find the sense in which the testator uses words. He had given a portion to this lady, either on attaining twenty-one, or marrying with consent, but not otherwise. There being no gift over of this portion in the consent, he now creates one by disposing of the residue, and directs that, "As to all the rest, residue, and

remainder of my estate ———, I do hereby give and bequeath the same to my said daughters Eliza, Mary Anne, Bedelia, and Sarah, share and share alike, and, in case any of my said daughters shall happen to die before her or their attaining the age of twenty-one years and unmarried, then I direct that as well the portion hereinbefore bequeathed to her, as also her share of the said residue so bequeathed as aforesaid, shall go to and be divided, share and share alike, between the survivors of them." Now, if that be taken to mean unmarried generally, there is this consideration, one-fourth of the portion, under this residuary bequest, will go to her, although he directed none at all to go to her unless she married with consent. Taking it so, if the question depends upon this portion of the will, the word unmarried must be taken to mean not married so as to derive a benefit under the will. There is nothing in this will to say that the word unmarried in the same sentence meant two different things; I therefore think it meant not married with consent. This decree appears to me consistent in this respect with the will. I think this share of the residue did not pass by the codicil, but, passing by the will, is governed by the sense of the word unmarried shewn by the will. Therefore, in the events which have happened, the administrator of this lady is not entitled to any portion of the residue.

ROLLS COURT—Nov. 4.

COPPINGER v. CARNEGIE.

Practice—Injunction—Costs.

In a possessory suit for an injunction, the rule that costs of suit are not given, does not apply to the costs of the motion shewing cause; and, if the cause is deemed insufficient, the defendant becomes liable to pay the costs of the motion.

In this case a conditional order for an injunction had been obtained by the plaintiff.

Berkeley now shewed cause.

His Honor having disallowed the cause shewn with costs.

Berkeley—The case of *Chatterton v. Whyte*. (1 L. E. R. 200,) decides that in injunction cases costs are never given against the defendants in possessory suits, as the proceeding is favourable to landlords.

Hughes, Q. C.—It is only in cases in which no cause is shewn against the conditional order that costs are not given against the defendant, but if the plaintiff is put to the expense of making affidavits, in case the conditional order is made absolute, costs will be given against the defendant. In *Chatterton v. Whyte* the words of the Master of the Rolls are, "seldom or never," therefore there is a discretion in the court.

Nov. 20.—MASTER OF THE ROLLS—I have made inquiry as to the practice upon this point, and have ascertained that as to the costs of suit, the plaintiff never gets them under any circumstances. It is in conformity with the rule laid down in Howard's Equity Exchequer, 318, under the head of possessory bills.—"If the defendant, being served with the injunction, delivers up

the possession, or ceases giving fresh disturbances, there is an end of suit, and in this case the plaintiff has no costs. That leaves undecided the question as to the costs of the motion, in the event of the defendant shewing cause which is disallowed. It has been the practice of this court that if a party does not come in to shew cause, there are no costs against him; but, if the defendant files an affidavit, he then becomes liable to the costs of the motion, and this does not disturb the rule, that in injunction suits there are no costs in the cause. It is not necessary for me now to decide what are properly costs of the motion, and what costs in the cause. That question I shall decide, if necessary, upon an application for a reference to the Master to review his taxation; I may, however, state for example, that counsel's fee for drawing the bill could not properly be considered costs of the motion. I consider it would be very unreasonable—if a defendant chooses to put an affidavit on the file, and afterwards is not able to support his case—that he is not to pay any costs, and I now decide the case in conformity with the frequent practice of the court, to disallow the cause shewn with costs.

Rule—Disallow cause with costs.

EQUITY EXCHEQUER.—TRINITY TERM.

ELLARD v. COOPER AND OTHERS.

Marshalling Assets—Period at which sufficiency of personal fund is to be ascertained.

The criterion as to the time from which to calculate the misapplication of the personal assets is when the specialty debts have been paid, and not the testator's death.

THE bill stated that the plaintiffs in December, 1833, had filed their bill in the Court of Chancery against William Cooper, John Turner Cooper, and Samuel Cooper, being three of the defendants in the present cause, as executors of a person named Austen Cooper, charging that one Letitia Burke had by her will, dated 11th day of April, 1808, bequeathed a sum of £400 to the plaintiff's father, and £100 to plaintiff, and charged the same on all her real and personal estate, and appointed Samuel Cooper the elder, and Austen Cooper, her executors and trustees. That plaintiff's father died in 1828, and that plaintiff, as his only child, became entitled to the said legacy of £400, and obtained letters of administration to him. That Austen Cooper alone proved the will of Letitia Burke, and possessed himself of all her estate, real and personal. That Austen Cooper had died in August, 1830—that the defendants, William Cooper, and John Turner Cooper, and Samuel Cooper the younger, proved his will, and that administration, *de bonis non*, to the said Letitia Burke had been granted to the plaintiff, and prayed an account of the personal estate of Austen Cooper, and an account of Letitia Burke's freehold estates, and that if Austen Cooper should be found to have misapplied the personal estate of the said Letitia Burke, his executors might be directed to make good the same out of his assets. A decree to account was pronounced in that cause on the 26th day of April, 1838, declaring the

plaintiff entitled to the legacies of £400 and £100, and on the 29th of June, 1842, the Master made his report, finding that Austen Cooper had received out of the real and personal estate of the said Letitia, a sum amounting in the whole to £5641 15s. 11d. That of this sum, he had duly administered about £2955 5s. 3d. and that there was then owing to the plaintiff on foot of these said legacies a sum of £1218 14s. 6d. That the said Austen Cooper, at the time of his death was seized in fee of certain freehold lands in the counties of Dublin and Donegal, and that his executors had received of the personal estate of Austen, and of the produce of the sale of the lands in Donegal £22,027 17s. 6d. and had expended in the due administration of their testator's assets about £15,249 12s. 6½d. By a final decree in the Chancery cause pronounced the 27th November, 1842, the said John Turner Cooper and Samuel Cooper were ordered to lodge in bank the sum of £3,029 15s. 8d., being the sum ascertained to be due by the said Austen Cooper, on foot of the estate of the said Letitia Burke, and it was declared that in default thereof the plaintiffs should be at liberty to enforce payment of their demand out of the real and personal estate of the said Austen. That John Turner Cooper and Samuel Cooper had not lodged the money in bank pursuant to this decree. That a person named William Cooper, a defendant in the present suit, filed his bill in the Court of Exchequer against the said John Turner Cooper and Samuel Cooper the younger, for the purpose of raising an equitable mortgage, made the 19th of November, 1819, to secure the payment of £10,000 to the plaintiff in that suit. The Remembrancer, on the 14th day of Jan. 1843, in the latter cause made his report, and found that £10,143 8s. 9½d. was due to William Cooper on foot of his mortgage, and that John Turner Cooper had in his hands a balance of £7,528 7s. 5½d., of the assets of the said Austen unapplied or misapplied, and the said Samuel Cooper the younger, as devisee of the said Austen, had received the proceeds of a house amounting to £770, and, as executor of the said Austen Cooper, the sum of £210 18s., amounting in all to the sum of £980 18s., and, that by a final decree pronounced in the cause of *Cooper v. Cooper*, on the 6th of February, 1843, the defendant, John Turner Cooper, was ordered to lodge in court the sum of £7528 7s. 2½d., and Samuel Cooper the sum of £210 18s., and that the said sums should be applied towards payment of the sums reported due, for principal, interest, and costs, on foot of two judgments obtained against the said Austen, and of the sum found due to the plaintiff in *Cooper v. Cooper*, on foot of his equitable mortgage; and, in default thereof, the real estate of the said Austen was directed to be sold, and the proceeds applied in payment of the said two judgments, and the said mortgage. That by an order made the 24th day of June, 1843, the plaintiff in the present suit, being also plaintiff in the Chancery cause of *Ellard v. Cooper*, was permitted to come in and prove her demand in the Exchequer cause of *Cooper v. Cooper*. That John Turner Cooper, and Samuel Cooper, not having complied with the decree of February, 1843,

the freehold estates of the said Austen Cooper were set up for sale. That by an order of the 9th of February, 1844, leave was given to the plaintiff in the present cause to intervene in the cause of *Cooper v. Cooper*, and notice of all future proceedings taken in the latter cause was directed to be given to her. That a considerable portion of Austen's personal estate, and also of the produce of those denominations of his real estate which had been sold pursuant to his will, had been applied to disburse the interest due on the said equitable mortgage of William Cooper, and that several judgments obtained against the said Austen had been also paid out of his personal estate. The present bill charged that the plaintiff was entitled to have her demands, which were proved against the said Austen Cooper, on foot of the assets of the said Letitia Burke, received by her, paid out of the freehold estates of said Austen Cooper, to the extent to which his personal estate had been applied in discharge of the interest on the said mortgage, and in payment of the said judgments. The bill also charged that the said John Turner Cooper had misapplied the assets of the testator to the amount of £———, and the defendant, Samuel Cooper the younger, to the amount of £———, and prayed to be entitled to the benefit of the proceedings had, and accounts taken, in the suit of *Cooper v. Cooper*, and for an account of what was due to the plaintiff on foot of the said legacies of £400 and £100, and of the other debts of the said Austen, and, that if it should appear that the whole of the personal estate of the said Austen should have been exhausted, then that the plaintiff and the other simple contract creditors of the said Austen, should be declared entitled to stand, *pro tanto*, in the place of the said William Cooper, the mortgagee, and of the judgment and specialty creditors of Austen, whose demands had been satisfied out of his personal estate. The will of Austen Cooper contained the following clause. After reciting the said equitable mortgage: "Now, I do hereby charge all my said estate of Kinsealy with payment of all and every sum of money which at the time of my decease I may owe to my said brother, (the original mortgagee); and, to avoid any question between my said sons, John Turner Cooper, and Samuel Cooper, of apportionment of said debt, I hereby order and direct that as between my said sons, and all in remainder to them, each of the said two divisions of said lands shall bear and pay one full moiety of said debt; and both divisions of the said lands nevertheless being, so far as regards the security of the said debts, chargeable with the entire thereof. And I hereby further declare, and my will is, and I hereby order and direct, that my personal estates and other funds hereby provided in aid and augmentation thereof, for payment of my general debts, be first applied in payment of all my other debts, and that the residue or surplus of the said funds, if any, may be applied in the next place, so far as the same may extend, in or towards payment and satisfaction of the said debt to my said brother, in exoneration, as far as same may be, of the said lands of Kinsealy."

In April, 1846, a decree to account was pro-

announced, and the Remembrancer reported that £3,577 was due to the plaintiffs, and a sum of £3,694 to the Commissioners of Charitable Donations and Bequests; that a sum of £518 15s. 2d. of the assets of Austen had been applied, by John Turner Cooper, to pay the interest on certain judgments against Austen; and a sum of £2221. 1s. 5d. to the said William Cooper, on foot of interest due on the said mortgage, and that more than enough had been received by the defendants, John Turner Cooper and Samuel Cooper, from time to time, out of the mortgaged lands, to keep down the interest.

Warren, Serjeant, with *O'Brien, Q. C.*, and *Maley*, for the plaintiffs, relied on the general rule as to marshalling assets, and the clause in the will of Austen Cooper.

Brenster, Q. C., *W. Smith, Rolleston*, and *P. W. Walsh*, appeared for the other parties.

The following cases were cited and commented upon during the argument:—*Wilson v. Fielding*, (3 Vern. 763, S.C. 10 Mod. 426); *Hazlewood v. Pope*, (3 P. W. 323); *Gibbs v. O'wgan*, (12 Ves. 415); *Putnam v. Bates*, (3 Russ. 188); *Aldrich v. Cooper*, (8 Ves. 388); *Prowse v. Abington*, (1 Atk. 482); *Gillespie v. Alexander*, (3 Russ. 138); *Dyos v. Dyos*, (1 P. W. 305); *Busby v. Seymour*, (7 Ir. Eq. Rep. 433); *Marsh v. Russell*, (3 My. & C. 30); *Pollexfen v. Moore*, (3 Atk. 272); *Kierman v. Fitzsimons*, (3 Ridgway, P. C. 16).

PENNEFATHER, B.—This case involves at least one question not previously determined. It now comes before the Court, on report unexcepted to. The case made for the plaintiff, is, that in as much as the personal assets of Austen Cooper had been to a certain extent applied in discharge of his specialty debts, the plaintiff is entitled to stand in the place of the specialty creditors, and onerate the realty to the extent to which it had been previously exonerated by the payment of the specialty debts out of the personalty. The claim is based, not only on the general rule of equity, that when one creditor has two funds for the payment of his demands, and another only one, and he with the two takes that to which alone the other is entitled to resort, that then the latter shall stand in the place of the former, but it is also rested on the special provisions of Austen Cooper's will, especially the clause in the latter part of it, providing "that if any portion of the personal estate should be applied in discharge of the mortgage; the simple contract creditors should be recompensed out of the real estate." It appears to us, that the case of the interest, paid on foot of the judgment, is not embraced in that clause, and as to that portion of his demand the plaintiff must rest on the general rule of equity alone, so that the sums paid on account of the interest due on foot of the mortgage, and on foot of the judgment, do not stand on the same footing. The defendants insist, in the first place, that the plaintiff had no right to file her bill in this court, but ought to have proceeded in Chancery to sequestration on the decree obtained there against the real estate of Austen Cooper; secondly, that this debt, as to the realty, is barred by the statute of limitations, and partly that by the report in the cause of *Cooper v. Cooper* adopted here, at the

death of the testator, his personal estate was found sufficient to pay, not only the interest on the specialty debts, but all his simple contract debts, and if that fund was subsequently reduced by the executors, or if they have committed a *devastavit*, the general rule of Equity to which I have adverted does not apply, as, if the fund was originally adequate at the time of the testator's death, its subsequent deficiency does not entitle the plaintiff to resort to the real estate. It is argued on the other hand, for the plaintiff, that no matter at what point of time the deficiency occurred, whether by failure of a security, or *devastavit* by executors, yet if the specialty debts had gone to exhaust the personal assets, the general equity would arise. The view taken by the Court, on the point, differs from both these positions. The time of the testator's death is not, in the opinion of the Court, the period at which to ascertain the state of the personal fund, in reference to the payments made out of it; the time is, that of the payment of the specialty debts, and if at that period the personalty is sufficient to answer the interest on the specialty debts, as well as the simple contract debts, in that event, the heir is not to suffer by the *devastavit* of the executors. It is urged by the defendant, that if the personal estate be exhausted before the specialty creditors were paid, the heir ought not to be liable, for that in effect would be to make the heir responsible for the executors; but, as, if there had been a wasting of the personal estate by the testator himself in his life-time, the devisee could not complain; so if the wasting be by the executor, the appointee of the testator, on the same principle, the heir cannot complain, and the simple contract creditor is entitled to his equity. The principle is this, that if the specialty creditor exhausts the fund to the prejudice of the simple contract creditor, the simple contract creditor shall stand in his place, that is, if he exhausts the assets to the prejudice of the simple contract creditor at the time that he is paid, or in other words, if at that moment he leaves enough to satisfy the simple contract creditor's demand, then the latter has no right to complain, for it is by his own negligence that he fails to realise his claims and that is the principle of all the cases. This is the true principle, a principle, indeed, for which we have failed to find any express authority; but there are expressions and *dicta* found in reported cases, which fully warrant our conclusion. The personal fund cannot be said to be exhausted, if enough is left at the time of the discharge of the specialty claims. The question is between the heir and the simple contract creditor, whether the heir shall be obliged to pay twice over the same sum. The principle the court acts upon is more agreeable to the general principles of equity than either of the above extremes, namely, either taking into account the state of the personalty at the time of the testator's death, as contended for by the defendant, or at any or every subsequent period, as insisted on by the plaintiff. This distinction applies to the payments made on foot of the interest on the judgment. In this case, it appears on the face of the report, that the personal fund was not at the time of such payment adequate to pay that interest as well as all the simple contract creditors, to that extent, at all events, the plaintiff is entitled

to stand in the place of the judgment creditors, and that being a payment to reduce the interest, not the principal of the debt, must be considered as a sum paid not carrying interest; on the principle, that the estate in the hands of the heir is not benefitted by the reduction of the interest; with regard to the interest on the mortgage, that stands on a different ground and besides, it depends on the particular clause of the will to which I have adverted. The testator might undoubtedly have subjected his estate to such payment, and if so, the will creates a term of years to guard against the defalcations of the executors, but each moiety of the estate was to bear the defalcation of the executor to whom it was devised, and not that of the other, and it is limited to the life estate of the respective devisees, that is to say, the moiety of John Turner Cooper is amenable for his default, and so of Samuel. John Turner Cooper's default, which is very great, is thrown upon his moiety. There is no default on the part of Samuel Cooper, and the interest in the house in Merrion-square, referred to in the pleadings, is the only assets in his hands. Then comes the latter clause of the will—it begins by reciting the debt to his brother, Samuel Cooper, the equitable mortgagee, and proceeds, "I do hereby charge all my estate with the payment of all the money which I owe to my brother at my decease, and as between my sons and all in remainder to them, both shall have a moiety of my real estate, each being chargeable with the whole of the said debt, and I further devise, that my personal estate be first applied in payment of all my other debts, and the residue of the general fund be applied in satisfaction of the mortgage," thereby directing that the personal estate should not be applied in discharge of the mortgage, unless there was a surplus after payment of the simple contract debts. Thus, if a part has been paid towards relieving the mortgaged estates; the mortgaged estate must reimburse the simple contract creditors, and this would carry the right of the plaintiff beyond the trust fund, and give her by the express desire of the testator a right to come on the real estate. Now it appears, that a sum of £2300 has been applied in exoneration of the real estates, contrary to the directions of the testator. This was clearly a misapplication of the funds, and would entitle the plaintiff to come on the real estate, but as it was a payment on account of interest, the plaintiff is not entitled to calculate interest upon it. It then remains to consider, whether there are sufficient facts in the report, for the court to ascertain whether, at the time of payment, there was a deficiency of personal estate, and that payment was made to the prejudice of the simple contract debts; if the *devastavit* was committed before the time of payment, or if the fund became at that time deficient, by the payment of the specialty creditors, the simple contract creditors are entitled to stand in their place. The case comes on, upon a report unexcepted to, not reserving any particular question for our consideration, we will construe the report in reference to the prayer of the bill, and will not encumber parties with further inquiry as to the alleged *laches* of the plaintiff, in not carrying into effect the Chancery decree by sequestration; that course would seem

to have been vain. A receiver had been, long previously to that decree, appointed over the estates in this court, and a sequestrator would have no power to disturb him. Besides, from the frame of that cause, there was no opening left for raising the question as to the marshalling of assets, and thus that ground of objection fails. As to the question raised on the statute of limitations, the simple contract debts were established against the executors, and the debts of the specialty creditors existed against the estate, and if the specialty creditors took that which was the legitimate fund for the simple contract creditors; it does not lie in the mouth of the heir to say, that the simple contract creditor must not stand in the place of the specialty creditor, his estate having been exonerated to that extent.

RICHARDS, B.—If there were no funds available to pay the simple contract debts after payment of the specialty debts, no default should operate the executor with the amount of the personal assets so properly applied, but, if at the time when the specialty debts were paid, the executor in consequence of his having wasted the personal assets, were unable to make them available for the benefit of the simple contract creditors, or if it were not sufficiently shewn, that there were then sufficient assets to pay the simple contract debts, then an enquiry should be directed as to their sufficiency, and if sufficient, he is guilty of a *devastavit*, if not, the specialty creditors have got the fund properly, and it is not possible to charge the executor with the deficiency.

LEWIS, B.—This is a question of great difficulty, and the inclination of my mind has changed during the progress of the cause. The authority of Lord Clare has been relied on to shew that the rule of marshalling assets, is only properly applicable at the death of the party whose assets are to be marshalled, and if there be then assets to pay the simple contract debts, the rule does not apply, no matter what may be the course of subsequent events, that is said to have been a mere *obiter dictum*, and from the authorities, it appears to me, that proposition cannot be maintained. If there be no sufficient assets at the time of the testator's death, no right of marshalling between the creditors can arise. If there be a sufficiency, or the fund be then able to pay the debts and fail afterwards, the simple contract creditors are not to bear that loss. It is said, that as the loss arises in this case from the default of the appointee of the testator a common depositary for all parties, that the loss should not fall upon the heir in preference to the simple contract creditor, that there being two innocent parties, the loss must remain where it falls, that because the simple contract creditors have a right to be paid out of the assets of the testator, is no reason that the heir at law should make good a deficiency occasioned by the default of the executor. In my opinion, the default of the executor can make no difference, the heir is a surety for the proper application of the personal estate. The specialty creditor has two funds for his security, but looks to the personal estate as the primary one. The question is one of principal and surety, and, if so time be given to the principal, on his failure the surety must pay. The heir-at-law is a mere surety

pledged in the second degree only; it is his duty to see the creditors paid, if he wishes to be secure: as surety he may undoubtedly call on his principal to pay, but, if he remain quiescent, he must take the consequences on himself. The true criterion whether the simple contract creditor shall have a right to marshal is not the state of the funds at the testator's death, but whether there were funds at any time. In *Aldrich v. Cooper*, Lord Eldon lays down the rule to be "whether the specialty creditors have exhausted the personal assets." If the criterion were the state of the assets at the testator's death, the rule would not be stated to be generally applicable to the case of an abstraction by one creditor to the injury of another. The case of *Pollexfen v. Moore*, (3 Atk. 372), appears to me an explicit authority to shew that the period of death is not the criterion. The decree of Lord Hardwicke, stated in the note, is, "that an account be taken of the personal estate of the testator come to the hands of his executor, &c., and of all his other debts, legacies, and funeral expenses; and, if such personal estate of the testator be not now sufficient, &c, the deficiency to be made good out of the purchased estate;" there is a peculiarity in this case, that the person committing the *devastavit* was both heir-at-law and executor. I do not think that makes any difference; the authorities appear to me sufficient to outweigh the *dictum* of Lord Clare in *Kearnan v. Fitzimon*, and clearly establish the principle that the time of death is not the true criterion. In the present case the assets were quite sufficient at the time of the testator's death, and I am quite prepared to say on the facts of this case, whether the time be that of the testator's death, or the application of the personality in satisfaction of the specialty debts, at whichever time the funds became insufficient to pay the simple contract debts, then the right of marshalling arose.

REILLY v. SHEIL · BOUVERIE v. SHEIL.—Nov. 18.

Practice—Costs—Set off.

The court will not allow a claim for costs to be interfered with by any set off between the parties not actually arising in the cause, although the set off arises in another suit concerning the same matter.

In this case by an order bearing date the 14th of July, 1848, Mr. Peebles, a defendant in one of the causes, was directed to pay to Jane O'Brien and Elizabeth Pigott, two other defendants in the same cause case, the sum of £19 3s. 4d. costs. By order bearing date, the 26th of November, 1845, and made in a cause of Pigott and others v. Peebles, Elizabeth Pigott had been directed to pay to Mr. Peebles the sum of £133 11s. 3d., and it was stated by applicant, that the suit of Pigott v. Peebles was concerning the same matters in litigation in the present causes.

Andrew Vance, on behalf of Mr. Peebles, moved that Eliza Pigott and Jane O'Brien might be restrained from enforcing payment of the £19 3s. 4d. under the order of the 4th of July, 1848, offering to set off against Eliza Pigott's portion of the demand, a part of the sum directed to be paid by her,

by the order of November, 1845, and against Jane O'Brien's moiety, certain debts sworn to be due by her to Mr. Peebles. Counsel relied on *Shine v. Gough*, (2 B. & B. 33), *McDonald v. Grady*, (Hayes 47).

Rolleston contra, cited *Wright v. Mundie*, (2 Sim. & Sta. 266).

Vance.—The costs which were not allowed to be set off in that case were costs at law.

PER CURIAM.—We can make no distinction on that account. It is now settled, upon the fullest consideration, that no equities can be allowed between parties, by way of set off, except those arising in the same suit, however, under all the circumstances, we will not give costs of the motion.

QUEEN'S BENCH.—MICHAELMAS TERM.

KERSHAW v. LINDSAY.—Nov. 6 & 10.

Lodging money in Court—Undertaking for costs—New rule.

Where a defendant paid money into court, and the plaintiff, after taking the money out, proceeded to trial, and a verdict was had for the defendant, Held, that the plaintiff had dissented himself to the costs which he had incurred up to the time of the payment into court by the defendant.

This was an application on the part of the plaintiff, that the officer might be directed to tax the costs, incurred by the plaintiff up to the time of the entry in the Master's book, of the payment of money into court by the defendant. The facts of the case sufficiently appear in the judgment of the court.

Hayes, for the motion.

E. M. Kelly, contra.

The following cases and authorities were cited and commented on in the course of the argument:—*Bailie v. Cazelet*, (4 T. R. 579); *Littleton v. Cross*, (4 B. & C. 117); *Murdock v. Shirley*, (Al. & Nap. 53); *Stodhart v. Johnson*, (3 T. R. 657); *Stevenson v. Yorke*, (4 T. R. 10); *D'Arcy v. Kirwan*, (5 Stew. L. T. 2623); *Crosby v. Olorenshaw*, (2 M. S. 335); *Portley v. Beckington*, (6 Taunt. 158); *Greene v. Coughlan*, (1 Jones. 283); *Jeffs v. Smith*, (4 Taunt. 196); *Wilton v. Place*, (2 Bos. & Pul. 56); *Lorck v. Wright*, (8 T. R. 486).

Cur. adv. vult.

Nov. 10.—BLACKBURN, J. C. now delivered the judgment of the Court. In this case an important question has been raised upon the construction of the 34th general order of Easter Term, 1834; which directs, that "on payment of money into court, the defendant shall undertake, by the rule, to pay the costs, and in case of non-payment, to suffer the plaintiff in taking the money out, either to move for an attachment, on a proper demand and service of the rule, or sign final judgment for nominal damages." The plaintiff in this case brought an action to recover a sum of £47 12s. 2d., and served notice of trial, for the sittings after Trinity Term, which were to commence on the 17th of June last. On the 12th of May, the defendant obtained a side bar rule to lodge £21 1s. 6d. in full

of the plaintiff's demand, and on the 23rd May lodged that sum, but omitted to make an entry of the lodgment, in the Master's book until the 15th of June. The plaintiff having drawn out the money, and proceeded to trial, when a verdict was had for the defendant. The plaintiff now claims to have the costs, incurred up to the time of the entry in the Master's book; but we are all of opinion, that the Court of Exchequer* has put the correct construction on the rule, and that the plaintiff by going to trial, lost his right to the costs incurred prior to the time of the lodgment. We will therefore say, no rule on the motion, and an addition will be made to the general order, explaining, that the payment of costs by the defendant, will only be in those cases, where the money lodged in court shall be accepted by the plaintiff in full satisfaction of his demand.

MOORE, J.—A rule will also be made by the court to the effect, "that for the future, no order shall be given for liberty to lodge money in court, to the credit of the cause after plea pleaded, without the special order of the court, or a judge upon application for that purpose,"

Motion refused without costs.

EXCHEQUER OF PLEAS.—Nov. 4.

HELY ADMINISTRATOR OF HELY v. MULHALLEN.

Pleading—Repugnancy of Dates—Omission of time in material averments.

A declaration stated the time of the defendant being indebted to the plaintiff's intestate in his lifetime, and of his making the promise, to be the 1st day of January, 1845, and stated the time of the grant of letters of administration to the plaintiff to be the 20th June, 1844. Held on special demurrer, that the averments were inconsistent, and that none of the allegations of time could be rejected as surplusage.

ASSUMPSIT by the plaintiff as administrator. The declaration contained the common money counts, and averred that the defendant, on the 1st day of January, 1845, at (venue, &c.) was indebted to J. H. in his lifetime, &c., and the breach was as follows, "yet the defendant hath disregarded his promise, and hath not paid any of the said monies, or any part thereof, to the said J. H. in his lifetime, or to the plaintiff since the death of the said J. H., to which plaintiff, after the death of the said J. H. on the 20th day of June, in the year of our Lord 1844, letters of administration were granted, &c. Special demurrer on the ground that the dates were repugnant and inconsistent.

Hickey for demurrer. It is quite settled that a time must not be laid, which is intrinsically impossible and repugnant. The very point in dispute here is decided in the case of *Ring v. Roxborough*,

(2 Cr. & Jer. 418, S. C.; 2 Tyr. 468.) That case affords an *a fortiori* authority as the time there was laid under a *videlicet*. Counsel also relied on *Dennis v. Richardson*, (14 East. 291; Stephens on Pleading, 44;) *Hunter v. Macan*, (1 Ir. Jur. 12,) decided on the authority of *Ring v. Roxborough*, and that the latter case had also been recognised and acted upon in this court in the recent case of *Jones v. Pope* (1 Ir. Jur. 8).

Matthew O'Donnell contra. Though it is necessary to lay each traversable fact with a certain time, it is not necessary to lay the day, month, and year. If we strike out the repugnant dates here, we have an averment that defendant was indebted in the life time of J. H., and that after his death letters of administration were granted to the plaintiff. *Ring v. Roxborough*, cannot be considered law, and is overruled by the case of *Hughes v. Williams*, (2 C. M. & R. 331.) (*Pigot, C.B.*—That case is distinguishable from the one before the court—the omission of the date of the letters of administration was there held immaterial, the fact of their having been granted being properly laid.) Counsel also relied on *Burton v. Nancolas*, (11 Moore 552; 1 Chitty Pl. 5th edit. 264); *Assignee of Cullen v. Mahon*, (1 Jones, 135,) "after," or "postea" is a sufficient allegation of time. Comyn's Digest Pleading, c. 19, 47, *Hargrave v. Rogers*, (Strange, 632.) The use of the *videlicet* would not avoid the repugnance, if any there were, *Arnold v. Arnold*, (3 Bing. N.C. 81); *Spyer v. Thelwall*, (2 Cr. M. & R. 692); *Coxon v. Lyon*, (2 Camp. 307 n.); *Scott v. Wedlake*, (7 Q.B. 776.)

PIGOT, C.B.—We have ascertained that the Court of Queen's Bench has decided the very point raised here, so that it becomes unnecessary for us to state the grounds of our judgment, as we shall decide in conformity with that authority. Independently of that, however, we should have followed the decision of *Ring v. Roxborough*, as being directly in point. The case of *Hughes v. Williams* does not displace that authority; on the contrary, it establishes that the fact of the grant of letters of administration is a material averment in order to satisfy the court that the ordinary who granted them had jurisdiction. It thus being a material traversable fact, must be laid with time, and that time should not be repugnant or impossible. It has been over and over again decided, from *Res v. Stevens*, (5 East. 244), to the present day, that you cannot reject time from a material averment, in order to obviate the objection of repugnance.

LEFROY, B.—We are here called upon to upset a rule of pleading which is, at all events, as old as the time of Lord Coke, namely, that a count must be certain to a common intent, that is, must be laid with time and place. It was distinctly laid down in *Ring v. Roxborough*, that each traversable fact must be laid with time and place, and that the fact of granting the administration is a material averment.

Demurrer allowed, liberty to amend.

* Napier, *amicus curiæ*, had informed the Court, that the Court of Exchequer had lately decided, that the plaintiff by proceeding to trial, had disintitiled himself to the costs.

COURT OF CHANCERY.

BAGNALL V. HORNE AND ADAMS.—Nov. 15th.

Practice—97th General Order—Evidence.

The 97th General Order, allowing documents to be proved by affidavit, does not apply, when the existence of the instrument is denied in a defendant's answer.

The bill in this case was filed, to raise the arrears of an annuity charged upon certain lands in the King's County. The annuity had been assigned to the plaintiff by the original grantee, for the payment of a debt, and against whom, as well as the inheritor, the bill was taken *pro confesso*. The defendant, Adams, who was a mortgagee of the inheritor, by his answer denied upon belief the execution of the assignment to the plaintiff, alleging that the grantee told him he never executed it.

Wm. Smith, for the plaintiff, proposed to read an affidavit made by one of the subscribing witnesses to the deed of assignment to the plaintiff to prove the execution of that deed, pursuant to the 97th general order.

Christian, Q. C. with *Kernan* for the mortgagee, objected that the assignment could not be proved by affidavit, as he, by his answer, disputed its existence, and cited *Joly v. Swift*, (3 Jones & Latouch 126); *Barfield v. Kelly*, (4 Russ. 355); *Pomfret v. Windsor*, (2 Ves. Senior. 472); *Brace v. Blick*, (7 Sm. 619.)

Wm. Smith, with *E. M. Kelly* in reply.—The cases cited, only apply where the deed is impeached. The mortgagee here has merely put the plaintiff to proof of the existence of the deed, by stating his belief, that it was never executed. Besides the defendant, Adams, has no right to make this objection, as the bill has been taken as confessed against the assignor of the annuity.

Christian, Q. C.—The defendant, Adams, is not precluded from making this objection. (*Lord Chancellor*.—If the bill was not taken *pro confesso* against the assignor, I should feel no difficulty in ruling with you, but such being the fact, is the question now open to you?) The plaintiff's right against the mortgagee, depends upon his proving the execution of the deed. The mortgagee would be entitled to examine the witnesses, if produced, notwithstanding the bill being taken *pro confesso* against the assignor. And if it appeared upon the cross examination, that in fact the deed was never executed, or was not executed when the bill was filed, the bill ought to be dismissed with costs.

LORD CHANCELLOR.—Let the cause stand over, with liberty to the petitioner to prove the deed by depositions, the mortgagee to be at liberty to examine the witnesses. The plaintiff to pay the costs of the day.

HUNT V. HODGES.—Nov. 16.

Waste—Jurisdiction.

The erection of a building, even of small size, for a purpose foreign from that contemplated on the demise of the lands on which it is built, is waste in the contemplation of a Court of Equity.

By a lease for lives, renewable for ever, of 22nd

Sept. 1720, part of the lands of Miltown were demised to Edward Allen at a penal rent for each acre tilled, and a covenant by the lessee to "repair the houses then standing on the premises, and all improvements made and to be made." By lease of the 2d May, 1763, the representative of the original lessee demised about fifteen acres of the above-mentioned lands to Perceval Hunt, for lives renewable. The representative of Hunt, by lease of the 2d May, 1785, demised fourteen acres of this land, with a house and garden thereon, to James Drought, for lives renewable. This lease contained a covenant "to repair the premises, and all improvements then made, or that should thereafter be made thereon," and a power of surrender at the end of every three years on giving six months' notice. The plaintiffs were the representatives of Hunt's interest, and the defendant Hodges of Drought's interest. The bill charged, amongst other acts of waste, that the defendant, about the beginning of 1843, "changed and altered the stable-yard, and one of the gardens attached to the dwelling-house, and built upon the site of the yard and garden a lead factory, and large furnace, and also several buildings for casting leaden pipes, and also built a very large chimney over the furnace." This was admitted by the answer, except that the chimney was stated to be only 39 feet high. The bill prayed, among other things, an injunction to restrain the defendant from continuing the lead factory or works, or from manufacturing sheet lead or lead pipes on the premises. It appeared that the furnace was very small, not more than fourteen feet square.

Monahan, Atty-Gen., Martley, Q. C., with *Hunt and Tottenham* for the plaintiff, cited *Hunt v. Browns*, (1 Sa. & Sc. 178), overruling *Calvert v. Gason*, (2 Sch. & Lef. 561); *Coffin v. Coffin*, (6 Madd. 17); *Elliott v. Watkins*, (1 Jones, 308); 7 Com. Dig. B. 2.

Green, Q. C., Fitzgibbon, Q. C., with *Fitzgerald*, for the defendant, referred to *Coppinger v. Gubbins*, (9 Ir. Eq. Rep. 304); *City of London v. Greyme*, (Cro. Jac. 182); *Cole v. Greene*, (1 Lev. 309, Sc. 1 Mod. 95); *Young v. Spencer*, (10 B. & C. 145); *Farrant v. Thompson*, (5 B. & Al. 829); *Lambert v. Lambert*, (2 Ir. Eq. Rep. 210); *Brace v. Taylor*, (2 Atk. 253.)

LORD CHANCELLOR.—This case has been much complicated, by both parties arguing as if it were a question of nuisance. If that were so, I would send it to be tried by a court of law. The parties have gone from that question to one totally different. Whether in a mere matter between landlord and tenant, this court ought to interfere to restrain the erection, or if they have been erected to restrain the use of buildings not tending to the improvement of the lands, with respect to the character in which they were demised. When a case of such alteration occurs, this Court will most likely leave the landlord to his remedy at law. This case is different, the buildings have nothing to do with the enjoyment of the premises, and have no connection with them. The question then is, when parties hold premises, such as these, and want to erect on them distinct buildings for purposes distinct from those for which the

lease was granted, this Court will interfere with such erection. By the old law, which does not seem to me in any way obsolete, to change any part of a demised building, is accounted waste, and the erection of buildings different in character from those demised, is waste. This was called a trivial charge, but Mr. Hunt ably met that, by showing that it was a continuing waste. The Case of *Bury v. Barry*, (1 Ja. and W. 653), shows the doctrine on that point. In that case the Lord Chancellor says, "I admit, also, that a small degree of waste—I do not say the smallest—manifesting an intent to do more, will be sufficient for the Court to act upon, but it will look at it in the manner in which the subject is viewed by the courts of law, and there the extent of the waste done is considered very material. There is an authority at law, where a verdict having been found for the plaintiff, judgment was entered up for the defendant, on account of the extreme smallness of the damages, *Harrow School v. Alderton*, (2 Bos. and Pul. 86). A Court of Equity will in this follow the law. I recollect one case where the subject of complaint consisted of some acts which were not waste, together with others that certainly were, namely, the pulling up a few young oak plants, they were so small that they were brought into court annexed to the affidavits, and there the injunction was refused." He then goes on "In this case, when the plaintiff has permitted his father to go on for five or six years, and suffered him to commit waste under the notion that he was making improvements; and when it is admitted, that upon the filing of the bill he desisted, though I am ready to say, that if another tree be cut down, if any act of waste be done in future, the plaintiff shall have an injunction, and though I do not mean to sanction the acts that have been done, yet under the form in which this application is made, I cannot grant it." And again "As to the elm trees, it seems that six or eight have been lopped, but it is sworn by four or five affidavits, in contradiction to one, that they stood on so small a piece of ground, that it was necessary to take off some of the branches, that the other trees might grow, the value of the cuttings is £1 4s., and they have been employed on the fences." Then taking the law to be so, is this a case for an injunction. I repeat again, that if any recent act were done, showing that the party intended to commit spoil and waste, the Court would give an effectual prohibition. Now I cannot say whether a jury in this case would give damages, but a court of law would say, that this without doubt was waste. We have an act, which is waste at law, established so as to manifest an intention to continue it. It is small, but still it is waste and on this ground I have no doubt, that the plaintiffs, who certainly insist on a very rigid measure of justice, are entitled to the exercise of an old jurisdiction of this Court. I must grant relief so far as it is prayed in respect of the factory. The form of the decree is a matter to be arranged, but I do not apprehend that there will be much difficulty on that point, the plaintiff is entitled to an injunction to stop any further use of the building. I cannot refuse this measure of relief, if I did, what is to prevent the

defendant from covering the whole premises with factories of a similar size?

ROLLS COURT.—Nov. 22.

EX PARTE HUTTON, IN THE MATTER OF THE INCUMBERED ESTATES ACT.

Incumbered Estates Act—Suit Pending—Cata.

A bill was filed for a sale of lands, and a decree pronounced, directing that the plaintiff should redeem a prior incumbrancer within six months, or the bill should stand dismissed as against him. After the expiration of the six months, the prior incumbrancer, not having been paid off, presented a petition under the Incumbered Estates Act. Held that the suit was pending within the meaning of the 67th sec. of the act, and the petition was informal, as it did not state that the consent of all parties to the suit had been obtained, and the petition should have prayed that the suit should be stayed. The suit having become abortive by the plaintiff's neglect in not complying with the decree. Semble, the plaintiff would not in such a case be entitled to costs against the inheritance.

THIS was a petition under the Act for the sale of incumbered estates. It appeared that by indenture bearing date the 1st of Nov. 1833, the lands sought to be sold were mortgaged to a Mr. Hutton, who was the first incumbrancer on them, and in possession of the title deeds. The same lands were subsequently mortgaged by Young, the owner, to a person named Leslie, who filed a bill of foreclosure in which suit Mr. Hutton was made a party; and, by a decree, dated the 19th day of January, 1844, the plaintiff was directed to redeem the petitioner's demand within six months from the 19th of Nov. 1847—being the date of the report ascertaining the sum due—or the bill to stand dismissed as against the prior incumbrancer, but the plaintiff did not redeem within the time limited.

Hutton for the petitioner.—Upon the 19th of May, the bill in the cause of *Leslie v. Young* stood dismissed as against the petitioner, and this case does not come within the 67th sec. of the act, for the suit is at an end for all purposes of foreclosure, redemption, and sale, as the court will not direct a sale of an equity of redemption. Besides, a consent to this petition has been signed by the petitioner for the plaintiff in the cause of *Leslie v. Young*.

Butt, Q. C., for the plaintiff in the cause of *Leslie v. Young*.—It is impossible to make any order on this petition, for, by the 67th sec. of the Incumbered Estates Act, no petition can be presented for a sale during the pendency of any suit unless with consent of the parties. The consent of the plaintiff is the only one which has been obtained; besides, a sale can be had in the cause of *Leslie v. Young*. If Mr. Hutton consents, and expense and delay to all parties will be avoided.

Norman, for Young, the inheritor.—If the estate is not made liable to double costs, I have no objection that a sale should be had under the petition.

MASTER OF THE ROLLS.—The suit of *Leslie v. Young* having been instituted for a sale, the peti-

tioner, who was a prior incumbrancer, and a party in that suit, stands upon his rights, and insists on being redeemed, although, had he submitted to a sale, he would have been the very first person paid out of the proceeds. The six months given to redeem expired in May last, and the petitioner now asks me to do what he might have done, but would not consent to, in the suit; for, if there had been any defect in that suit, it could have been remedied by supplemental bill. By the 67th sec. it is provided, that where any suit for foreclosure or sale has been commenced before the 1st of July, 1848, no petition shall be presented unless with the consent of the parties competent to consent to the dismissal or staying of the suit, and every such consent shall be stated in the petition. I do not say that a party would be turned round if the petition did not contain that statement, and he was in a position to say that he has the consent of all parties necessary; but the effect of this act is now sought to be got rid of by the argument that this provision does not apply where the suit, having been dismissed, is not pending so far as the petitioner is concerned. If that were so, every creditor who happened not to be before the court, would be entitled to apply under this act, although there was a suit actually pending for a sale of the very same lands, and by this means the provisions of this section would be defeated, the object of which was to prevent double proceedings. I do not now say whether I may not, under the subsequent provisions of the section, have jurisdiction to make an order staying proceedings where the parties do not consent, but every person in the suit should have notice of that order. As to the costs for the plaintiff, I do not think there is any ground for fixing the inheritance with the cost of proceedings which have been rendered abortive by his means, for the act provides that the court may give directions for staying such suit, and respecting the costs thereof and otherwise, as it shall see fit. The object of the legislature is to prevent costs, and it would have been much better to have allowed the proceedings to go on in the suit of *Leslie v. Young*, where all the expense had been incurred. I will make no order on this petition in its present form, but will give leave that the prayer may be amended by praying that the proceedings may be stayed in the suit of *Leslie v. Young*. I am unwilling that any technical objection should be allowed to interfere with the working of this statute.

NUGENT V. WATERS.—Nov. 24.

Receiver—Writ of Error—Supersedeas.

A Receiver will not be appointed under the 5 & 6 Wm. the 4th c. 55, pending a Writ of Error on a judgment at law, although the petition be presented before the issuing of the Writ of Error, and security for costs be not entered into, the plaintiff in error being the plaintiff in the court below. A Court of Equity will not entertain the question of irregularity in proceedings at law.

In this case, Nugent the petitioner, who had been defendant at law, obtained judgment for costs on a demurrer to a *scire facias* in the Court of Common

Pleas, and on that judgment, presented a petition for a receiver, under the 5 & 6 Wm. 4, c. 55. After the petition had been presented, a writ of error issued on the judgment of the Common Pleas. A conditional order for the appointment of the receiver, had been made, against which the respondent now shewed cause.

Miller, S. B.—This conditional order cannot be supported, for the writ of error is a *supersedeas* of the judgment, even though no bail in error has been entered into. The plaintiff in error baving being plaintiff below, *Stephenson v. Higginson*, (Black. Dun. & Os. 37,) 1 Arch. Prac. 487, 2 Saund. R. 101, n.)

Molesworth, contra.—The writ of error is not according to precedent, and therefore is bad. *Nut-ton v. Carlow*, (10 Mod. 283,) shews how formal a writ of error must be; according to *Smart v. Taylor*, (1 Price 312), if the writ be defective, it is no *supersedeas*; besides the writ of error has not been returned to the Court of Error, and therefore has ceased to act as a *supersedeas*, *Wickstead v. Bradshaw*, (Hob. 116,) anon. (6 Mod. 221); *Dow v. Clark*, (1 Crom. & M. 160.)

THE MASTER OF THE ROLLS.—I do not see any difficulty in this case. The case of *Ball v. Ball*, (Smith & Bat. 221,) decided by the King's Bench, is an authority on some of the points, for there the *habere* having been taken out and executed, immediately after judgment, and before a writ of error issued, the court granted a writ of restitution. It has been decided by the Court of Exchequer, in *Stephenson v. Higginson*, that the case of a plaintiff in error, who has been plaintiff in the court below, is not within the statute of 1 Geo. 4, c. 68, and I have no hesitation in following that case. The case of *Ball v. Ball* is exactly in point with the one now before me, for in the present case, the petition was presented before the writ of error issued, and in that the *habere* had been absolutely executed. But even if this case were within the statute, *Ball v. Ball* decides, that a writ of error is a *supersedeas* till a rule of bail has been entered and served. I shall not decide upon the irregularities which have been urged against the proceedings at law, it has been often decided, that in this Court, proceedings at law must be taken to be regular, till set aside. I will allow the cause, but without costs, because the petition had been presented before the writ of error issued.

IN THE MATTER OF THE ACT TO FACILITATE THE SALE OF INCUMBERED ESTATES IN IRELAND, EX-PARTE, LORD BLANEY.—Nov. 29.

Incumbered Estates Act—Trustees—Notice—Construction—Contract.

Upon a petition under the Incumbered estates act, for a sale of lands, vested in trustees, to the use of petitioner for life, then to preserve contingent remainders, remainder to the first and other sons of petitioner in tail male, remainder to petitioner in fee, there being no children of the petitioner. Held, that the trustees, as representing unborn issue in tail, ought to have notice of the proceedings, also, that a contract for a sale freed from a jointure, without consent of the jointress, was null

and void. Semble this act will be construed strictly according to the letter.

This was a petition under the incumbered estates act. It appeared by indenture, dated the 24th day of June, 1796, that the lands sought to be sold, were limited to the use of Thomas Andrew, Lord Blaney, father of petitioner for life, and (subject to a jointure of £1500, late currency, for Lady Blaney,) to his first and other sons in tail male. By indenture, bearing date the 13th day of March, 1826, the lands were conveyed to J. Alexander and the Rev. R. Alexander, their heirs and assigns, to the use of Thomas Andrew, Lord Blaney, for life, and after the determination of that estate to the use of trustees, to preserve contingent remainders, and upon trust after the decease of Thomas Andrew Lord Blaney, to pay Lady Blaney, an annuity of £1500, late currency, as her jointure, and subject thereto, to raise £20,000, as portions for younger children, then to the use of petitioner for life, then upon trust to support contingent remainders, and after the decease of petitioner to use of his first and other sons in tail male with remainder to petitioner in fee. Thomas, A. Lord Blaney, died in 1834, and at the time, the petition was presented, Lord Blaney was unmarried, and under the limitations of the deed of 1826, possessed of a life estate in the lands, with remainder to himself in fee. Previous to the petition being presented, a contract had been entered into for a sale of the estates, discharged from the jointure of Lady Blaney.

Brewster, Q.C. and Alexander Norman for petitioner.

MASTER OF THE ROLLS.—The contract in this case is a nullity, a tenant for life, such as the petitioner, has no right to sell unless under the act, and a jointure is not an incumbrance within the meaning of it. Lady Blaney's consent must therefore be obtained, also this is a proposal to sell the estate of unborn issue, and I cannot make an order of reference without notice to the trustees, who represent them. These trustees have the legal title in them.

Norman.—The 53d section would seem to give jurisdiction; it gives power to release the portion of lands sold, from charges not being incumbrances under the act; and, under the 49th & 50th sections, the surplus money is to be invested in the funds, or in the purchase of lands to be settled to the same uses as the land sold. In the present case there will be a large surplus.

MASTER OF THE ROLLS.—The words of the act are plain, I will not put a fanciful construction upon it. You must serve notice on the trustees, and I will let this petition stand over till Saturday week, that you may obtain the necessary consent.

Rollestone.—This is an application for liberty to substitute service of subpoena. A decree for a tenant in tail has been born in India, his father, an officer, serving in that country, and also a defendant, and has appeared in the cause, we now seek service of the subpoena upon the father's son, may be deemed good service upon the son, as in a recent case in the Court of Chancery, a son of an officer in the East India Company's service was allowed by serving him in another cause.

PER CURIAM.—In dealing with a minor, we cannot travel out of the act of parliament, the son must be served in India by his father, the father being verified by the commanding officer of the regiment.

CLIFT v. GALWAY.—Nov. 19.

HONAN, Petitioner, GALWAY, Respondent.
Judgment Creditor—Petition for Receivership—Suit Pending.

Where a receiver has been appointed in a judgment creditor, who is a notice petitioner, might obtain full relief in the suit, and petition, and applies to have the receiver appointed to the matter of his judgment, he shall be allowed the costs of the petition, although the circumstances of the suit are such as to raise a suspicion of collusion between the plaintiff and defendant in the suit.

In this case a bill had been filed by a judgment creditor of the defendant, praying an account, it appeared that the solicitors for the defendant were partners, and, before the bill was filed, a cousin of the defendant had been appointed receiver upon consent. The petitioner subsequently obtained an order extending this receiver to the petition, but the question of costs was to stand over.

John Pennefather moved for an order that he might be at liberty to pay the costs of his petition.

Rollestone contra.—Costs dismissed with costs.

PER CURIAM.—In this account, the petitioner is at the peril of the filing of the petition, and the receiver is to render an account again.

EQUITY EXCHEQUER.—Nov. 17.

TIGHE v. WALSH.

Practice—Substitution of service—Parties out of Jurisdiction

In the case of a minor, the court will allow service of subpoena out of the provisions of 4 & 5, Wm. 4, to be applied with.

Hickey, contra.—This application is too late. At the moment the two months expired, the defendants were in *quasi* contempt, they should have filed their answer, accompanied by a notice that they did so without prejudice to this application. *Mannix v. Mann*, (5 I. E. R. 190). He also cited *Eyre v. Eyre*, (Sausse & Scully, 653); *Prior v. White*, (101. 361). The precise point has been ruled by the Master of the Rolls in *Whyte v. Maguire*, (1847, unreported).

PARRFATHER, B.—The position of the defendant here is analogous to that of a defendant at law when the time for pleading has expired, the plaintiffs are too late. We think the practice, as settled by Honour the Master of the Rolls, a very good one, and must therefore refuse the motion with costs; besides, we have ascertained from the Registrar that Baron Richards has already decided this at the same way.

QUEEN'S BENCH.—MICHAELMAS TERM.

BUTLER AND ANOTHER V. LLOYD.—Nov. 4.

Interpleader act, 9 & 10 Vic. c. 64—Costs of issue—Reference to the Master—Sheriff liable for neglect.

Where a sheriff made a seizure of sheep, under a writ, and, an adverse claim being set up, applied for relief under the interpleader act; the court ordered an issue, and directed the sheriff to retain the sheep until the determination of the trial.

A verdict having passed for the claimant, he brought an action against the sheriff, for injury alleged to be sustained by the seizure of the sheep.

The court stayed this action, and referred it to the Master, to ascertain whether any deterioration was caused to the sheep by the neglect of the sheriff; to take an account of the sheriff's expenses, and to strike a balance between the charges of the sheriff and such loss.

The court directed the costs of the issue to be paid by the claimant by the execution creditors.

The sheriff of the County of Roscommon, having on the 6th of March last, under a writ of *fiery facias*, at the suit of the above named plaintiff, taken the above named defendant, taken in execution certain sheep, and a notice of claim having been served upon him, on behalf of the Rev. John Armstrong, the sheriff applied for relief under the interpleader act, and the several parties having appeared on the 20th of April, to maintain their respective claims, the court thereupon directed an issue, in which the claimant was to be plaintiff, and the execution creditors, defendants; the question on the trial to be, whether the sheep seized were the property of the claimant or the defendant, and the sheriff was directed to retain the sheep until the determination of the issue. The trial took place at the sittings after Trinity Term, before the Lord Chief Justice, and a verdict having been given for the claimant, the court, on the 29th of June, made an order, directing the sheriff to return the sheep to him.

Napier, Q.C. with *J. T. Ball* now, on behalf of the sheriff, moved that the expenses which he had

incurred in feeding and keeping the sheep, from the 6th of March, to the 29th of June, might be paid to him, either by claimant or the execution creditors, and for his costs.

Martley, Q.C. and *O'Driscoll*, on the part of the execution creditors, contended that the sheriff was not entitled to the costs of his original application to the court, and that it would be unjust to ask the execution creditors to pay for the keep of the sheep.

Macdonagh, Q.C. and *Closs* appeared on behalf of the claimant, and moved that the sheriff or the execution creditors, might be directed to pay to the claimant the costs of the order of the 20th of April, the costs of the issue, and a sum of £143 14s. being the loss sustained by him, by reason of the seizure of the sheep, or that the claimant might be at liberty to proceed in the action already commenced by him against the sheriff.

THE COURT made the following order.—It is ordered, that with respect to the application for costs, the plaintiffs in this cause do pay unto the Rev. John Armstrong the costs of the order of the 20th day of April last, and also the costs of the said issue, and that the sheriff do not have any costs of the original order as against the plaintiffs in this cause, and as to the present motion, no costs to any of the parties, and with respect to the said action, so brought against the said sheriff; it is ordered, that all further proceedings therein be stayed, and that it be referred to the Master of this Court to take an account of the reasonable cost and charges, to which the said sheriff is entitled, for feeding and keeping the sheep up to the time when the title to them was ascertained, and on the other hand, to ascertain whether any deterioration was caused to the said sheep by the neglect or mismanagement of said sheriff, and the amount of such deterioration, and to strike a balance between the said charges by the sheriff and such loss or deterioration. And it is further ordered, that the party against whom the officer shall find such balance, the said sheriff, or the said Rev. John Armstrong, as the case may be, shall pay unto the other party the amount of such balance forthwith, upon the confirmation of the Master's report.

HILL V. HOLT.—Nov. 20.

Practice—Bill of particulars—Amendment notice.

This was an application to have plaintiff's bill of particulars amended. It was an action of *assumpsit*. The declaration contained the money counts, and an account stated. The bill of particulars merely stated, that the action was brought "to recover the sum of £52, being for money lent, and on amount stated," to this there was no date. There was no affidavit sworn, or notice of motion served.

Coates for defendant, contended that this bill of particulars being merely an echo of the declaration, was clearly a contempt of the rule of court, and therefore did not require an affidavit, or notice of motion, *Brown v. Watts*, (1 Taunt. 354). A side bar rule might have been obtained, if no bill of particulars had been served.

MOORE, J. on consulting with the officer, made the order.

EXCHEQUER OF PLEAS.—Nov. 8 & 22.

JOHN JACK, LESSEE OF DOWLING v. GRAVES.

Will—Construction.

Bequest of a term of years as follows:—"I also leave to T. D., my brother, one-third of the quarry field during his life, also the house that stands next in the lower field, but, at his death, said land and house to go to his son T. D. during his natural life, and after, by his last will, to his wife and children." T. D. the younger died intestate. Held that the legal estate in the term did not pass to the wife and children, but was vested in the personal representative of the testator.

THIS was a motion for a new trial of an ejectment tried before Chief Justice Blackburne at the last Spring Assizes for the Queen's County. The evidence was, that a person named John Carroll, being possessed of certain premises in Maryborough for an unexpired term of 999 years, made the following bequest of his interest in the term:—"I also leave to Thomas Dowling, my brother, one-third of the quarry field during his life, also the house that stands next in the lower part of said field, but, at his death, said land and house to go to his son, Thomas Dowling, during his natural life, and after, by his last will, to his wife and children." After the testator's death, John Campion and Henry Holbrook, the executors named in his will, obtained probate, and assented to the bequest to the Dowlings. Thomas Dowling the elder, and Thomas Dowling the younger, after the death of the testator, let the premises for which the ejectment was brought, and which were a portion of the lands comprised in the testator's will, to the defendant for 900 years, from the 31st of May, 1833. Thomas Dowling the elder died in 1834, and Thomas Dowling the younger died intestate in the same year, having survived his wife, and leaving two children, both of whom were alive at the time of bringing the ejectment. Both the testator's executors having died, administration *de bonis non*, &c. of the testator was granted to William Dowling, the sole lessor of the plaintiff. Under these circumstances, it was contended by the defendant's counsel that, according to the true construction of the testator's will, the legal estate vested in the children of Thomas Dowling the younger on the determination of the life estates, and that the lessor of the plaintiff was not entitled to recover. The judge having reserved liberty to the defendant to move accordingly, and a conditional order having been obtained.

MacDonogh, Q. C., with *Hamilton Smythe*, now shewed cause.—The sole question in this case is, whether the legal estate vested in the children of Thomas Dowling the younger after his death. Under the limitations of the will, Thomas Dowling the younger took either a simple power, which has not been executed, or a power in the nature of a trust, and, as there has been no appointment, the property would in Equity vest in the objects of the power, but, in law, would revert to the personal representative of the testator. The administrator must be regarded as a trustee for the children. There

was no assent given to the limitation to the wife and children. (*Lefroy, B.*—It is quite decided that the assent of the executors to the bequest to the tenant for life, serves as an assent to the remaindermen.) The *Attorney-Gen. v. Potter*, (5 Beavan, 169,) shows that that doctrine is not universal, but is modified by the circumstances of the case. (*Lefroy, B.*—In that case there must have been a limitation of the estate after the estate for life, and prior to the vesting of the estate in remainder.) The assent of the executors to the life estate could not ensure here, as, until T. Dowling the younger's death, it was contingent who should take, and in what shares. The administrator should be regarded as a trustee for the children, and the latter should resort to a court of Equity for a declaration of their rights. *Harding v. Glyn*, (1 Atkyns, 469); *Brown v. Higgs*, (8 Vesey 574); *Birch v. Wade*, (3 V. & B. 198); *Burrough v. Philcox*, (5 M. & C. 92). The disposition here comes within the authority of *D. of Marlborough v. Godolphin*, (2 Vesey Sen. 75).

Green, Q. C., and *J. T. Ball*, contra.—The jury have found that the executors assented to the bequest. There cannot be a partial assent. (*Pigot, C. B.*—It is quite settled that if A. bequeaths a chattel to B. for life, with remainder to C, and the executor assents to the life estate to B, his assent accrues to the benefit of C. The *Att.-Gen. v. Potter* went on this ground, that the executor's assent could not come to the remainderman without divesting the executor of the estate which the testator had provided for the payment of the legacies.) Here is an express estate to the children on the face of the will. There are two classes of cases, first, where all the legal estate vests in the first taker, with a power to dispose of it in remainder, and secondly, where the tenant for life has only the limited estate, with a power of selection and distribution. In the former class the remaindermen take only an equitable estate; in the latter, the legal estate vests in them on the death of the tenant for life. The case of *D. of Marlborough v. Godolphin*, has been pronounced to be doubtful by Sir E. Sugden. *Sugden on Powers*, 2d vol. 181; *Mason v. Lyubury*, (M. S. Trinity, 1834); *Brown v. Peacock*, (6 Sim. 257). The will should be read as if it were—"To Thomas Dowling the second for life, and then to his wife and children, as he should appoint." No case similar to the present has as yet been decided in a court of law. All the cases cited for the plaintiff are bequests of money, and so could not come under the consideration of a court of law. The case of *Brown v. Higgs* is distinguishable. No express estate for life was there given to the first taker, but the entire legal estate, with a trust superinduced. Our construction of the will is, that the estate was given to the wife and children, as joint tenants in remainder, subject to be divested by the execution of the power.

Cur. adv. vult.

Nov. 22.—*Pigot, C. B.*—The question involved in this case, reduces itself within a very narrow compass; several authorities have been cited to the court, but none of them precisely applicable. In a case like this, depending on the construction of a particular clause in a will, it is impossible to decide

on remote analogies. The words of the will are: "but at his death, said house and lands to go to his son, Thomas Dowling, during his natural life, and after, by his last will, to his wife and children." The question is, whether this clause constitutes a distinct gift to the wife and children, with a power of distribution among them, or merely confers on the donee a power of appointment between the wife and children; on the best consideration that I have been able to give to these words, I am of opinion, that the testator did not intend an estate to pass by his own will, when he expressly directs it to pass by that of another, and that the legal estate is consequently vested in the administrator, the lessor of the plaintiff.

LEFROY, B.—I fully concur in the opinion of my Lord Chief Baron, and the view taken by the court seems confirmed by the subsequent clause of the will. The question is simply this, did the testator intend the property to pass by way of limitation, or as his nephew's will should direct, or in other words, as expressed by the Lord Chief Baron, did he intend that an estate should pass by his own will, when he in express terms directs that it should pass by that of another. I freely assent to the proposition, that if the testator's intentions were, that the wife and children should take by limitation, the assent by the executor to the bequest of the term to the tenant for life, would enure to transfer the interest therein to the remaindermen, but that argument assumes, that the remaindermen took a legal interest, under the words, and "after by his will to his wife and children," i.e. to go by his will to his wife and children, whereas, in the very next clause, we find the testator unequivocally leaving certain lands to his nephew, with a condition superadded, that he should not dispose of them but by his will, words clearly indicating a power, and an intention that it was, through the medium of that power, the objects of the testator's bounty were to take. Again, the next clause of the will indicates the same intention, and applying the principles "*noscitur a sociis*," where we find two clauses, distinctly contemplating the exercise of a power it affords a strong inference, that by the third clause in question, the testator intended, that the objects of the bequest should also take through that medium, and not by way of limitation. Now, though the effect of this construction at law is, that the object cannot take anything in case of a non-execution of the power, it is different in equity, when the power is given in such terms as to impose a duty on the donee, and evinces an intention that the objects of it should be benefited. According to *Brown v. Higgs*, and that class of cases, a Court of Equity will relieve from the effect of such non-execution. In this case there is an intimation sufficiently strong, that the wife and children should not be ultimately defeated by the omission of the donee, or in other words, the power here is clothed with a trust, and a Court of Equity will give them the same benefit as if they took by limitation, though at law they cannot take any estate. The cases referred to in argument, distinctly establish these propositions. (His Lordship referred to *Duke of Marlbo-*

rough v. Godolphin; *Sugden on Powers*, 6 Edit. vol ii. 177, et seq. *Crossing v. Crossing*, *ibid.*) On these principles, the objects of the power here, though they cannot be held to have taken any interest at law, and the legal estate in the term is vested in the administrator, yet they would be clearly entitled to relief in a Court of Equity, and there the administrator would be held as a trustee for the wife and children. It is satisfactory to reflect, that in deciding this case according to the strict rules of law, the Court at the same time meets the substantial justice of the case.*

No rule on the motion.

STEVENSON V. STEPHENS.—Nov. 21.

Practice—Judgment as in case of a non-suit—*Remanet*, *Collier v. Jones*, overruled.

Where a record has been left a remanet at Nisi Prius, and no proceedings taken for three years, the court will not grant liberty to the defendant to enter up judgment as in case of a nonsuit.

Skelton moved for liberty to enter up judgment, as in case of a nonsuit, a notice of trial had been served by the plaintiff for the sittings after Hilary Term, 1845. The trial was afterwards postponed to the next ensuing sittings, but in consequence of the non-attendance of jurors, the case was left a remanet, and no further proceedings taken. Counsel rested his application on the case of *Collier v. Jones*, (1 H. & B. 321), and *Ham v. Gregg*, (6 B. & C. 125).

PENNEFATHER, B.—Your application appears, not only against the authorities, when carefully distinguished, but also against the express words of the statute. The case in the Queen's Bench must have been decided without due consideration of *Ham v. Gregg*. You must have a trial by *proviso*.
No Rule.

MURRAY V. SKINNERS.—Nov. 22.

Promissory note—Failure of consideration—*Admission of parol evidence.*

In an action by the payee, against the maker of a promissory note, payable twelve months after date, a witness was examined, who stated that the plaintiff had given £50 as a portion to the defendant's wife at her marriage, and on that occasion the note was given by defendant, on the understanding, that if the defendant's wife survived the marriage for twelve months, the gift of the £50 should be absolute and the note should not be put in suit. Held on a motion for new trial, that such evidence was admissible as not varying the written contract, but shewing a failure of consideration.

ASSUMPSIT by the payee against the maker of a promissory note, payable twelve months after date. On the trial before the Chief Baron, at the sittings after last Trinity Term, the brother of the de-

* Before Pigot, C.B., and Lefroy, B. Pennefather, and Richards, B. B. were in the Court of Delegates.

fendant having been asked the circumstances under which the note was given, stated; that in 1841, the plaintiff had promised to give £50 to his niece on her marriage with the defendant, and on the latter event taking place, the note, payable twelve months after date, was given with a distinct understanding, that it was only to be paid by the defendant, in case his wife (the plaintiff's niece) did not survive the marriage twelve months. The witness, also stated in reply to a question from the court, that the £50 in the promissory note, was the £50 given as the niece's portion. The counsel for the plaintiff objected to the admission of this evidence as going to qualify and vary a written contract, but the objection was overruled, and the jury found for the defendant.

Butt, Q.C. and *Armstrong, R.*, now moved that the verdict might be changed into a verdict for the plaintiff, or for a new trial, on the ground that the parol evidence was inadmissible, as qualifying the contract expressed on the face of the note. This is not the case of a want of consideration or a failure of consideration. The promise, according to the note, was to pay in twelve months at all events, but the defendant seeks to shew by parol that the promise was to pay only in the event of the wife dying within that time. It is admitted that the defendant got the £50, and suppose the wife had died within twelve months, could defendant insist that there was a failure of consideration, *Moseley v. Hanford*, (10 B. & C. 729); *Woodbridge v. Spooner*, (3 B. & Al. 233); *Hoare v. Graham*, (3 Camp. 57); *Free v. Hawkins*, (8 Taunton. 93.)

Charles Kelly, contra.—The evidence went to shew failure of consideration. In all the cases cited on the other side, the contingency might or might not have happened before the note became payable, here the event must necessarily have taken place, before the maturity of the instrument or not at all, *Foster v. Jolly*, (1 C. M. & R. 70, S. C. 5 Tyr. 239); *Rawson v. Walker*, (1 Starkie 361); *Free v. Hawkins*, (8 Taunt. 92); *Solly v. Hinde*, (2 C. & M. 516; S. C. 4 Tyr. 306; 2 Phillips Ev. 756.) A failure of consideration may be relied upon between the primary parties as much as the total absence of it.

R. Armstrong in reply.—When we speak of the consideration for a note or bill, the question is, did any money pass from the payee to the maker, and if money did pass, then it cannot be said that there has been a failure of consideration. (*Pennefather, B.*—Do not the facts given in evidence, really go to shew that here was no consideration for the note? There was no other consideration for this note, but the £50 to be repaid in a certain event, and to secure that repayment the note was passed. If the evidence goes to shew, that the event did not happen, and that, therefore, there should have been no repayment, did it not go to shew that there was no consideration for the note? In one case cited by Mr. Kelly, a note was given, payable on demand, with an agreement, that the payee should act as executor, and evidence was let in to shew that he declined to act as such, and was therefore disentitled to recover.) In that case no money

moved from payee to maker. (*Richards, B.*—not the testimony objected to, merely evidence of the true consideration for which the note was given? The party was to owe the money if particular event happened, that event did not happen, and therefore no debt was contracted by the maker.)

PIGOT, C. B.—We are all of opinion that the verdict had for the defendant should not be set aside. It is extremely important, no doubt, to guard against any invasion of the rule that parol evidence should not be admitted to vary the purport of a written contract, but on the authorities, this distinction is clearly established, that although parol evidence cannot be received to vary or qualify any written instrument, yet a defendant may shew the want or failure of consideration in a case like the present, though his proofs may involve an admission of the contract, which frequently involves the admission of parol evidence, and, if any authority were wanted for this proposition, a single case is to be found in *Pike v. Sweet*, (Darnley Lloyd, Mercantile Cases, 159, S. C. 1 M. & C. 226); where it might be argued that in that case evidence was admitted to control the contract which the instrument imported. Yet Lord Tenterden held that the evidence went, not to control the contract, but to shew the relation between the parties at the time of the passing of the note. *Solly v. Hinde* applies, as going to distinguish testimony which tends to establish the non-existence of a consideration, and that which goes to control or qualify the written contract. In that case the instrument imported a promise to pay at all events, yet an agreement was admitted to shew that the note was not to be put in suit in a particular event, but was to be paid only on a contingency, and such an agreement was received, not as qualifying the contract, but shewing a failure of consideration. In the case before the court, the evidence went to shew that the £50 was a gift, in case the defendant's wife survived the marriage twelve months, and it appears that she did so survive. If it were a gift, it is clear that there was no consideration for the note. The evidence objected to only goes to shew, that in the events which happened it turned out to be a gift, and that therefore there was a failure of consideration. On this principle we are of opinion that the evidence was properly admitted.

Motion refused with costs.

ERRATA.—Page 12, for sec. 38, 8 Vic. c. 10 read 10. Page 17, for De G. & Mon. read De G. & Sim. Page 18, on the twelfth line in the judgment of the Master of the Rolls, read bill for will; and in the 19th page, in the same judgment, in the 16th line from the top of the page, read bill for will.

COURT OF CHANCERY.

LEECH v. LAW.—Nov. 7 & 8.

Registry Act—Priority—Bankrupt.

An unregistered mortgage has priority over the subsequent certificate of appointment of assignees duly enrolled.

his cause came before the court, on exceptions to the Master's report, by the defendants, Hugh W. Henry Milner, and Thomas Atkinson assignees, of Joseph Beale a bankrupt. The first objection was to the Master's report of priority of same due on foot of a deed of the 9th of September, 1837, by which Joseph Beale, conveyed to William Beale, certain premises upon trust, to indemnify the defendant, Richard Garret, against liabilities incurred for the bankrupt, on which Garret subsequently was compelled to pay considerable sums. This deed was not registered. Joseph Beale became a bankrupt in April, 1842, and the certificate of the appointment of the assignees was only registered 20th June, 1842. The Master related priority to the deed. To this report the assignees excepted.

Green, Q.C. with *Darley* for the exception, cited, *ex v. Alsop*, (5 B. & Ald. 142); *Anon* (Dea & Chitt. 349); *Warburton v. Loveland*, (6 Bli. 1); *Atterbury v. Rochfort* (8 I. E. R. 284. 2 J. & L. 1); *Butcher v. Harrison*, (4 B. & Ad. 129, S.C.; L. & M. 677); 3, 4, Vic. c. 110, s. 46.

Brewster, Q.C., with *F. Walsh*, for the defendant, Richard Garret, cited, *Jones v. Gibbons*, (9 B. & Ad. 407); *Mitford v. Mitford*, (1b. 87, see page 40); *Saunders v. Leslie*, (2 B. & Bea. 509 see page 515); *Loveland v. Ivis*, (1 H. & Bro. 3).

Darley in reply, referred to *Drury v. Ham*, (Atk. 95); *Sumpter v. Cooper*, (2 B. & Ad. 223); *ex parte Coles*, (1 Dea. & Chitt. 100); *Latouche v. Manney*, (1 Sch. & Lef. 137).

LORD CHANCELLOR.—It seems strange, that a question should have occurred for the first time under the late bankrupt act, as a similar question might have arisen, as the law previously existed. I should wish to look a little more carefully into the cases which have been referred to. The question seems to be, what does the act give to creditors, whether it is not merely the property which the bankrupt can honestly dispose of.

Nov. 8.—LORD CHANCELLOR.—I shall overrule this exception. The case of *Sumpter v. Cooper*, (B. & Ad. 223), gives me some difficulty, as it seems posed to the general bearing of the other cases, and is expressly so, to the case of *Jones v. Gibbons*, (9 B. & Ad. 407); *Ex parte Coles*, (1 Dea. & Chitt. 100), appears to be an authority against the assignee, but the statement of the case shows that it may have been determined, on the ground of an equitable mortgage, not admitting of registration. Regarding *Doe v. Alsop*, which was a contest about a subsequent deed; the case which most affects the question, is *Sumpter v. Cooper*. But that case was decided on another point, and *Jones v. Gibbons* was not mentioned, but the judgment seems to be on the assumption that an unregistered deed is void. In that case, the marginal note is, "a debtor deposited the title-deeds of his houses with his

creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered, pursuant to the statute 7 Anne, c. 20. The debtor afterwards became bankrupt, and the assignment of his effects, under the commission, was duly registered, the assignees brought an action against the creditor for the rents of the houses, which he had received from the time of the assignment made to him by the bankrupt. Held, that although this instrument was void, the rents which the defendant, being the equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission." In the statement of the facts, it is said that the assignment took place under circumstances which formed a strong case of fraudulent preference, and the instrument was never registered. Then at the trial, the Lord Chief Justice directed a non-suit, reserving liberty to the plaintiff to move to enter a verdict in their favour, if the court should think the equitable mortgage unavailable. It is clear, that fraudulent preference could not have been an ingredient in the case, if it were, that question should have gone to the jury to determine. It is not easy to see what view the court took of the point, the registry act was cited by the counsel, Campbell, (I believe afterwards Lord Campbell,) who contended that the equitable mortgage was merged by the assignment, that even if subsisting, it was void for want of registration, and was not available at law, and assumes all along that the assignment was void; he also cited *Doe v. Alsop*, no one seems to contradict him, and the Court, thus entirely passing by the deed itself, says, "we are of opinion that the non-suit was right, the defendant was the equitable mortgagee of the bankrupt's moiety of the premises, and having received the whole of the rents, he would have an equitable right to retain them against the bankrupt, if he had remained solvent, or he has the same right against the assignees, who can only recover that to which the bankrupt was both legally and equitably entitled; as to the statute of Anne, we think it cannot apply to the case of an equitable mortgage, it refers only to the registration of deeds, and where there is merely a lien or equitable mortgage, created by the deposit of deeds, there is no instrument to be registered." This case appears to go against the whole current of authority, though there is a good deal to be said on the subject, particularly when we consider the case of *Warburton v. Loveland*, (6 Bli.) I do not know whether the assignees may not think it worth while to have a case sent to a court of law, but my present impression is with the current of authority. (The assignees having declined to take a case.) I cannot well get out of the case of *Sumpter v. Cooper*, except on the ground of its not having been fully argued, but I am forced by the general bearing of the cases to overrule this exception.

ROLLS COURT.

HILLAS v. PHILLIPS.—Nov. 17.

Practice—Substitution of Service—Decree.

The Court will, under special circumstances,

permit substitution of service of a decree and memorandum under the 104th General Order.

This was an application to substitute service of a decree and memorandum under the 104th General Order, and a subpoena for costs.

L. Morgan.—On Sunday the 5th of November, the plaintiff served the defendant personally by handing him a copy of the decree and subpoena, but this being irregular, on the following day the plaintiff went to the house of the defendant, whom he saw in the parlour, plaintiff went to the window, and shewing defendant the decree, posted a copy on the outside of the window. In Daniel's Ch. Pra., Vol. 2, p. 1025, it is laid down that under the old practice substitution of service of a decree has been allowed, and that probably now, under special circumstances, the court would permit the decree to be served on the solicitor.

MASTER OF THE ROLLS.—You may take the order, serving a copy through the post-office.

MOORE v. MARSH.—Nov. 21.

Injunction—Care-taker—Refusal to give up Possession.

Where a person was put into possession of a gate-house as care-taker, and, after several years, refused to deliver possession to the owner. Held that a bill for an injunction will lie.

The bill was filed for an injunction to put the plaintiff in possession of a gate-house occupied by the defendant, and stated that in the year 1819, Daniel Moore, deceased, hired the defendant as a servant, and put him into the gate-house as care-taker, and that the defendant never was a tenant; that Daniel Moore by his will demised the beneficial interest in the premises to H. Moore, with the remainder to Wm. Moore. That after the decease of the testator, probate was granted to William Moore and Robert Molyneux. That William Moore, as executor, paid the defendant his wages up to February, 1848, and also gave him a gratuity. That William Moore discharged Marsh, but did not require him to give up possession of the gate-house. That in August, 1848, an agreement had been entered into with a Mr. Belas for an assignment of the premises, including the gate-house, that Mr. Belas called upon Molyneux to give him possession, which was demanded from Marsh, but refused. That Marsh threatened to resist any attempt to remove him by force. That plaintiff was reluctant to assert his right to take possession, as it might lead to a breach of the peace.

Martley, Q. C.—This is a case in which this court should exercise its authority. *Biddulph v. Molloy*, (2 I. E. R. 228); *Sherrock v. Chartres*, in note to *Biddulph v. Molloy*; *Edgeworth v. Edgeworth*, (2 Bro. P. C. 27, Tomlin's ed.; Furlong, L. & T. 210. (Master of the Rolls—The passage referred to is that of the determination of a tenancy; in the present case there never was any tenancy. I wish to know has this proceeding ever been applied to a case of lawful entry and forcible detainer, where the relationship of landlord and tenant does not exist.) In the case of *Biddulph v. Molloy*, the tenancy had determined, that was a case of forcible

detainer, and the relationship of landlord and tenant did not then subsist, and it cannot make any difference whether the original possession is lawful or not. This is a proper case for an absolute order.

MASTER OF THE ROLLS.—In Howard's Equity Exchequer, it is laid down, p. 318, "If a defendant refuse to give possession, the plaintiff shall, upon affidavit of service of the injunction and of the detaining the possession, have an injunction to the sheriff, except the defendant will justify his right to the possession." I will make the order in the terms of *Biddulph v. Molloy*, and will grant a conditional order, to be made absolute unless cause shewn.

CALLAGHAN v. CALLAGHAN.—Nov. 27.

Receiver—Ejectment—Leave of the Court.

Where an ejectment was brought against lands over which a receiver had been appointed, upon application to the Court the proceedings will be stayed, and, in every such case, leave of the Court to bring an ejectment should be obtained; and, if the receiver has funds in hands, he will be compelled to pay the costs incurred by non-payment of the rent.

This was an application on behalf of Walter Morrogh, the receiver in the cause of *Callaghan v. Callaghan*, that the proceedings by ejectment, brought by J. Hunt, the receiver in the causes of *Gage v. Ld. Audley*, and *Nelligan v. Ld. Audley*, for non-payment of rent, should be stayed, the said Walter Morrogh undertaking to pay one year's rent, inasmuch as said ejectment was brought without any formal demand for the rent, and also without leave of the court.

It appeared that in May, 1848, W. Morrogh, who had been appointed receiver in the cause of *Callaghan v. Callaghan*, was extended over the lands of Castlehaven, against which the ejectment had been brought, and the rent of which was payable to Mr. Hunt, the receiver in the cause of *Gage v. Ld. Audley*, and *Nelligan v. Ld. Audley*, upon the passing of his account in the month of May, 1848, there being a large arrear due upon this estate, the Master refused to allow Mr. Hunt poundage. Shortly after this, Mr. Hunt caused a statement of facts to be laid before the Master, who directed an amended statement to be filed at the receiver's expense, which was accordingly done on the 24th of June, and the Master, by his report, directed ejectments for non-payment of rent to be brought against the lands.

Brewster, Q. C., with whom was *R. Deasey*, now moved to have these proceedings stayed, the leave of the court not having been obtained, and relied on the cases of *Cocker v. Tempest*, (7 M. & W. 502); *Jefferies v. Sheppard*, (3 B. & Ald. 696). There should have been a demand, *McIntosh v. Haydon*, (R. & M. 363).

Hughes, Q. C., and *Hunt, contra.*—The case of *Townshend v. Somerville*, (1 Hogan 99) decides that an application need not be made to the court for liberty to proceed in ejectment proceedings until the *habere* is about to be executed.

MASTER OF THE ROLLS.—I have a clear authority to deal with this case. Even if the case of

Townshend v. Somerville, in Hogan's Reports, be law, the parties were not aware, at the time the ejectment was brought, that there was a receiver under this Court, and it is a fair principle that an application should be made for liberty to bring the ejectment, for the Court will direct the receiver to pay off the rent, and, if it appears that at the time the ejectment was brought, he had funds in his hands, will compel him to pay the costs. I do not go so far as to hold that a landlord is to be tied up if there are no funds, nor do I apply the very technical principle of issuing an attachment in every case where proceedings are instituted without leave. It does not appear there was misconduct on the part of any one in the case before me, as, from the circumstances of the estate, and the time of his appointment, it could not be supposed that the receiver had sufficient funds for payment of the head landlord; and an order was made by the Master in the case of *Nelligan v. Lord Audley*, directing proceedings by ejectment to be taken. If this report of the Master had been copied and forwarded to Mr. Morrogh, the result would have been, that, in a month or six weeks, Mr. Hunt would most probably have had his rent paid, and the expense of these ejectments avoided. This was an error on the part of Mr. Hunt, who appears, however, to have acted most fairly in the discharge of his duty as receiver since the year 1833. Nothing can more strongly illustrate the necessity of not depending on conversations in matters of business; for Mr. Morrogh states he received no intimation of the Master's order, while Mr. Hunt states that he apprised him of it; if a notice had been served this would have been avoided. I have full power to deal with this case, and I consider that the leave of the Court should have been obtained. If a party serves ejectments, and wantonly incurs costs, I will make him pay them, and, if I had the slightest idea that these proceedings were instituted for the purpose of incurring costs, I would make Mr. Hunt pay every farthing of them. However, he was bound to comply with the Master's directions, he was in a manner under pressure, I do not wish therefore to visit him with the consequences of a mere error of judgment. I would not be justified, however, in throwing these costs upon the funds in the cause of *Callaghan v. Callaghan*, and Mr. Morrogh was quite right in making this application. I will direct the proceedings to be stayed, with costs, and that Mr. Hunt shall have credit for the costs in passing his account.

BRIDGE v. EGAN—Dec. 2.

Sale—Plaintiff—Liberty to bid—Carriage of Decree.

Upon a sale under a decree, plaintiff was allowed to bid, and also to retain the carriage of the proceedings; the only other solicitor in the cause having upon a former sale raised objections to the title, and obtained a purchaser's discharge.

This was an application on behalf of the plaintiff that he might be at liberty to bid for the land set up to be sold in this cause, without prejudice to an order bearing date the 26th day of Nov. 1846,

by which the carriage of the proceedings was restored to the plaintiff's solicitor.

Drury.—On the 6th of May, 1846, there was an order made in this cause giving liberty to the plaintiff to bid, and directing that the carriage of the proceedings should be transferred to John Hunt, solicitor for the defendant Egan. After the lands were sold, Mr. Hunt raised objections to the title, and the purchaser was discharged. The carriage of the proceedings was then taken from Hunt, and restored to the plaintiff, who, in order to remove the objections, filed a bill, and obtained a decree, under which the lands were again set up to be sold. The plaintiff is the only creditor, and the only other solicitor in the cause except the one acting for the receiver, was concerned for the former purchaser, and, by raising objections to the title, caused considerable expense to the estate.

MASTER OF THE ROLLS.—Under these circumstances I will make the order.

QUEEN'S BENCH.—MICHAELMAS TERM.

HOPKINS v. MURRAY—Nov. 15.

Action on the Case—Breach of Duty—Liability of Assignee.

H., a lessee of certain premises, assigned her interest to D., who assigned to M. In neither of these deeds was there a covenant to pay the rent. M., while in possession, suffered a year's rent to be in arrear. B., the lessor, recovered this rent from H. in an action of covenant. H. subsequently brought an action on the case against M., founded upon a breach of duty; Held that H. was entitled to recover from M., in this form of action, the rent which she had paid to B.

DECLARATION stated, that before the committing of the grievances thereafter mentioned, to wit, on the 26th April, 1828, at, &c., by an indenture made between John Blennerhassett, of the one part, and the plaintiff of the other part, certain premises therein described were demised to the plaintiff, her heirs and assigns, for the lives of three persons therein named, two of whom were then in being; at the yearly rent of £105; and the plaintiff thereby, for herself, her heirs and assigns, covenanted to pay the said reserved yearly rent on the days and times therein appointed for the payment thereof, of all which the defendant had notice. The declaration then proceeded to say, that the plaintiff being so seized of the said premises, afterwards, and before the committing of the grievances by the said defendant, as thereafter mentioned, to wit, on the day and year last aforesaid, at, &c., at the request of the defendant, all the estate and interest of the plaintiff of and in the demised premises, with the appurtenances, was duly assigned to the defendant, to hold to the defendant, his heirs and assigns, from thenceforth for and during the said term of three lives, subject to the rents reserved by the said indenture of release, and to the performance of the covenants therein contained on the part and behalf of the plaintiff, her heirs and assigns. By virtue of which assignment the defendant entered into and used the said demised premises, and was seized thereof for the said

term, and continued so seized thereof for a long space of time, to wit, from thence until the 1st April, 1848, to wit, at, &c., whereupon it then and there became and was the duty of the defendant, as such assignee of the said demised premises, from the time of the assignment thereof to pay the rent and perform the covenants in the said indenture contained, on the part of the plaintiff, her heirs and assigns, to be paid and performed for and during so long a period during the said term as he, the defendant, should remain seized of the demised premises, as such assignee, as aforesaid. Nevertheless, the plaintiff says that the defendant, not regarding his said duty in that behalf, but contriving, &c., to injure the plaintiff in this behalf, did not, nor would after he became seized of the said demised premises, and after the time of the assignment thereof to him, and during the time he remained seized of the said demised premises, as such assignee thereof, and during the said two subsisting lives, pay the rent received, by and perform the covenants contained in the said indenture of release on the part of the plaintiff, her heirs and assigns, as aforesaid; but, on the contrary thereof, hath hitherto wholly neglected and refused so to do, and hath permitted a large sum of money, to wit, the sum of £105, being one year's rent of said premises due and ending on the 1st November, 1847, to remain due and unpaid, contrary to the said covenant. The declaration then proceeded as follows:—By reason whereof, and of the said breach of covenant, the said John Blennerhassett, in Michaelmas Term, in the 11th year of the reign of her present Majesty, in the Court of Exchequer, impleaded the plaintiff in a plea of breach of covenant for the damages sustained on the occasion of such breach of covenant, as aforesaid; and such proceedings were thereupon had in the said action, that afterwards in Hilary Term, in the 11th year of our lady the now Queen, it was by the said court considered that the said John Blennerhassett should recover, and the said John Blennerhassett recovered against the plaintiff £128 19s. for his damages, as well by reason of the said breach of covenant as for his costs and charges about his suit in that behalf expended. By means of all which said several premises the plaintiff was forced and obliged to pay, and afterwards, to wit, on, &c., at, &c., did actually pay the said sum of £128 19s., so recovered against her, as aforesaid, and was necessarily put to and incurred certain costs and charges, amounting to £21 9s. 8d., in and about her defence in the said action at, &c., of all which the defendant had notice, to the plaintiff's damage of £200. Plea—Not guilty. At the trial before the Lord Chief Justice, at the sittings after Trinity Term, 1848, the plaintiff, after proving the original lease, gave in evidence a deed of assignment from the plaintiff to one Daniel, dated the 29th April, 1828, and an assignment from Daniel to the defendant, dated the 10th June, 1828. In neither of these deeds was there a covenant to pay the rent. The plaintiff also examined John Blennerhassett, who proved the defendant to have been in possession, and to have paid rent. The defendant's counsel then objected that the plaintiff had failed to shew

any right to maintain this form of action, and called for a nonsuit.

The CHIEF JUSTICE declined to nonsuit, and directed the jury to find for the plaintiff for £150, with leave to the defendant to move to enter a nonsuit, or to reduce the amount of the verdict to £96 16s.

On a former day in this term, Martley obtained a rule Nisi, pursuant to the leave reserved at the trial; against which,

Tomb, Q.C., and *Macdonough, Q.C.*, now shewed cause. The case of *Burnett v. Lynch* (5 B. & C. 589) establishes the principle upon which an action on the case lies. Abbott, C. J., when delivering judgment in that case, says:—"I think that a duty did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants, and that as a breach of that duty has been committed, a special action on the case may be maintained;" and in a previous part of the same judgment he says, "It is true the defendant entered into no express covenant, or contract, that he would pay the rent and perform the covenants, but he accepted the assignment subject to the performance of the covenants." In *Humble v. Langston* (7 M. & W. 530), Parke, B., says:—"The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land; and the lessee is also liable, in the nature of a surety as between himself and the assignee, for the performance of the same covenants, during the continuance of his interest as assignee; the consequence is, that a duty is imposed on the assignee, at common law, to perform the covenants during that time, for which an action on the case will lie." This duty arises from the relation between the parties, for the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor is the principal, bound, whilst he is assignee, to pay the rent and perform the covenants running with the estate; and the surety, after paying the debt and discharging the obligation to which he is liable, has his remedy over against the principal, *Wolveridge v. Steward* (3 Tyrw. 658; 3 M. & Sc. 561). There is here a privity of contract, but we are not obliged to argue the case in that point of view, for the defendant is liable, if he undertakes a duty, to perform it: the action is founded, not upon a contract, but upon a duty (see the cases collected in *Fur. L. & T.* 482). The verdict is for rent and the costs of a demurrer, but we seek to sustain it only for the amount of the rent.

Martley, Q.C., and *Close* for the defendant.—We admit that unless we can distinguish this case from *Burnett v. Lynch*, the plaintiff must succeed. That case, however, is put distinctly on the ground of a duty arising from privity of contract whereas here there is not a suggestion that there is either privity of contract, or privity of estate. *Burnett v. Lynch* was the case of assignor and assignee; there was there an assignment of the estate, and that interest passed to the assignee, subject to the payment of the rent; he had induced the mind of the assignor to believe that he would pay the rent. There can be no liability on the part of the assignee, unless

it rests on contract, and no principle has been shown to the court why the remote assignee should be held liable. (*Blackburne, C. J.*—The second assignee is legally liable to the head landlord, and, upon his default, the lessee becomes liable; in equity and justice the principal debtor is the assignee, he is primary liable.) The declaration only states an assignment from the plaintiff to the defendant. (*Moore, J.*—The point for argument is, whether, admitting the authority of *Burnett v. Lynch* to be law, as respects lessee and his immediate assignee, it applies to a remote assignee.) *Burnett v. Lynch* is founded upon contract, and not upon a duty; there was an understanding between the parties at the time they entered into it, it was a legal contract, and the assignee was liable during the time he had the legal estate. None of these ingredients exist in the case now before the court. The decision in *Wolveridge v. Steward*, was reversed in the Court of Exchequer Chamber. (1 Cr. & M. 645). [The following cases were cited in the course of the argument—*Mayor v. Steward*, (4 Burr. 2440); *Keppell v. Bailey*, (2 M. & K. 517); *Atkins v. Sealy*, (Al. & N. 359); *Grattan v. Diggles*, (4 Taunt. 766).]

MacDonough, Q. C. in reply, was directed to confine himself to the form of the action.—It was competent for the plaintiff to have declared either in tort or assumpsit, and to have described her cause of action either as founded on a breach of duty, or on a breach of promise implied by law from that duty. The assignee in possession is liable to the head landlord, and the lessee, if compelled to pay the rent, may recover it back from the assignee in an action of assumpsit for money paid to his use. *Stone v. Evans* (Peake's Add. Cas. 94). In *Mazzetti v. Williams*, (1 B. & Ad. 424,) Lord Tenterden, C. J. says, "The plaintiff in *Burnett v. Lynch* might have declared as for a breach of contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit," and Taunton, J. at page 426 of the same case, observes—"The form of the declaration, whether it be in tort or assumpsit, makes no substantial difference, nor can it be any real ground of distinction whether the foundation of the action be an express or an implied assumpsit." In *Burnett v. Lynch*, Littledale, J., remarks—"Where from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequent damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action."

He was stopped by the Court.

BLACKBURNE, C. J.—This is an action on the case brought by the plaintiff to recover damages from the defendant for his breach of duty in not paying the rent reserved in the lease, and which the plaintiff in consequence was obliged to pay. The facts of the case may be explained in a few words. The plaintiff assigned all her interest in the premises to a person, who assigned to the defendant, and in neither of these assignments is there any covenant which would give a remedy for the breach now before the court. What then is the state of these parties? The defendant occupied the premises,

and was legally bound to pay the rent; it was emphatically his duty to do so, his interest was a beneficial one, and he ought to be liable to the burthens. The plaintiff was also liable, though deriving no enjoyment from the possession of the premises; both were liable upon one and the same covenant; the plaintiff was liable, because she had contracted under seal; the defendant was liable in point of law, he was also liable in point of conscience and duty. The case is similar in principle to that of joint obligors in a bond where they have equally received the money, and each can bring an action for the money paid for the use of the other, if the entire has been paid by one; they are both liable upon the same contract, and for the same amount, and each is circumstanced precisely as the parties now before the court. The only question remaining for consideration is, had the plaintiff a right to recover the money which she paid by compulsion, in this form of action, or ought she to have sued the defendant for money paid to his use, and *Burnett v. Lynch* is an authority to shew, it is optional with the party either to sue upon the implied assumpsit, or for the breach of duty.

CRAMPTON, J.—This is an extremely clear case. The action is not founded upon a contract express, but upon a breach of duty—a duty to exonerate the lessee under whom the party derives, and if *Burnett v. Lynch* be law, it rules the present case. The only distinction attempted to be made, and for which no foundation exists, was, that the action in *Burnett v. Lynch* was against the first assignee, whereas here it is against the second. The authorities referred to by Mr. MacDonough remove all difficulty; and establish that the party has open to him the alternative to sue in assumpsit or in tort; and it may further be collected from them, that an action on the case, founded on a breach of duty, is more proper than an action of assumpsit, founded upon the breach of a supposed promise.

PERRIN and MOORE, J. J., concurred.

Rule discharged.

COMMON PLEAS—Nov. 25.

WATERS v. LIDWELL.

Practice—Plaintiff in Error—Costs—

1 Geo. 4, c. 68.

A Plaintiff in error, who was plaintiff below, cannot be compelled to give security for costs.

This was an application to quash a rule obtained by the defendant in error, that the plaintiff in error should give bail in error.

S. B. Miller, for the plaintiff in error, contended that the statute, 1 Geo. 4, c. 68, s. 8, did not contemplate the case of a plaintiff in error who had been plaintiff below. That the words of the statute were "that no execution shall be stayed, &c., unless plaintiff in error shall be first bound by recognizance, &c., to satisfy and pay if such judgment shall be affirmed, the debt, damages, and costs clearly meaning the defendant below only, as these words could not apply to the plaintiff below, against whom costs only are awarded. He cited *Stephenson v. Higginson*, (Bl. D. & O. 37).

Molesworth contra.—The plaintiff in error ought to give security for costs. There is a direct conflict between the Courts of Queen's Bench and Exchequer on this point, and the question is, which should be followed. In the case of *Dawson v. M'Entyre*, (3 Ir. Law Rep. 443,) the Court of Queen's Bench decided that plaintiff in error, having been plaintiff below, should give security for costs. The case of *Stephenson v. Higginson*, in the Exchequer, was decided on the authority of *O'Connell v. Mansfield*, said to have been decided in this Court but not reported, and of some English cases. I have spoken to all the counsel engaged in *O'Connell v. Mansfield*, and they have informed me that the point was not decided in that case. As to the English cases, they were decided on the words of the English statute, 3 Jac. 1, c. 8, which is different in its terms from the Irish act, as remarked by Perrin, J. in *Dawson v. M'Entyre*. In the English act there is a preamble which states as the reason for passing the act, the delay occasioned in recovering debts, and is only conversant with delay of debts, and that may be very well held to apply only to the case of defendant below being plaintiff in error, but the language of the Irish act is general, "no execution shall be stayed by any writ of error in any case whatsoever, unless the plaintiff in error," &c., and Burton, J. mainly relies on that in *Dawson v. M'Entyre*. As to the argument derived from the combination of words "debt, damages, and costs," by adopting that the Court would be driven to exclude from the operation of the statute all actions of tort, and many actions of contract, where damages only are given, and that consequently, even with respect to defendants below being plaintiffs in error; no security for costs could be claimed unless "debt, damages, and costs" had been awarded against them. Those words, therefore, must be construed to mean debt, damages, or costs, according to the nature of the case.

PER CURIAM.—On the authority of *Stephenson v. Higginson*, we will quash the rule for bail in error, but as there has been a conflict of authority, we will give no costs.

Motion granted.*

EXCHEQUER OF PLEAS.—Nov. 24-25.

DE LA COUR v. MURPHY.

Suggestion of Breaches, 3 Wm. 3, c. 9, s. 8—*Effect of Clause in Warrant of Attorney to Contravene Statute.*

A warrant of attorney contained the following clause:—"It shall be lawful to and for the said R. D., his heirs, executors, administrators, or assigns, to issue one or more execution, or executions, upon the judgment, or judgments, to be entered upon these presents, for so much money as shall remain uncollected, or unpaid, to the said R. D., by the said defendant, without filing a suggestion of breaches, or taking any other or further legal proceedings to obtain such execution, or executions, further than the judgment, or the judgments, to be entered up as aforesaid."

* See Nugent v. Watters, ante p. 35.

The court refused to give effect to this stipulation, and set aside an execution issued on this judgment, without a suggestion of breaches as required by 3 Wm. 3, c. 9, s. 8.

THE facts of this case were as follows: the defendant having been appointed a deputy barony cess collector in the county of Cork, had, with his sureties, passed the usual bond with warrant of attorney, duly to collect the rates and to account with the plaintiff. The bond was conditioned that the defendant should well and faithfully collect all such public money as he should, by the warrant of the plaintiff, be authorized and required from time to time, to collect in said barony and pay the same to the plaintiff weekly, and every week as he should collect the same, and complete each and every of such collections, and pay the full amount thereof, and of each of them, to the plaintiff, at, &c., one week before the first day of each ensuing assizes. The warrant of attorney contained the following clause, on which the present question turned:—"That it shall and may be lawful to and for the plaintiff, his heirs, executors, administrators, or assigns, to issue one or more execution, or executions, upon the judgment, or judgments, to be entered upon these presents for so much money as shall remain uncollected or unpaid to the plaintiff, by the defendant, without filing a suggestion of breaches, or taking any other or further legal proceedings to obtain such execution, or executions, further than the judgment, or the judgments, to be entered up as aforesaid." The plaintiff, in accordance with this authority, issued an execution upon the judgment entered on the bond and warrant, without suggesting breaches.

Joshua Clarke now moved, on behalf of the defendant, to set aside the execution and subsequent proceedings, on the ground that there was no suggestion of breaches, as required by the 3 Wm. 3, c. 9, sec. 8. It is quite settled now, that a judgment entered on a bond and warrant of attorney is within the 3 Wm. 3, c. 9, s. 8, and breaches must be suggested, *Stratton v. Codd* (9 Ir. L. Rep. 1). This statute has been held peremptory and remedial, and passed for the benefit of the defendant. (*Lefroy, B.*—The object of the statute was to enable the obligee to issue executions *toties quoties*, and if you issue only one execution under the proviso in the warrant, the judgment would be satisfied.) The case of *Hurst & others v. Jennings* (5 B. & C. 650) is analogous to the present one. It has been also held that the parties cannot, by express agreement, dispense with the legal obligation to issue a *scire facias*, *Heath v. Brindley*, (2 A. & E. 365). This statute is for the benefit of defendants, as previously to its enactment, the practice was to issue execution for the entire amount of the judgment.

Leahy, contra.—This statute is for the benefit of the plaintiff, to enable him to issue successive executions, according as there are breaches. The clause here is frequently inserted in warrants of attorney (9 Bythewood 567). The case of *Hurst v. Jennings* does not apply; the authority to dispense with a *scire facias* being by deed and not by the warrant. Besides, the contrary was decided in *Morris v. Jones* (2 B. & C. 242); S. C. 3 D. &

Ry. 603; counsel also cited *Gorman v. Hinks* (Batty, 527).

Clarke, in reply.—It is quite settled that this statute is compulsory, though the term *may* is used instead of *shall*, *Roles v. Rosewell* (5 T. R. 538); *Hardy v. Bern* (ibid. 636). (*Pennefather, B.*—The question is, assuming the act to have been passed for the benefit of the defendant, has he, by his own contract, waived that benefit? Suppose that after judgment obtained, a defendant were to consent to have execution issued for a given sum, would this covenant be such as the court could not give effect to? If the execution were a mere irregularity, it might be waived; but it seems to me to be something more.) This court has set aside a plea of confession, no writ having been issued, such practice being against public policy. (*Pennefather, B.*—That decision went on the grounds that such a plea of confession amounted to a *cognovit*, and required to be attested by an attorney, under 3 & 4 Vict. c. 105. Since the passing of the statute of William, the act of 6th Anne, c. 7, s. 1, became law, requiring the plaintiff to mark the execution with the sum due, and in default thereof, subjecting him to heavy penalties. That statute obviates the mischief contemplated by the act of William, and removes many of the difficulties; and if the 6th of Anne were law in England, it might, perhaps, supply an answer to the reasoning of Judges Buller and Kenyon, in the case of *Roles v. Rosewell*.) The statute of William must be construed as if the question were raised immediately after its enactment. In mortgages, where the right of redemption has been barred by the contract of the parties, even a Court of Equity has refused to give effect to the agreement, as contravening public policy. Such as agreements to dispense with the taxation of costs.

Curr. adv. vult.

Nov. 25—Pigot, C. B.—The point upon which his application exclusively rests, is, that the warrant of attorney, on which judgment has been entered, contains a provision that the plaintiff in the judgment, should be at liberty to issue execution for so much money as was uncollected, or unpaid, without filing any suggestion of breaches, pursuant to the 3 Wm. 3, c. 9, s. 8. The condition of the bond is, to perform two duties; first, duly to collect the county cess, and secondly, to pay it over when collected; and the question shortly is, can the stipulation in the warrant of attorney operate to take away the effect of the statute? It has been decided ever since the case of *Roles v. Rosewell*, that notwithstanding the terms of it, this statute must, according to the plain intention of the legislature, be treated as mandatory; and that it is not merely discretionary with, but compulsory on the plaintiff to suggest breaches. The Judges to whom the case of *Hardy v. Bern* (5 Term Reports, 636) was referred by the Lord Chancellor, take the following view of the act:—"It is apparent to us that the law was made in favour of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what was in conscience due; and also to take away the necessity of proceedings in Equity

to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only had accrued. We are of opinion that it is not in the power of the plaintiff to refuse to proceed according to that statute, in cases within the provisions of the section we have been referred to, but that he must assign the breach of the covenants for which he proceeds to recover satisfaction. And if the defendant plead to issue, and the cause goes to a jury for trial, the jury upon trial for such cause must assess damages for such of the breaches assigned as the plaintiff, upon the trial of the issues, shall prove to have been broken." If the case rested here, I should be of opinion that the words of the act being mandatory, and framed for the benefit of defendants, its policy must be taken to have been, to impose an obligation on the parties which they could not, by any act of theirs, evade. The legislature seems to have thought that it was not advisable for parties to be compelled to resort to a court of Equity, and accordingly instituted a mode of proceeding which did not previously exist; and the legislature having directed this mode of proceeding by obligatory words, those words must be complied with. The Court of King's Bench applied this principle in the case of *Hardy v. Bern*. The case of *Hurst v. Jennings* (5 B. & C. 650) was one of a bond and deed collateral. The latter recited the bond, and contained a stipulation that it would be lawful for the plaintiffs to commence an action upon the bond, and proceed to judgment thereon, whenever they should think fit, and that they should be at liberty at any time, according to their will and pleasure, to issue one or more execution, or executions, upon the judgment, as they might be advised. It appears to me that the contract by which the defendant consented that the plaintiff should issue executions at their own will and pleasure, amounts to the present case; for, if the plaintiffs might have issued executions at their will and pleasure, they might clearly have done so under the terms of the contract, without any suggestion of breaches. The application to set aside the execution was granted in that case, on the ground of the contract being an evasion of the statute. And Abbott, C. J. there observes—"This is a contrivance to defeat another wholesome statute, namely, 8 & 9 Wm. 3, c. 11 (English Act), which requires the assignment of breaches in actions upon bonds conditioned for the performance of covenants and agreements." And Littledale, J. in giving judgment, says—"If this case does not fall within the words of the statute of William, still it is an evasion, and the court has power to set aside the execution on that ground." If, then, the proceedings were set aside there as being an evasion of the act of parliament, this is a much stronger case, as here is a document expressly avoiding the statute and in direct violation of it. But it is said that the present question is analogous to that raised in the case of *Morris v. Jones* (3 D. & R. 603) where it was held that an execution might issue on a judgment after a year and a day without revivor by *scire facias*, when the warrant of attorney contains a stipulation to that effect. The report of that case does not give the judgment at any length, but the difference between it and the present is

plainly indicated in subsequent authorities. The distinction is that the statute of Westminster was rather in aid of plaintiffs than defendants. Thus in *Hiscocks v. Kemp* (3 A. & E. 676) the court deal with the objection as to issuing executions without a *scire facias*; but they do not there decide that it was competent to the parties by agreement to violate the act, but they refer to the terms of it, and put upon it a construction precisely the opposite of that which the statute of William has received, namely, that the statute of Westminster was for the benefit of plaintiffs rather than defendants. It has been also suggested in the course of the argument that by the 6th of Anne the plaintiff was bound, at his peril, to indorse the amount claimed on the back of the execution, and that therefore the statute of William is no longer so necessary for the protection of the defendant as it was originally found; but, besides that, the statute of Anne was passed subsequently to that of William, and consequently cannot affect the construction to be put upon the latter; it does not afford any means of ascertaining the amount of the executions in the present instance, as the bond is here conditioned for the due collection of the cess, the necessity for ascertaining, by a verdict of the jury, the breaches on which plaintiff relies, exists here. The mischief guarded against by the statute was the hardship of seizing goods, or issuing a *ca. sa.*, without any means being afforded of ascertaining the extent of the plaintiff's demand. That the defendant here might resort to a court of Equity is quite plain; to obviate the necessity for which was the main object of the statute, and this case appears to be as much within the mischief as if the contract in question had been entered into immediately after the statute of William, and before that of Anne.

PENNEFATHER, B.—I fully concur with my Lord Chief Baron. The nature of the security, and its object, have been fully considered; and, however great the inconvenience which may arise from the necessity to assign breaches in the present case, we must decide the question upon the general principles of law. The condition of the bond here is, not merely to pay over the sums collected, but also to collect the cess with due diligence; and the breach complained of may be the non-collection, and thus the damages be very uncertain. Therefore, whatever inconvenience might have been removed by the statute of Anne, in cases where the bond is conditioned for payment of money, and the obligor knows whether the execution is overmarked or not, that statute does not remedy the inconvenience, where, as in the present case, the damages are unascertained. For my own part, I should doubt very much if the statute of Anne does not go far to vary the effect of that of William; but that case is not now before us, and therefore it is not necessary to pronounce any opinion upon it; but I quite agree that in the present instance the proceedings ought to be set aside.

RICHARDS, B.—I concur in the judgment of the court. I will not say that this agreement had in it anything positively illegal. Such an arrangement as the present might, in many cases, be found extremely convenient and conducive to public advan-

tagement. There are many cases where subordinate officers are called upon to pass such bonds, and the necessity for filing a suggestion of breaches might create delay and difficulties in enforcing the remedies upon such judgments, and therefore I was at first disposed to struggle against holding an assignment of breaches necessary in this case; but, on more mature reflection, I have come to a different conclusion. If this were a dealing out of court, the parties might, perhaps, avail themselves of this arrangement; but where the plaintiff seeks to enforce his rights under the process of the court, it is not competent to him to rely on a previous arrangement to waive the act of Parliament by which such proceedings are regulated. To allow this, would be, in many cases, to open a door to oppression; because the plaintiff, by this arrangement, constitutes himself the arbiter of the amount of damages. But it is urged that a court of Equity is open to redress this grievance; but it has been held that one of the objects of this act was to prevent the necessity of resorting to an equitable tribunal; and if such a course were sanctioned, how great an opening would we be making for litigation; how impossible would it be to discharge the general business of the court if we were called upon to determine upon affidavit the extent of the breach committed and damages actually sustained.

LEFROY, B.—I concur in the judgment of the court. In my opinion, a defendant cannot bind himself to waive the provisions of this statute. There is a maxim of law—"Quilibet potest renunciare juri pro se introducto." That maxim, however, does not apply to cases of this species. Courts of law apply it to rules which confer a right upon parties, not to rules and laws which are intended to afford protection from the abuse of a privilege which the party has, in the first instance, been the means of giving. This statute has in view to protect a man from the consequences of his own act. The policy of the act is to guard against the oppressive use of a power which a party gives against himself when he enters into a penal bond. Courts of Equity act on this principle in cases of mortgages, where an attempt is made to bar the right of redemption by the agreement of the parties, and refuse to give effect to such a contract. So when the legislature has taken precautions to guard against the oppressive use of a power given by a party's own act, the court should not suffer him to contravene this act. This is not a *jus pro se introductum*. This contract would be one violating the principle of the act of Parliament, and a contract to violate the law cannot be a valid one. Besides this reasoning on principle, we have an authority almost precisely in point. As to the argument rested on the effect of the statute of 6 Anne, it does not appear to obviate the difficulty; for if the parties, by their contract, could evade the act of William, they could, on the same principle, by contract get out of the provisions of the act of Anne.

Motion granted without costs.

ROLLS COURT.

BISHOP OF DUBLIN, Plaintiff.—THOMAS, LORD TRIMLESTON, RICHARD FARRELL AND OTHERS, *Defendants.*—June 12.

BISHOP OF DUBLIN, Petitioner.—THOMAS, LORD TRIMLESTON, *Respondent.*—3 and 4 Vic. 105, sec. 27.

Decree against two for the payment of costs in joint and several, and the registering of such decree, under the 3d and 4th Vic. c. 105 sec. 27 as not alter its effect.

As a decree declared "that the defendants A and B should pay to the plaintiff his costs of the cause when taxed and ascertained." Held that the effect was not necessarily to establish contributions in moieties between the parties. But the proportion of contribution will depend upon the special circumstances of the case.

Objection.—Costs in Equity are not in the nature of damages but of a debt.

The case came before the court on a motion to set aside a decree against the appointment of a receiver of the defendant's lands, under the decree in the case of the *Archbishop of Dublin v. Lord Trimleston and others*. The bill in the cause had been to recover certain chief rents, payable out of the estates of Lord Trimleston, to the Archbishop of Dublin. The defendant, Richard Farrell, made a party as executor of the late John Thomas Lord Trimleston, (who had been tenant in life of the property in question) The final decree in the suit, was pronounced on the 9th of February, 1846, and declared, "that the defendants, Thomas Lord Trimleston and Richard Farrell, do pay to the Plaintiff his costs of this cause, when the same shall be taxed and ascertained." The costs were taxed and certified to the amount of £421 2s. The plaintiff demanded the whole of this sum from Lord Trimleston, the respondent. Lord Trimleston refused. The petitioner had obtained a conditional order for a receiver on the 22nd of February, under the provisions of the 27 s. of the 3 and 4 Vic. c. 105. The respondent, Lord Trimleston, served a notice on the petitioner, and Mr. Farrell, as counsel, submitting that the conditional order be discharged, on payment of one moiety by the said respondent, or that upon the respondent paying into court, or to the petitioner, the sum of £421 18s. 2d. the proceedings in the said petition might be stayed, and that Richard Farrell be directed forthwith to pay to the respondent one moiety of the petitioner's taxed costs in the cause, or that the respondent be at liberty to proceed in the name of the petitioner, as petitioner in the cause for the recovery of said moiety, against the defendant Richard Farrell.

Baldwin, Q.C. with Christian, Q.C. for Lord Trimleston, contended that as the decree was joint, and as Lord Trimleston had tendered his moiety, Mr. Farrell was clearly liable for the remainder, and cited (Beames on costs 117,) and (2 Fowler's Ex. 299.)

Radcliff, Q.C. with Gayer, Q.C. for the Archbishop. The Archbishop is not to be expected to take upon himself the apportionment of the costs, he having obtained a decree against both of the defendants for his costs. The decree in point of law

is a joint and several order to pay costs, *Ex parte Bishop* (8 Ves. 333; 3 Dan. C. P. 91); the plaintiff therefore may proceed for the whole against both or either.

Hughes, Q.C. with F. Walsh, and James Farrell for the defendant Richard Farrell. The present application on the part of Lord Trimleston against his co-defendant, Mr. Farrell, is unsustainable; in the first place, it seeks that Mr. Farrell should contribute a moiety. If Mr. Farrell is liable to contribute, that liability must be measured by his interest in the subject matter of the suit, and, also by the line of defence taken by him in the cause. The cases of contribution in Equity, proceed upon the assumption, that the parties stand in *equali jure*, *Hartley v. O'Flaherty*. (Lloyd Gould, T. P. 208). The interest of Mr. Farrell, is less than that of Lord Trimleston. In his fiduciary character he could not admit the plaintiff's right whilst contested by the principal defendant, but did not, with Lord Trimleston, file a discharge in the Master's Office, or take exceptions to the report. The right to contribution can only be enforced by a plenary suit, and not on an interlocutory application, where the court cannot look into the equities between the parties as to the amount of their respective contributions, *Ex parte Wilmshurst*, (1 Glyn. Jam. p. 4, confirmed an appeal Id. 244). In *Pitt v. Bonner*, (You. & Col. V.C. 670), contribution was decreed on the consent of the parties, but except on consent it can only be enforced by bill in Equity, or action at law. Another principle is, that costs in Equity are in the nature of damages, Lord Trimleston has no claim to enforce contribution *Corporation of Burford v. Lenthall*, (2 Atk. 551,) *Attorney-Gen. v. Wilson*, (1 Crn. & Phil. 1).

Christian, Q.C. in reply—The decree of the 9th February, 1846, gives the same relief against both, and costs against both; Mr. Farrell cannot be considered a mere nominal defendant, as his answer is similar to that of Lord Trimleston. The effect of the decree was to establish contributions between parties in moieties, and in such a case, a reference to the master is unnecessary. This is a petition for a receiver on foot of a joint decree, at law it was necessary that the execution and elegit should be joint; the same necessity arises in the case of a receiver, which is an equitable execution.

MASTER OF THE ROLLS.—I am of opinion the Archbishop is entitled to retain this receiver. There is no doubt that in respect of a joint judgment, proceedings must be taken against all parties liable, I will therefore, if pressed, give liberty to the petitioner to amend. With regard to the question whether a decree against two generally for the payment of costs, is to be considered on the same footing as a joint judgment, I find in (3 Daniel, c. p. 9) the case *ex parte Bishop* cited as establishing that such an order is joint and several, and that in a case where one party had absconded, proceedings against the other were held valid. If that be the nature of the decree previous to the passing of the 3 and 4 Vic. c. 105 s. 27, which gives decrees the effect of judgments, I am of opinion that the act does not alter the nature of the decrees, but that the proceedings given thereby, must still be

consistent with the previous state of the law. I see no ground why Mr. Farrell should pay a moiety of these costs; although he may be liable to a portion, as Lord Trimleston was not beneficially entitled to the assets of the testator. I do not think that the principle of their being no contribution between wrong doers applies to the case of costs in equity, they are not in the nature of damages, but of a debt. With regard to the objection raised by Mr. Farrell, that Lord Trimleston could only obtain contribution by a plenary suit; it may be a matter for the consideration of his counsel, whether in the event of such a suit being instituted, Mr. Farrell would have to pay the costs if Lord Trimleston succeeded in recovering any sum. I will disallow the cause shown, and on the parties so desiring it, give a reference to the master, to report what are the respective proportions of the costs which ought to be paid by Lord Trimleston and Mr. Farrell respectively. The costs to be reserved till the return of the report.

LEECH v. MULLOY.—Nov. 24.

Receiver—Priority—Creditors—Trustee.

A trustee, having permitted his cestui que trust to remain in possession of the trust estate, was sued in an action of covenant by the landlord for rent due by the cestui que trust. Held, that the trustee was entitled to be repaid the amount of rent advanced by him, in priority to other creditors of the cestui que trust who had obtained a receiver over the trust estate.

This was an application that the receiver might be directed to pay to the trustee the sums advanced by him under the following circumstances. A person named Price, being a trustee of a leasehold estate, allowed his *cestui que trust* to remain in possession of the trust estate; the rent being unpaid, the landlord sued the trustee on the covenant in the lease, and who was in consequence obliged to pay the amount claimed. The *cestui que trust* having confessed several judgments, his creditors obtained a receiver over the leasehold interest.

Fitzgerald, F. applied that the receiver might be directed to pay to the trustee the sums advanced by him. The trustee was clearly liable on the covenant, and was entitled to recover from his *cestui que trust*, so he has an equal right against the creditors, for he must be considered as in the place of a trustee for them.

Ince, contra—Price cannot be considered as a trustee for the creditors, and, as such, claim in priority to their demands; he must be left to his remedy against his *cestui que trust*.

Nov. 25.—MASTER OF THE ROLLS—On considering this case, I think John Price, the trustee, was liable, under the covenant, to pay the rent due to the landlord; and there is a case, *1 Beavan 112, Close v. Wilberforce*, which shews that as between the trustee and his *cestui que trust*, the trustee has a right to be paid the amount advanced by him. Then the question arises as to priority between the trustee and the creditors of the *cestui que trust*. I do not think the creditors have a better equity,

the trustee has the legal title, and having at least an equal equity, I think that the receiver must pay the trustee in priority to the other creditors.

Some inaccuracies having crept into the reports of the cases of *Hillas v. Phillips*, and *Callaghan v. Callaghan*, decided in this court and reported in the last number, the orders in those cases are inserted reported.

It is the earnest desire of the Editors, and that of the gentlemen who favour them with reports, to be minutely accurate; the anxiety to be both concise, and rapid, unfortunately caused the present inadvertence, but the utmost vigilance shall be exercised to prevent any error in future. In the case of *Moore v. Marsh* it is right to observe that *his Honor*, although he granted the conditional order, expressed his desire that it should be understood he did so at the wish of the plaintiff, and in order that the question might be again, and guarded himself from deciding that such a bill was sustainable.

Callaghan v. Callaghan, Nov. 27.—Let Mr. Morgan, the receiver in the cause of *Callaghan v. Callaghan*, within ten days from the date of this order, pay to Mr. J. Hunt the receiver in *Gage v. Lord Audley* and *Nelligen v. Lord Audley*, the sum of £— being the amount of all rents due out of the lands of Castlehaven, to the 1st of Jan. 1848, after deducting the poor-rate, and thereupon let proceedings in the ejectment for non-payment of rent stay, without costs, and declare that said Mr. Morgan is entitled to his costs of the motion, as part of his costs in the said cause of *Callaghan v. Callaghan*, and declare that said J. Hunt the receiver, in the said cause of *Gage v. Lord Audley*, and *Nelligen v. Lord Audley*, is entitled to the costs properly and necessarily incurred in said ejectment proceedings, same having been taken under the directions of the Master, and also for his costs of appearing at this motion in said causes, in which he has been appointed receiver, and no rule on the rest of said motion.

Hillas v. Phillips, Nov. 17.—*Morgan* moved that the service already had be deemed good. *Court*—It is so, transmitting a copy of this order, directed to said Phillips, through the post office.

QUEEN'S BENCH.—MICHAELMAS TERM.

MARTIN IN ERROR v. THE QUEEN.—Nov. 12—18.

Indictment for felony, 11 & 12 Vic. c. 12—Form of Caption—Interest of Juror in goods of Felon.

Where the caption of the indictment stated that "it was presented on the oaths of good and lawful men of the county of the city, &c." omitting the words "sworn" and "charged." Held that the caption not being a pleading, this averment was sufficiently certain.

Held also, that it being stated in the caption that it was presented by "good and lawful men, &c." (naming twenty-three) was a sufficiently certain averment that the indictment was found by "twelve good," &c.

Held that an indictment need not state the printing and publications therein stated to be felonious, they being merely evidence of the felonious intent, and requiring no innuendo.

Where a corporation were entitled by grant to the chattels of felons convicted within their boroughs. Held that it was not a good ground of challenge that the juror was a burgess of the city, and interested in the goods of the felon, the goods being vested entirely in the Council on trust for the citizens.

Held also that it was not a good ground of chal-

lenge, that the juror being a rate-payer, and liable to be rated to the borough-rate, was interested in goods of the felon, inasmuch as this interest, depending on several contingencies, was too remote.

Sentence directing the prisoner to be transported beyond the seas, without specifying any place. Held good, the 30th Geo. 3, c. 32, vesting in the Lord Lieutenant the power of fixing the place of transportation.

The prisoner was indicted for felony under the 11 & 12 Vic. c. 12, at a commission of Oyer and Terminer, held at Dublin on the eighth of August, 1848. The caption was in the following form:—

“County of the City of Dublin to wit. Be it remembered that at an adjournment of a commission of Oyer and Terminer, and general gaol delivery, holden in and for the county of the city of Dublin, at the Sessions House, Green-street, in the said county of the city of Dublin, on Tuesday, the eighth day of August, 1848, in the twelfth year of the reign of our sovereign lady Queen Victoria, &c., before the right honourable Jeremiah Dunne, Lord Mayor of the city of Dublin, the Right Hon. David Richard Pigot, Chief Baron of her Majesty's Court of Exchequer, and the Hon. Richard Pennefather, one of the Barons of her Majesty's Court of Exchequer, &c. It is presented on the oath of good and lawful men of the body of the said county of the city of Dublin, whose names here follow (naming them) in manner and form following, that is to say”

The indictment consisted of fourteen counts. The first twelve stated at length the various articles which were alleged as overt acts in support of the felony.

The thirteenth count stated, that the said John Martin “feloniously did compass, imagine, invent, devise, and intend to depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom.”

The fourteenth stated that the said John Martin “feloniously did compass, imagine, invent, devise, and intend to levy war against our said lady the Queen, within that part of the United Kingdom called Ireland, in order, by force and constraint, to compel her to change her measures and counsels.”

Both these counts stated the intention to carry into effect these objects, by publishing divers printings in divers numbers of the *Felon* newspaper, but did not set forth the printings.

Plea—Not guilty.

When the jury were being sworn, the prisoner challenged William Duff, one of the jurors, because “he says that the city of Dublin hath been, from the time whereof the memory of man runneth not to the contrary, and now is, a body corporate; and that by a certain charter granted to the then Mayor and Commons of the said city of Dublin, by our late lord King Henry the Fifth, &c., the said King Henry the Fifth granted to the said Mayor and Commons of the said city of Dublin, that they, their heirs and successors, should have all and all manner of goods and chattels of felons and fugitives condemned and convicted within the said city of Dublin, and the liberties thereof,” &c.

To this challenge the crown demurred, joinder in demurrer, and judgment against the challenge. Verdict of guilty on all the counts.

Sentence—“That the said John Martin, for the said felony above specified and charged, be transported beyond the seas for the term of ten years from the eighth day of August.”

Error was brought on the judgment, and the following points were noted for argument:—

1st. That the caption of the indictment is bad, inasmuch as it does not appear thereby when or where the grand jury therein mentioned were sworn, or what jurisdiction they had to find said indictment; whereas it should have appeared by said caption that the said grand jury were sworn in the presence of the court, and were sworn and charged to inquire for our lady the Queen, and the body of the county of the city of Dublin; and that the caption is also defective, inasmuch as that it does not expressly aver that the indictment was found upon the oaths of twelve good and lawful men.

2nd. That the several counts in the indictment are bad for uncertainty, the two last counts for not setting forth the printings therein mentioned, and the other counts for not expressly averring that the printings published by the prisoner were “felonious” printings, expressive and declaratory of the previously charged compassing and imagining, and that they were published of and concerning her Majesty the Queen, and the crown and Government of the United Kingdom, “and” of and concerning some felonious or traitorous design then on foot, or intended to be taken; in fact, that the counts are bad on arrest of judgment, for not charging the publication of the printings with a “colloquium,” and an express averment that they imported the alleged compassings.

3rd. That the challenge to the juror, William Duff, was a good challenge, and should have been allowed.

4th. That the sentence of transportation here pronounced is bad, as it varied from the sentence of transportation prescribed by the statute introducing transportation as a punishment, and which requires a place not in Europe to be named by the court as the place to which the convict is to be transported.

Sir C. O’Loghlin and Holmes for the plaintiff in error. The objections in this case are fourfold; the first relates to the form of the caption of the indictment; the second to the indictment itself; the third, to the disallowance of the challenge to the juror; and the last, to the form of the sentence. As to the first objection, we contend that the caption should have gone on to shew that the grand jury were sworn in the presence of the court, and that they were sworn and charged to inquire for our lady the Queen, and the body of the county of the city of Dublin; and that the indictment was found by twelve lawful men of the city of Dublin. It should appear in the caption that the grand jury were sworn to inquire for the Queen and the body of the county (2 Hale, P. C. 167; 2 Hawk. Book 2, c. 25, s. 126; Anon. 1 Vent. 60); *Res v. Morris* (2 Keble, 671); *Res v. Halliday* (3 Salk. 187). We admit this objection would not be good if the

indictment was found in the Queen's Bench, but it is otherwise when found in an inferior jurisdiction, *Rex v. Farre* (1 Keble, 629). It ought to appear when and where the grand jury were sworn, *Davidson v. Moscrop* (2 East. 56); *Rex v. French* (2 Keble, 58-); *Rex v. Turnith* (1 Mod. 26). The words *jurati* and *onerati* may be intended at trials at Nisi Prius, but not so in indictments, *Rex v. Gakes* (1 Keble, 101). All the precedents in cases of high treason contain the words which we say are necessary, *Poster's Crown Law*, 4; *Hardy's case* (24 St. Tr. 231), *Stone's case* (25 St. Tr. 1158), *O'Connor's case* (26 St. Tr. 1202); *Frost's case*, 1839; *Weldon's case* (26 St. Tr. 230); *Rex v. Hinchy* (Batty, 512). As to the form of the indictment, we admit we are bound to shew that all the counts are bad, for if any one be good the judgment can be sustained. One objection applied to twelve out of the fourteen counts in the indictment, and the last two counts are clearly bad, being too general; the writings should have been set forth. Where words or writing form part of the *corpus delicti*, they ought to be set forth in the indictment, *Twine's case* (9 St. Tr. 819); *Zenobio v. Antell* (6 Term. R. 162); *Lloyd's case* (2 East. P. C. 1122); *Rex v. How*. (1 Strange, 699); *Rex v. Cheere* (4 B. & C. 902). Upon principle, the indictment should set forth the words; for unless they are, how could the party plead *autrefois acquit*. The 11 Vict. c. 12, expressly enacts that the words should be set forth in the informations, where a party is charged with open and advised speaking; and s. 7 provides, that if a party is indicted for treason, he can plead that he was tried for felony, and how could he do that unless the words were set forth? This statute has taken a clear distinction between open and advised speaking and other acts of high treason. The twelve first counts are bad. The true nature of the crime is the compassing to do certain acts, the doing so by certain acts, and the setting forth these compassings. The two first ingredients are expressed, but the third is wanting. No rule is more settled than that all the facts which constitute the crime should be set forth in the indictment. We contend that there should be the words "of and concerning our lady the Queen and the crown," &c. The word "felonious" ought to have been set forth to every material part of the offence, *Rex v. Nicholas* (7 Car. & P. 538); *Regina v. Green* (1 Cr. & Dix. C. C. 77). The printing here is part of the offence, and therefore it should have averred that the printing was felonious. The finding of a jury will not aid the matter, *Rex v. Knight*, (3 Salk, 186); judgment of Lord De Grey in *Rex v. Horne* (Cowp. 682); *Rex v. Marsden* (4 M. & Sel. 164). The crown will probably rely on 9 Geo. 4, c. 54, but that statute did not intend to deprive the defendant of a substantive objection, *Rex v. Martin* (8 Ad. & Ell. 681). The crime in high treason consists of the compassing, and therefore the writings need not be set forth, for they are the evidence. The challenge to the juror ought to have been allowed (3 Coke Litt. 459). The juror himself has no direct interest, because it is the corporation that is entitled, but we aver that the juror is a member of the corporation, and we shew that the corporation is by charter entitled

to the forfeiture of a felon's goods, and we further aver that the juror is liable to be rated to the borough rate. Where a corporation is party to a suit, or immediately interested in it, no member of it can be a witness, and any objection that goes to the competency of a witness is a good objection to him, as a juror. The law is more jealous as to jurors, and an objection considered too remote in the case of a witness, would not be considered so in the case of a juror. *Coldfield v. Wilson*, (1 Vern. 254); *Dowdeswell v. Nott*, (2 ibid. 317); *Hesketh v. Braddock*, (3 Burr. 1847). And what would be a good objection in a civil case, will be good in a criminal case. 2 *Hawk. P.C.c.* 43, & 3. This conviction could be used by the corporation as evidence against the crown. We shew that the corporation is interested in the property of the person, and therefore the juror who is a member of that corporation cannot be a witness or juror. At the time of the challenge the juror was liable to a borough-rate. The corporation have the power to levy a borough-rate whenever the borough fund is deficient. We shew that the juror had a direct personal interest in the conviction of the prisoner, because, if the borough fund should be insufficient, he is immediately liable to be rated. The goods of felons go to make up the borough fund, and the juror was therefore directly interested in the increase of the borough fund. A party may be a good witness in a case, though not a good juror. *Reg. v. Wills*, (6 Mod. 30ⁿ). Parties interested cannot be admitted as witnesses. *Att.-Gen. v. Wyburgh*, (1 P. W. 600); *Barret v. Stoak*, (1 Mod. 74); *Reg. v. Hornsey*, (10 Mod. 150); *Oranien v. Palmer*, (2 B. & Ad. 236). The sentence is bad, the court not having specified a particular place not in Europe. The Lord Lieutenant and council only possess the privilege of changing the place, when properly named; the court cannot add to, or diminish, the sentence appointed by the law. In England the sentence of transportation is general, and the place ought not to be named; *Rex v. Kenworthy*, (3 D. & Ry. 173); in Ireland, on the contrary, the sentence must indicate the place to which the prisoner was to be transported. The crown will rely on the 11 & 12 Vict. c. 78, which enables a court of error to pronounce a proper judgment, where an improper judgment was given below, but this statute cannot apply to cases where the judgment below was pronounced under a discretionary power. Section 5 only gives a power to pass a new sentence, not to amend the old one; this statute only applies to cases where but one sentence, and that a capital one, could have been pronounced. The act did not receive the royal assent until the 31st of August last, whereas the prisoner was tried and convicted on the 8th of August, and the writ of error was applied for, and allowed, previous to the 31st of August. The act has not a retrospective operation.

Perrin for the Crown.—The form of the caption of the indictment in this case is taken from that in *Weldon's case*, (26 St. Tr. 26). The caption states, "It is presented on the oath of good and lawful men of the city of Dublin." In the case of the *King v. Morgan*, (1 Ld. Raym. 710.) these words were made use of, and Holt, C. J., held there was

occasion for the words "*jurati et onerati*," and same was decided in the *Queen v. Gray*, (5 I.L.R. ; *The King v. Gray-Cox*, (Sir T. Jones, 180) ; *r. v. Ambler*, (2 Keble, 59) ; *Reg. v. O'Connell*, (7 I. 261) ; and in 1 Chitty Crim. Law, 834). It is said that the number of the grand jury who did the bill should be stated. In none of those was that done. It is also contended that it is not said that the jurors were sworn before the court, the *Queen v. O'Connell*, is decisive to show such an averment is not necessary. As to the acts of the indictment, the 13th and 14th are in *Thistlewood's case*, (33 St. Tr. 697 & 70) ; *dy's case*, *Emmet's case*, (2 St. Tr. 1098 and 1). *Thistlewood's case* was brought under the

Geo. 3, and the act, 11th & 12th Vic., on these proceedings are founded, is precisely the words of the former act. The 6th and 12th acts are framed similarly to those for high treason ; and those matters, which it is contended, should be stated in the indictment, are entirely the jury. The charge against the prisoner regarding the intention to depose the Queen, is plainly correct. The 9 Geo. 4, c. 54, ss. 31 and 32, make statements which follow the words of the act of indictment good and sufficient. (Cox. Ed. of act of protection of Crown and Government, note, p.

King v. Marsden, (4 Maul & Selwyn, 164). It is argued that the word "traitorous" not being stated before the word "printing," is a reason holding those counts to be bad where the intent charged is shewn by the printing, but none of the precedents are so, and the reason for introducing the entire of the articles is, that as each and every appeared to bear on the intent charged, it was possible to separate them. The next objection is the form of sentence, and the *Queen v. Cummins*, (1st Term, 1845,) was relied on as an authority, where the Chief Justice in giving judgment in that case, stated the ground for reversing the judgment was entirely the non-allowance of a peremptory challenge. The ground of error in the sentence in *May's case* was, that the sentence did not state that the party was transported to any place beyond the seas. 26 Geo. 3, c. 24, requires transportation to some place out of Europe, but that act is confined to the specific case of persons who take and keep forcible possession. The 30 Geo. 3, c. 32, enables the Lord Lieutenant of Ireland to fix the place to which the convict is to be sent. After sentence the Lord Lieutenant has the entire control of the prisoner. 58 Geo. 3, c. 70, and 5 Geo. 4, c. 84, were the statutes upon which the decision in *Cummins's case* was founded. The practice in England is different. The 5 Geo. 4, c. 84, directs that the court shall sentence the prisoner to be transported beyond the seas. If the argument of Sir C. O'Loughlen, that the judge must name the colony, but Lord Lieutenant may change the place, be well founded, the course of practice in Ireland for more than one hundred years, and the opinions of all the eminent judges who preceded must have been erroneous. The next objection, is the only one of any weight. We admit that a juror has any substantial interest in the conviction of the prisoners, it is a good ground of challenge ; but this juror had not any claim what-

soever to any of the goods of the prisoner. If the ground of challenge was good, neither a sheriff nor a juror could be found within the city of Dublin to try a felon, and since the time of Henry V. there has been no legal conviction. The challenge is defective in many respects. It states the charter was passed in the time of Henry V., but does not state the exact time. This was not a general grant of the goods of felons, but a grant of those goods within the city of Dublin. The court has judicial knowledge that the bounds of the city are altered since the time of this charter, and it is not averred the goods were within those ancient bounds, which, at that time, constituted the city. There is no allegation to show that this juror was a member of the same corporation—which might have been done by showing the succession—nor is there an allegation that the corporation created by the 3 & 4 Vic. c. 108, were ever entitled to, or received or used the goods forfeited under this charter. There is no allegation that the lord mayor or burgesses ever made use of this right, which is a necessary averment, inasmuch as if they have not done so, the right has been lost by non-usage. (Comyn's Dig. Franchise, G. 3, and Croke, James, 155,) show by non-usage of a fair, the right to hold it is lost. (*Moore, J.*—Should not the crown have replied non-usage ?) There should have been a plain averment of usage since the time of Henry V., and also, that the goods of the prisoner could not have veiled till after conviction. The challenge should show what description of goods Martin was possessed of ; for all the goods of the felon do not pass by this grant, but remain in the crown, and are *bona notabilia*. No direct interest is averred to have been in the juror in the goods of Martin, but merely one contingent on the failure of the borough fund. And could it be said that an interest so much subdivided was one to weigh with the juror (Viner's Abr. Trial, G. F. Leech's Crown Cases, 132).

Holmes in reply.

Monahan, Att.-G., in general reply. No grounds exist for the objections urged against the caption ; the court before whom the prisoner was tried, was held by her Majesty's letters-patent, directed to the judges of her high courts of law, and was not one of inferior jurisdiction. The caption shewed that a session of Oyer and Terminer had been held in the city of Dublin, that the commissioners were judges of the superior courts, and that an inquisition was presented on oath by twelve good and lawful men of the county of the city of Dublin. The words "present on their oath," rendered it unnecessary to say that the jury were sworn and charged. In some of the cases relied on by the counsel for the prisoner, the word "sworn" was held to be sufficient, and in (1 Starkie, Cr. Pl. 236,) it is laid down that the word "charged" may be omitted ; it is sufficient if it appear that the jurors acted under the obligation of an oath ; here they are stated to have presented on oath, and therefore they must have been sworn. There was a sufficient answer to the objections to the caption, for the record was returned to the court in the present term, and an indictment cannot be quashed for a fault in the caption the same term it comes in ; *Anon.* (6 Mod. 221). Then as to the objection to the

sentence, if the present one be erroneous, no good sentence of transportation has been passed in Ireland for the last twenty years, for in none was there more stated than that the prisoner should be "transported beyond seas." The present sentence was good in law, but, even if it were not, the 11th and 12th Vict. c. 78, empowers the court to amend any defect which may appear in the sentence, and the court might now order such alteration to be made. The objection that the juror was incompetent to serve, cannot be sustained. The court should look to the real facts of the case. Dublin contained 15,000 persons qualified to serve as jurors and burgesses, and every one occupying a house worth five pounds, was liable to be rated to the burgess fund; the objection was, that the prisoner possessed property to the value of twenty shillings, and that the interest to be derived from the twenty-thousandth part of that sum was sufficient to disqualify a burgess from acting as a juror. If the objection were good, all the burgesses of cities, with similar charters, would be disqualified; the Lord Mayor could not sit as judge in any case of felony, and the judges who now form this court being burgesses of Dublin, are equally incompetent. The cases cited as applicable to this question were for the recovery of the property of the parish or corporation to which the disqualified juror belonged, and it was also to be observed, that when those cases were decided corporate property was private property, whereas the 3 & 4 Vict. c. 108, places the corporation in the condition of trustees for the public.

Cur adv. vult.

Nov. 18.—BLACKBURNE, C.J., now delivered the judgment of the court. In considering the different grounds of error which have been assigned in this case, I shall take them in the order adopted by the counsel at the bar. The first is, as to the caption of the indictment, which is said to be defective in not stating where the grand jury were sworn, and in not stating where the indictment was found. It is to be observed, that the caption is not any part of the indictment; it is merely a statement of the proceedings entered by the officer of the court, and should describe the time and place where it was found, and the jury by whom it was presented. The crown contends that the caption is right, and we are of opinion it is. It states, that, at an adjournment of a Commission of Oyer and Terminer, holden in and for the county of the city of Dublin, on Tuesday, the 8th of August, before commissioners appointed under the great seal, "it was presented on the oaths of good and lawful men of the county of the city of Dublin (naming 23) in manner and form following." The question is, does this caption afford the required certainty? To assume that it does not, would be repugnant to the plain meaning of the words of the caption. The next objection is, that the words "sworn and charged," which are used in the common forms, are here omitted; and many cases were cited in support of this. Were the court constrained by these authorities, they should act on them with reluctance, considering that the caption is but a copy, or entry, of the proceedings made by the officer of the court; but the formality of this caption is supported by three distinct authorities.

In the case of the *King v. Morgan* (1 Lord Raymond, 710), which was an indictment for riot, and removed into the Queen's Bench after being tried at assizes. On a motion being made in arrest of judgment, upon the ground of the omission of the words "sworn and charged," in the caption of the indictment, Chief Justice Holt said, that the whole court were of opinion that the caption was good although these words were omitted. And in the case of the *King v. Graycar* (Sir Thos. Jones, 180), on a motion being made to quash the indictment for the omission in the caption of the words "*jurati et onerati*," the court held that it was supplied by the words "*supra sacramentum*." And in the case of *King v. Ambler* (2 Keb. 59), on a writ of error, the words "*supra sacramentum*" in the indictment were held to be sufficient, and as far as the opinion of text writers can be referred to, it is settled that if it appear that the finding was on oath, it is sufficient, though the words "sworn and charged" are omitted. The last objection is, that the indictment was not said to be found by twelve men; but that is answered by the fact that there are twenty-three names set forth, although the concurring number was not stated. The court are therefore of opinion, that the first cause of error must be overruled. The second class of objections is to the counts of the indictment. The two last, namely, the 13th and 14th, were objected to, on the ground that they did not set forth the writings which the indictment charged as the overt acts of the compassing attributed to the prisoner. It is not necessary to decide on the objection, and I shall merely observe, that the counts here are conformable to the precedents of indictments for high treason under the English act of the 36th of George the Third, of which the act of the 11th Victoria, on which the present indictment was founded, is a mere transcript, and no objection ever appears to have been taken to any of the counts framed under the former statute; and we think the other counts of the indictment are not open to any of the objections made. They severally charge that the prisoner did feloniously compass, imagine, devise, and intend to deprive or depose the Queen from her style, honour, and royal name of the imperial crown of the United Kingdom, and that this felonious compassing he did express, utter, and declare, by publishing certain articles in a certain number of the *Felon* newspaper, in the exact terms of the statute; and this is contended by the crown to be sufficient; but, on the other side, it is objected, that in pleading it should have been averred that there was some particular design imported by the article published, and that it should have stated that it was published in prosecution of and in furtherance of that design. I confess I do not see how more could have been stated than is to be found in the indictment. The crime is the design to depose the Queen. The expression of that design, and the overt act to effect it, are the publication of the articles. There is no dispute that the articles had a tendency to effect this design, and unquestionably did both one and the other. Nothing can be clearer than the language of the pleading and the statute. The design, the evidence, and the acts done in pursuance

of it, are clearly stated. The cases in which the preparatory words "of and concerning" were used, were cases of libel and oral slander, in which the words required inuendoes to explain their object. This is not a case where the design and intention of the publication were left at large, or to conjecture, for here the charge is plain; it is the compassing to depose the Queen, and the expression of it, by the publication of these articles; so that all which could be required in cases of libel and slander, is, in substance, contained in the present indictment. And there is not, as my brother Perrin suggested, a single instance in which it was necessary, in reference to any of these publications, to explain their object or intention by an inuendo. It was, in the second place, objected that the publication was not averred to be felonious. I do not see how, in propriety of language, these publications could be called felonious. That word is properly descriptive of the *intention* with which means are used, or acts are done by a party—but the gun, for instance, with which a murder was committed, or the publications here could only be called felonious by a misapplication of that term. The act done—namely, the publication—was properly stated to have been feloniously done by the prisoner, and that satisfied all the requirements of the law. The court is therefore of opinion that all the errors assigned on these various grounds should be overruled. The third error assigned is, the disallowance of a challenge for cause, to which challenge the crown demurred. It is in effect, that the juror, being a burgess of the corporation of Dublin, and a ratepayer, had an interest in the conviction of the prisoner, Henry the Fifth having, by charter, granted to the corporation of the city of Dublin the goods and chattels of felons convicted within the city. Various objections have been made to the form of this challenge: were it necessary, the court would consider them in detail, and some of them are of a very serious character; but, as we decide that the challenge should be overruled on its merits, the court will not intimate any opinion on those objections. To one, however, I will have subsequently to refer—I mean that "which relates to the enjoyment of the franchise." This challenge contains double matter; first, it suggests an interest in the juror, as a burgess of the corporation; and secondly, an interest, as a ratepayer of the city of Dublin. Now, what interest has a burgess, or a citizen, in the forfeiture consequent on the conviction of a felon? Plainly none; for the goods so forfeited are all dedicated to public purposes. The corporation is but a trustee for the proper application of the property and income, and even that application and disposition is confined to the town council, to the total exclusion of the burgesses. The Chief Baron stated in the court below—and Baron Pennefather concurred in his view—"that the Municipal Act vested the whole management in the town council, and that though the burgesses might have a general interest in the management of the fund, *qua* burgesses, still, as burgesses, they were not empowered to do a single act in the matter. The town council was invested with the sole authority, though the entire corporation might

be nominally trustees for the public. Looking at the matter in this view, and considering the enormous inconvenience that would arise if the objection taken were held good, it appeared to him that the challenge to the jurors would not be admitted." Such was the opinion of those eminent judges, and in that opinion I entirely concur; and for these reasons, we are satisfied that, as a burgess, this juror is not interested in the goods of the felon. The next question is, was he interested as a ratepayer? The challenge stated that the goods and chattels of felons were applicable to the borough fund, "that William Duff was a burgess of the said City of Dublin, and an occupier and tenant of certain hereditaments within the city of Dublin, liable to be rated to a borough rate within the said city, and that the borough fund of the city of Dublin, after the payment of all debts from the body corporate in said hereinbefore recited act mentioned, and contracted before the passing of the said act, and after satisfaction of all lawful claims upon the real and personal estate of such body corporate, is not sufficient for the purpose in said act mentioned," and that consequently the juror was interested in the conviction of the prisoner. The authority mainly relied on to support this objection is a passage from 2 Hawkins, P. C. c. 43, s. 28, where it was stated that it had been always held to be a good cause of challenge that the juror was interested in the attainder or forfeiture of the goods. Upon this point the authority when stated below not being at hand, the Chief Baron stated his opinion to be, that the meaning was, that the juror should be shown to have a direct interest in the subject matter of the trial. The authorities support his lordship in that opinion. In Lord Maguire's case, *State Trials*, Vol. 4, the matter of objection was, that the prisoner's lands were sequestered, and that the juror had obtained a grant of them. Under such circumstances nothing could be plainer in justice or law than the incompetency of the juror to sit on the trial, for the conviction of the prisoner would confirm his own title. The case of *Hesketh v. Braddock*, (3 Burr. 1847), is relied on. There the objection was, that the sheriff who returned the jury, and the jury who tried the case, were freemen of the city of Chester. The action was brought to enforce a custom under which none but freemen of the city could trade in it; and Lord Mansfield said that every freeman was interested in the issue to be tried, the object of it being to establish a privilege in which the freemen had an exclusive monopoly—the sheriff and the jury being freemen. In this and other cases the objection was, that the party had an actual, direct, personal, and immediate interest in the result of the case to be tried. In order to ascertain whether those cases, or any of them, are applicable to the case now before the court, it is necessary to examine the precise character or nature of the interest the juror has in the result of the trial. It has been stated that the corporation is empowered or required to impose a borough rate, if the funds of the corporation are not sufficient to meet its liabilities, and defray the expenses of carrying the provisions of the act into effect. The 133 section of the

Municipal Corporation Act directed that the corporation should make an estimate of the amount so required, in addition to the ordinary funds of the borough, this estimate was not averred to have been made, and never might be made; and, until the making of it, the amount of the rate could not be ascertained, nor could a rate exist at all in fact or in law; so that it was purely casual and contingent whether the juror would ever be liable to be rated. Again, the borough fund, by section 128, is declared to consist of the rents, issues, and profits of all hereditaments, estates, and tenements; and the annual proceeds of dues, monies, chattels, and valuable securities, were to be received to the credit of the borough fund. It did not follow, however, even if there were a deficiency notwithstanding the various sources from which this income was derived, that the means of supplying that deficiency might not exist before the ascertainment of the amount, and therefore before any legal rate could be made. Besides, the goods of a felon were not forfeited until judgment, and, in the time that intervened between the challenge and the conviction he might dispose of all the goods that he then possessed. And, in addition to this, it was possible the juror might die, and cease to be the proprietor of rateable property before a rate was imposed, without ascribing any value whatever to the uncertainty of this supposed liability, which, for the reasons stated, I am satisfied is altogether ideal. What were the expectations of advantage that accrued from the forfeiture of a felon's goods? To be accurately expressed it would be in such terms as these:—that his rate would be lessened provided the town council should have thereafter a right to impose any rate, and provided they took the steps prescribed by law to enable them to do so; provided also the juror should live until the rate was made, and provided he did not dispose of his rateable property in the meantime; and finally, provided the prisoner did not dispose of all his chattels before the judgment. In my apprehension it is utterly impossible to discover or define any actual interest in the result of a suit which is to depend on such a series of contingencies. I am, therefore, clearly of opinion that, considering the nature of the challenge, there is not any resemblance between this and any decided case where objections to a juror or a witness were allowed for interest; nor do I think there is any authority or position to be found which could warrant the court in holding that the juror in question did not stand indifferent, as he stood unsworn. Even had the challenge averred matter that proved the juror's present liability to be rated, there was authority to shew that such liability would not (unless the party were actually rated) be a ground of incompetence. The *King v. Kirkford*, (2 East. 559) established the distinction between present and actual interest, and that which was future and contingent. There objections were taken to the competency of a witness on the ground that he had rateable property, but was not actually rated, and Lord Ellenborough stated that the interest which the juror was alleged to have should be an actual existing interest at the time, and not an expectant interest; and in *Marsden v. Stanfield*, (7

B. & C. 815,) upon an issue to try whether a tenement was situated within a chapelry, a witness occupying a rateable property in the chapelry was held to be competent, because he was not actually then rated, though upon a future occasion he might be. In considering and disposing of this challenge and its merits, I have no regard whatever to the consequences that would follow if it were allowed; embarrassing and injurious as they would undoubtedly be, I have excluded them from my mind, and confined my attention to the challenge, whether it was supported by authority, precedent, or on legal principles; but I think it right to say that the matter of the present challenge, if it has any real existence, has lain dormant for centuries—if it has the tendency now for the first time attributed to it, it must vitally have tainted the most important branch of the administration of justice in this populous city, and therefore the discovery of its pernicious nature and effect could scarcely have been reserved until the nineteenth century. This consideration has impressed me with the importance of the omission in this challenge of an averment of user, possession or enjoyment—omission, in my mind, not of form but of substance for rights of this kind might be, as the authorities abundantly proved, lost or forfeited by an unauthorised misuser. If it were necessary to decide the case on the ground of this omission, I should be strongly disposed to think it fatal to the challenge; and that the averment of user and possession was not made, because it could not, in my judgment, be made without tendering an issue upon the fact. Upon its merits, this challenge is utterly untenable. The last error assigned is, that the act under which John Martin was convicted, and sentenced to transportation beyond the seas for the term of ten years, required that some place not in Europe should be specified in the sentence pronounced by the judge. This was assuming that the sentence of transportation was governed by the act, 26 Geo. 3, c. 36, s. 66. I do not think it is. The sentence is in the very terms of the act of 11th Victoria, which created the felony of which the prisoner has been found guilty; and under the 30th Geo. 3, c. 32, the Lord Lieutenant is to appoint a place to which the convict is to be transported in execution of the sentence. On this subject there were various authorities; I will content myself by referring to the case of the *King v. Reynolds*,* in which this court decided that the sentence ordering that the prisoner should be transported for the term of ten years, the colony to which he was to be sent not being named, was correct. The objection, therefore, is not only met by the very terms of the statement in which the sentence was pronounced, but it has also been met by the authority to which I have referred. For these reasons it appears to me that all these causes of challenge ought to be overruled.

Crampton, Perrin, and Moore, J. J., expressed their concurrence.

Errors corrected.

* This case is not reported.

COURT OF CHANCERY.

POTTS v. TURNLEY.—Dec. 1.

Attorney general ought to be fully apprised of the proceedings in a suit instituted against a charity, or the crown.

Counsel having applied for the costs of the attorney-general,

The Attorney-General said that in cases of wills involving questions concerning charities, he was de a defendant, that an answer was sent him the plaintiff's solicitor, which being signed, he no further notice of the proceedings in the cause, that he was consequently unable to protect the rights of the crown.

LORD CHANCELLOR.—That practice is very improper. I think Lord Eldon was in the habit of putting cases where the rights of the crown were concerned, and the Attorney-general made a party this formal way. You should have an opportunity of inquiring whether you wish to take any part in the case. It appears to me that where the rights of a charity are concerned, the Attorney-general ought to be furnished with a brief of the proceedings, and made fully acquainted with his rights in the case. At present the rights of the crown have not been defended in this suit. I think the proper course in this case is, that I should direct the plaintiff's solicitor to lay the pleadings and evidence before the Attorney-general's counsel.

Dobbs stated that the Attorney-general's counsel appeared at the first hearing.

LORD CHANCELLOR.—That counsel was instructed by the plaintiff where the rights of the crown are concerned, there ought to be counsel for the Attorney-general, appointed by him.

FOSTER v. KERR, CLELAND v. KERR.—Dec. 9.

Practice—Staying Proceedings.

The bill in the first cause was filed to raise the amount of two judgments obtained in 1846, subsequent to a voluntary settlement of the same year. The second cause was instituted to foreclose a mortgage of 1845, affecting the inheritance. Decree to account in the first cause declaring the judgments to have priority over the settlement under no tenant in tail in esse. An application to have second cause stayed was refused, though the petitioner, a defendant in the first cause had appeared at the hearing of the latter, and had not insisted upon being redeemed.

The plaintiff in the first cause claimed in respect of two judgments, one of Easter Term, 1846, and the other of Trinity Term, 1846, confessed by the defendant, John Kerr. By deed bearing date the 2d of May, 1846, the defendant, John Kerr, conveyed the lands in the pleadings mentioned to trustees therein named, upon trust, amongst others, to himself for life, without impeachment of waste, and subject to certain trusts, to the use of William Alexander Williams Kerr, and his assigns, during the term of his life, and, after his decease, to the use of the

first, and every other son of the said William Alexander Williams Kerr, severally and successively in tail male, according to the usual course of strict family settlements, with remainders over, in default of such issue, to the use of the said Wm. Alexander Williams Kerr, his heirs, &c. There was no tenant in tail in esse under this settlement. The bill was filed on the 19th of January, 1847, less than a year after the judgments had been obtained against the cognizor and others, and prayed a sale, and that the said deed might be declared fraudulent and void, as being voluntary. By a decree in the first cause, bearing date the 14th of June, 1848, the judgments were declared prior to the trusts of the deed.

The bill in the second cause was filed on the 25th of March, 1848, to raise the sum of £14,000, charged on the inheritance by deed of mortgage bearing date the 29th of March, 1845.

The plaintiff, Cleland, was a party defendant to the first cause, had appeared at the hearing, and had not insisted on being redeemed.

On the 19th of July, 1848, an application was made by the defendant, John Kerr, to his Honour the Master of the Rolls, that the proceedings in the second cause might be stayed, and that all parties thereto might prove their demands in the first cause. The application at the Rolls was refused, and in the course of his judgment, his Honour stated that he would not restrain the mortgagee on account of several imperfections in the first cause. First, because the judgments not being a year old at the time of filing the bill, the plaintiff, under the 3 & 4 Vic. c. 105, s. 22, was not entitled to sue. Secondly, that the first cause might be dismissed at the final hearing, the mortgagee having then the right to demand to be redeemed, and that right was not lost, because not insisted on at the first hearing. And thirdly, although it was not necessary to decide the case on that point, because he could find no reported case in which such an order was made where the debtor was alive; that such orders, however desirable, were only made in creditors' suits for the administration of assets. From this decision the defendant, John Kerr, appealed.

Christian, Q. C., with E. Burroughs, for the appeal, cited *Lofie v. Fores*, (2 Ir. Eq. Rep. 443); *Beauchamp v. Huntley*, (Jacob, 546); *Damer v. Portarlington*, (2 Phillips, 30).

Hughes, Q. C., with H. Smythe, for the plaintiffs in the second cause, submitted that the first suit was irregularly framed, inasmuch as the judgments were not a year old before the filing of the bill. Although the plaintiff here did not insist on being redeemed at the first hearing in *Foster v. Kerr*, he may claim that right on the hearing for further directions. (Lord Chancellor.—The plaintiff has lapsed his time, he cannot at the second hearing insist on redemption). and cited *Uniack v. Rochford* (1 Mol. 216); *Rigby v. Strangways* (2 Phillips, 175); *Woodburne v. Harrington* (4 Law R. N. S. 69); *Rotherham v. Webb* (4 I. E. R. 52).

Leach, for Foster, the plaintiff in the first cause, cited *Bennett v. Bernard*, (10 I. E. R. 584).

E. Burroughs, in reply.—The plaintiff, Cleland,

is bound by a decree in the first cause, which was pronounced in his presence. He might then have insisted on the ordinary decree in a redemption suit, referring it to the Master to take an account of what was due for principal, interest, and costs, and that the plaintiff in the first cause should pay him within three months, or the bill to be dismissed. The court, after a decree for redemption, and pending the accounts, would stay a mortgagee from prosecuting a foreclosure suit, to prevent double litigation. It is too late at this stage of the proceedings to raise any objection as to the judgment not being entered a year when the bill was filed. The objection should have been made at the first hearing, *Vincent v. Going* (7 I. E. R. 468).

LORD CHANCELLOR.—Though this court is always anxious to avoid increased expense as much as possible. I find that in the case of *Reid v. Territt* (1 Collyer, 1), when there was an irregularity in the former suit, and a difficulty in the carrying out of the decree, an application to stay proceedings was refused. Here a creditor has obtained a decree within a year from the entering up of his judgment, the only parties representing the estate being the defendants, Kerr and his wife, the trustees named in the deed of May, 1846, and the tenant for life in remainder, William Alexander Williams Kerr. There is no tenant in tail in esse under the limitations of the deed of 1846, and it is possible that a tenant in tail hereafter may be dissatisfied with the decree, and demand a rehearing. I feel I cannot, therefore, on such a contingency, which is within the range of probability, affect the rights of a prior mortgagee.* I have already stated what I believe to be the practice of this court—that a mortgagee cannot insist on redemption at the final hearing, having failed to do so at the first. I do not say that if there were no infirmity in the first cause, and that in it as satisfactory relief could be obtained as in the second, that I should not stay proceedings in the latter, although neither suit be for the administration of assets; but having regard to the defective constitution of the first suit, and the high nature of the security of the plaintiff in the second cause, I cannot prevent him from prosecuting that in which his relief will be more effectual and conclusive, and I must, therefore, affirm the order of the Master of the Rolls.

ROLLS COURT.

DOWER v. ROXANE.—Nov. 27.

Practice—Notice to Solicitors.

Every notice should state, not only the names of the solicitors, but the persons for whom they act.

MASTER OF THE ROLLS.—The notice in this case does not state for whom the solicitors act, to whom it is addressed; and if it were not a motion almost of course, being thus irregular, I should say no rule. *Note.*—Some days afterwards, his honour refused a motion, in the case of *Allen v. Carew*, for the reason given in the above case, stating it was impossible to know whether the proper parties had notice.

* See *Lloyd v. Johns* (9 Ves. 37.)

COURT OF EXCHEQUER CHAMBER.

THE QUEEN v. SUGDEN.—Nov. 16, 28.

Right of Lord Chancellor to appoint to office of Assistant Registrar—Statute 6 & 7 W. 4, c. 74, construction of—Casus Omissus—New Office—Rights of the Crown.

Held by five judges that in the construction of statutes, the court would rather strain the words in order to arrive at the construction evidently intended by the policy of the legislature, than either omit them, or declare the state of facts which had occurred to be a casus omissus.

Held by four judges that there was a casus omissus, but that the office being a new one, and the crown not having interfered in the first instance, the right of appointment devolved at common law upon the head of the court.

CRAMPTON, J. dissentiente.*

This was a writ of error brought to reverse the judgment of the Court of Queen's Bench on an information in the nature of a *quo warranto*, calling on the plaintiff in error to shew cause, by what authority he held the office of Assistant-Registrar to the High Court of Chancery in Ireland. The Court of Queen's Bench having given judgment for the crown, the defendant brought his error to reverse that judgment. No question being raised upon the pleadings, the only matter for the consideration of the court depended on the construction to be given to the 11th section of the 6 & 7 W. 4, c. 74.†

* Coram Blackburne, C.J., Pigot, C.B., Pennefather, B., Torrens, J., Crampton, J., Perrin, J., Richards, B., Ball, J., Jeffroy, B., and Jackson, J. Absente, Doherty, C. J., and Moore, J.

† 'And whereas it is expedient that the office of the Registrars of the said Court should be regulated; therefore be it enacted, that the establishment of the Registrar's office shall consist of two Registrars, one Assistant-Registrar, and six clerks, and such a number of scrivenerly clerks as the service of the said office shall require, and as shall be approved by the Lord Chancellor; and that Francis Prendergast and Charles O'Keefe, Esquires, shall continue to be such Registrars, and Robert Long, Esquire, shall be the Assistant Registrar, and Yelverton O'Keefe, John Kelly, William Young, Robert Levy, John Connor, and Thomas Battley shall be continued as such clerks, and that Francis Whelan and John Kelly, junior, shall act as assistant clerks in the said office; and that upon the happening of a vacancy in the office of either of the said Registrars, such vacancy shall be filled up by the Assistant Registrar; and that upon a vacancy happening in the office of Assistant Registrar, the same shall be filled up by the chief clerk, if no sufficient objection to the satisfaction of the Lord Chancellor shall be made; and in that case, if the Lord Chancellor shall not consider him to be qualified, then the Lord Chancellor shall, until aftermentioned, appoint some proper person to be Assistant Registrar; and as vacancies may occur in the office of any of the present clerks or assistant clerks, such vacancies shall not be filled up until the whole number of clerks be reduced to six: and upon a vacancy happening after the number shall be reduced to six, the Lord Chancellor shall appoint some proper person to fill the office, and so from time to time until the whole of the present clerks shall be removed; and when a new succession of clerks shall be so appointed, then and in that case, upon the death, resignation, or removal of any of

As all the questions argued at the bar are fully met in the opinions delivered by the judges, it is only necessary to state the points relied on, and the authorities cited by the counsel at either side.

Hamilton Smythe, with *Tombe*, Q. C., for the plaintiff in error, contended, first, that the relator, Kelly, could not claim the office of Assistant-Registrar by right of succession, as the eleventh section only intended that right to exist when all clerks in office at the time of the passing of the act had been removed. Secondly, that the policy of the act being to supply the office with persons whose competency the Chancellor was to be able to give him the power of appointing in time to time a fit and proper person to fill the office of Assistant-Registrar, until the new succession of clerks was complete, and that the right of Y. O'Keeffe to this office was personal. Thirdly, that the Chancellor had no right of appointment by the statute, that this was a new office, there being no reservation of the rights of the Crown, the appointment vested consequently in the Chancellor, as the head of the court. For this see cited Stat. West. 2, c. 30; 13 Edw. 1, 185; Inst. 425; *Scrags v. Coleshill*, (Dy. 175); *Ston's case*, (4 Co. 32); *Bridgman v. Holt*, in 354, S.C. Show. P.C. 11; *Harcourt v. Fox*, Show. 526, S.C. 4 Mod. 723; *Harding v. Pollock*, (3 Bligh. P. C. N. S. 161); *Wilkes v. Wilkes*, (8 T. R. 631); *Crosby v. Hurley*, (Al. and p. 431); *Kennedy v. Gregg*, (8 Ir. L. Rep. 225); *Walker v. Sweeney*, (Al. & Nap. 498); *Martin v. Marshall*, (Hob. 63).

Corbett, with *Napier*, Q. C., for the defendant in error.—The evident meaning of the eleventh section is, that there shall in future be six clerks, not a chief clerk and five others. The expression chief clerk designates the head of a class, and not an individual. How can it be known who the chief clerk is, he being previously mentioned; the particle "the" means Y. O'Keeffe, John Kelly, &c., as they would be to the head of the office, and the word "chief" is synonymous with "first," means O'Keeffe—who is to fill the office—if there was no objection made him; if there was, then the Chancellor was to appoint "a fit and proper person;" that is a permissive enactment, excluding any power of appointment by the Chancellor, until the contingency of objection being made, had arisen. It is essential that a chief clerk should exist, as if there be none, there is no material to provide for the filling of the offices of Assistant-Registrar, or Registrar. The last section of the 6 & 7 W. 4, shews that certain

offices were intended to be abolished, and provision made for the performance of the duties belonging thereto, and then enumerates the offices to be abolished, that of chief clerk is not among them, this office not being among those abolished, and there being no provision for the execution of the duties connected therewith, it must still exist. The 27th section provides for the payment of a retiring allowance to a person named Daly, who had been chief clerk, by the then chief clerk, O'Keeffe, and the Registrars, if the term chief clerk be taken as a *designatio personarum*, after the departure of that person, who is to fill his place as to the payment of Daly. Under the 11th section no vacancy was to be filled till the whole number of clerks were reduced to six; when reduced to six, the assistant clerks became clerks, and then a succession was created in the office. This is not an office peculiar to O'Keeffe; chief is a designation of the head of a particular class, and on the nomination of O'Keeffe, Kelly became the chief or head of that class. The words chief and first are synonymous. This is a newly-created office, and the right of appointing thereto belongs to the crown by virtue of the royal prerogative, and not to the head of the court, except there be a lapse of the assertion of the rights of the Crown. When a court is created, the right of appointment to all subordinate offices necessarily incident to it should of right belong to the head of the court. This office is not necessarily incident, as in that case it must have been co-existent. The judgment of Mr. Justice Littledale, in *Harding v. Pollock*, (3 Bligh. N. S. 220,) shews the right of the crown to appoint to all offices, by virtue of its prerogative, *King v. O'Grady*, (Q. B. Ir. 1816); *Viner. Ab. tit. Office*, Pl. 5.

Nov. 28.—The Judges differing on this day delivered their opinions *seriatim*.

JACKSON, J.—This case comes before the court on a writ of error to the judgment of the Court of Queen's Bench, on an information requiring the plaintiff in error, the defendant below, to shew by what authority he uses the office of Assistant-Registrar to the High Court of Chancery in Ireland. No part of this case depends upon the pleadings. The plaintiff here contends that his right is derived from the appointment of the late Lord Chancellor (Sir E. B. Sugden), and the question whether the plaintiff in error has shewn a title to this office, depends on the right of the Lord Chancellor to appoint to the office of Assistant-Registrar; and this turns on the true construction to be given to the 11th section of the 6 & 7 Wm. 4, c. 74. In other words, whether the statute provides for the state of facts which have occurred, or whether there be not, in this respect, a *casus omissus*. The Act of Parliament upon which the present question arises was passed for the purpose of regulating the office of Registrar to the Court of Chancery it becomes, therefore, necessary to inquire how it was regulated previously to the period of its enactment. The 4 Geo. 4, c. 61, sec. 42, vested the appointment of the "first clerk" in the Registrars, to whom, out of the fees of the office, they were to pay a salary of £500 per annum, and also the salaries of all inferior clerks. The 6 & 7 Wm. 4,

em, other than the junior clerk, the vacancy thereby occasioned shall be filled up by the clerk next in seniority whom no sufficient objection to the satisfaction of the Lord Chancellor shall be made; and that on all future vacancies in the office of junior clerk, the Lord Chancellor shall appoint some proper person to be such junior clerk; and that upon a vacancy happening in the office of Assistant-Registrar after the whole number of clerks shall have been appointed by the Lord Chancellor under this act, then such vacancy shall be filled up by the senior clerk in the said office for the time being to whom no sufficient objection to the satisfaction of the Lord Chancellor shall be made.

c. 74, took these appointments from the Registrars and gave it to the Lord Chancellor; the 11th sec. states what the staff of the office should consist of after the passing of the act, viz., two Registrars, one Assistant Registrar, and six clerks, and legislates for three distinct periods of time. First, till the existing clerks were reduced to six; secondly, from that time till the Lord Chancellor had appointed a new succession of clerks; thirdly, from the time of the removal of all the then existing clerks, or the completion of the new succession; and then proceeds to enact that the present Registrars shall continue such, that the future Registrars shall be appointed from the office of the Assistant Registrar, and this applies to all times. It then appoints by name to the new offices, and goes on to provide for the future, that is, after the new succession of clerks had been appointed by the Lord Chancellor. Robert Long was then Assistant Registrar; the vacancy caused by his promotion, or removal, was to be filled by the chief clerk, there was no officer antecedently known by that name, and the act does not provide for the appointment of any person after the death of O'Keeffe, the then first clerk; it provides for the appointment of the then first or chief clerk, being as much a direction that the vacancy should be filled by O'Keeffe, the only person known as chief clerk, as if it named him. It is not enacted that the next in order should take the office in the event of O'Keeffe being considered objectionable, but that that the Chancellor should appoint a fit and proper person, no succession was then intended to take place till, the third period had happened; and when it was the intention of the legislature that a succession should take place, it is enacted that the vacancy shall be filled by the clerk next in seniority; if it was intended to introduce a succession among these clerks, it would have been done at an earlier part of the section. The 11th section contains no provision for appointment by the Chancellor, or a succession after promotion in the office till the third period had arrived. This, I think, is a *casus omissus*. The act has rendered it impossible that there should be an appointment of a chief clerk after the death of O'Keeffe, till the third period had arrived. The words are—"And as vacancies may occur in the offices of the present clerks, or assistant clerks, such vacancies shall not be filled up until the whole number shall be reduced to six; and upon a vacancy happening after the number shall be reduced to six, the Lord Chancellor shall appoint some proper person to fill the office, and so from time to time, until the whole of the present clerks shall be removed." By the first part of this clause, the Chancellor was prohibited from appointing till the number of clerks was reduced to six, and then he was to appoint a proper person to fill the vacancies as they should occur, and so from time to time, till the whole of the existing clerks were removed. The defendant in error claims this office as chief clerk. It appears to me, that except the rule of succession by seniority can be applied during the first period, he has no right. If that be so, the appointment is either in the crown or the Chancellor. The question, then, is, has the

plaintiff in error shewn a title on the record? His right depends on this, that where a new office is created, the appointment resides in the crown, the *prima facie* source of all appointments. We have no intimation of any reservation in the crown, and it is manifest that it was for the interest both of the crown and the public to give the appointment to the Lord Chancellor. I am of opinion that, being the head of the office, the Lord Chancellor was to have the appointment. Whether the claim is by succession or appointment, the Chancellor was to have the approval; and it was the obvious policy of the act to give the appointment to the head of the Court. In the 2nd section, the crown reserves to itself the right of appointing a fit person to be Clerk of the Crown and Hanaper, and in the 17th section gives the appointment of additional clerks to the Lord Chancellor, manifestly shewing an intention to make a due selection. Much confusion has arisen from the use of the terms "first clerk," and "chief clerk." I do not know whether these terms were intended to be synonymous; there is a distinction taken in the schedules; in the first, Mr. O'Keeffe is denominated "chief clerk," the others "clerks," not first clerk, second clerk, &c., and in the second schedule, their designation is changed to that of first, second, and third clerks. The contribution provided by the 27th section for Mr. Daly, who had been chief clerk, is curious; Y. O'Keeffe, the then chief clerk, was to pay him £200 per annum, and the two Registrars £100 each; and in case of the death of any of these persons, the successor in that office was to continue to pay the allowance during the life of Daly. If the defendant in error was never chief clerk, who was to pay Mr. Daly's allowance, and if he was intended to be first clerk, and to pay this allowance, it is to me inexplicable how he could be intended to have during Daly's life but £200, and his inferior £300. It is not, however necessary to solve these difficulties. I am of opinion the act contains no provision depriving the Lord Chancellor of the appointment, it is in him still, and resides in him as the head of the court. I am, therefore, of opinion that the judgment of the court below must be reversed.

LEFROY, B.—The question as to the right of the plaintiff to the office of Assistant Registrar to the Court of Chancery, depends entirely on the construction to be given to the 11th section of the 6 & 7 Wm. 4, c. 74. Three constructions have been proposed, under one of which either party is entitled to the office. The relator contends that, by the construction of this act, he has a good title. The plaintiff here—the defendant below—says, he has a title, either by the appointment of the Lord Chancellor, under the act, or, if the act has not provided for the appointment of a person to hold *pro interim*; that is, from the time the then existing clerks were reduced to six until the new succession was complete. In that case, a lapse of appointment by the crown having taken place, the Chancellor was entitled to appoint. These propositions unfold every view of the question arising on this act. To consider them in their order—first, it is said, Mr. Kelly, as clerk, was named to

continue in the office; his right to hold it was subject to the approbation of the Lord Chancellor, of which there has been no expression. Mr. Kelly claims, under the statute, in three capacities; first, as chief clerk; secondly, as senior clerk by succession; and, thirdly, by necessity. Was he ever chief clerk, either in name or qualification, at the time of the passing of the 6 & 7 Wm. 4, c. 74? I think not; he had not the qualification it was intended the persons to fill this office should have. The 4 Geo. 4, cap. 61, sec. 42, enacts, "that the Registrars may appoint a *first clerk, to be approved* of by the Lord Chancellor of Ireland, and to be *removable* by the Registrars, with the *consent* of such Lord Chancellor; and the said Registrars shall, and they are hereby required, out of such fees, to pay to the said first clerk a clear yearly salary of not less than £500; and the said Registrars shall also, out of the said fees, pay all salaries and allowances to all *inferior clerks* in the said office of Registrar." The person appointed under that section was to be a person appointed with the consent of the Lord Chancellor, and removable only with his concurrence; the legislature thus placing a guard round his appointment, both of consent and concurrence. The Registrars were also to appoint all scrivenary clerks; to these no fixed salary was given, there was no qualification required as a test of their fitness, they were merely the inferior clerks, for the appointment of whom the approbation of the Lord Chancellor was unnecessary. At the time of the passing of the 6 & 7 Wm. 4, c. 74, the test of qualification was the approval of the Lord Chancellor. The 11th section enacts, "that the establishment of the Registrars' office shall consist of two Registrars, one Assistant Registrar, and six clerks, and as many scrivenary clerks as the service of the said office shall require, and as shall be approved of by the Lord Chancellor." It then goes on to enact who shall be the Registrars, the Assistant Registrar, and that John Kelly, with others, "shall be continued as such clerks." What was the position of John Kelly then? O'Keeffe was the chief clerk; Kelly, a mere scrivenary clerk, continued with all the infirmities of his original appointment, without any approbation of the Chancellor, brought in merely at the will of the Registrars. The section then goes on to provide for the filling these offices in future. What is the principle to be acted on in these appointments? There is to be a succession, but with the qualification that the appointment was to take place by, and with the approval of the Lord Chancellor, after the whole number of clerks had been reduced to six. Secondly, as to Mr. Kelly's claim by right of succession. The senior clerk was to be the person who was so, after the removal of all the then existing officers, and should have the approbation of the Lord Chancellor even to entitle him to his right by succession. There was to be no succession till the whole of the present clerks were removed and others appointed by the Lord Chancellor. How can Mr. Kelly, consistently with this right of approbation, claim this office by succession? He was to continue as he was; no doubt, he was to have a fixed salary—that will not supply the qualification re-

quired, there is nothing in the act to shew that a different policy was to be followed in the *interim* until the new succession of clerks had come. Mr. O'Keeffe did not gain his office by succession, but as chief clerk, having been first clerk under the 4 Geo. 4, c. 61, and with all the qualifications required by the legislature. Suppose the Lord Chancellor had objected to Mr. O'Keeffe, and passed him by, Mr. Kelly could have had no title by seniority, Mr. O'Keeffe being still chief clerk; and it was impossible to set up a title by succession, until in the words of the act, "the whole of the present clerks shall be removed." Lastly, can Mr. Kelly claim through the title of necessity? It appears to me that this was provided for, the words of the section "in case the Lord Chancellor shall not consider the chief clerk qualified, then the Lord Chancellor shall, until after mentioned, appoint some proper person to be Assistant Registrar," if fairly construed, enabled the Chancellor to appoint a proper person till the new succession had arrived. It is argued that the passage in the section, "that upon a vacancy happening in the office of Assistant Registrar," &c., should be read, "that upon *any* vacancy," &c. I will read it so; there is nothing extravagant in reading the passage thus—that the chief clerk was to be appointed if there was no objection to him; if there was, then, that the Lord Chancellor should appoint a proper person, *from time to time*, until the whole of the present clerks were removed, the words *until after mentioned* being intended to apply to the appointments to be made from time to time. And this mode of interpretation is borne out by authority. In *Stradling v. Morgan* (Plowden, 205), it is said, "From which case it appears that the sages of the law heretofore have construed statutes quite contrary to the letter, in some appearance; and those statutes that comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to extend but to some persons only; which expositions have always been founded on the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances; so they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." And in *Arthur v. Bokenham* (11 Mod. 161), Trevor, C. J., says, "Therefore, in doubtful cases, we may enlarge the construction of acts of Parliament, according to the reason and sense of the law makers expressed in other parts of the act, or guessed by considering the design and frame of the whole." And the same rule, as to construction of statutes according to the intent, will be found in the *King v. the Poor Law Commissioners* (6 Ad. & El. 7), per Coleridge, J., and in *Stracey v. Nelson* (12 M. & W. 585) per Parke, B., p. 544. The court is not to be tied

down by words, which, if given effect to, would violate the general policy of the act. The next question is as to the supposed *casus omissus*. I cannot think the legislature left a certain period unprovided for; it is, in my mind, more difficult to attain a construction by expunging words than by reading them without much violence in a different sense; and that we should not come to the conclusion, there is a *casus omissus*, which the legislature abhors as much as nature does a *vacuum* without a satisfactory reason. On these grounds, I am opinion that the judgment of the court below should be reversed.

BALL, J.—I also am of opinion that the judgment of the court below should be reversed. On the face of the record, Mr. Kelly relies on this, to deprive the plaintiff here of his office, "that the defendant, on the promotion of O'Keeffe, was, and still is, the chief and senior clerk," and that, as such, he has a title by devolution of office, and that the defendant cannot be appointed by the Chancellor or any other person. With respect to his claim as chief clerk, the 4 Geo. 4, c. 61, s. 42, created the office of first clerk; the first schedule to the 6 & 7 Wm. 4, c. 74, describes it as that of chief clerk, meaning no more than a description of the office of first clerk, held by O'Keeffe. The first schedule of the 6 & 7 Wm. 4, c. 74, names certain persons in succession, as clerks, with salaries—O'Keeffe, £500 per annum; Mr. Kelly, £300; Mr. Young, £180, &c. Mr. Kelly is, undoubtedly, the first of the future clerks; but has the act made the office of chief clerk a continuing office? I think not. The £500 per annum was to be paid to O'Keeffe alone. It is difficult to hold, that it was intended that Kelly should pay out of his £300 per annum the £200 Mr. O'Keeffe was bound to pay Daly during his life. It was next argued, that the office should not be permitted to cease. I agree with my brother Jackson that, in this respect, there is a *casus omissus*; but I think the Chancellor has the right of appointment under the statute, and that if even the crown had a right, this being a new office, and there being no reservation of the rights of the crown, it appears to me, that, on the general rule of law, the Chancellor should have the appointment.

RICHARDS, B.—This question wholly depends on the construction of the statute 6 & 7 Wm. 4, c. 74. I am of opinion that the right of appointment is in the Chancellor, and has been properly exercised by him. To arrive at this conclusion, two questions are to be considered; first, on the construction of the statute, was Kelly entitled? At the time the act was passed, O'Keeffe held a peculiar position; he was appointed with the concurrence and approbation of the Lord Chancellor, and it is impossible to contend that this high office was to be continued to any other person. The title given him was given to no other officer. It is important to observe, with reference to the new succession of clerks, that they were to be the appointees of the Chancellor, and that at each step they were to go through the ordeal of further approbation. The vacancy was not to be filled by the senior clerk until after the whole of the then existing clerks had passed away,

and a new succession come; and the reason is, the legislature did not wish the persons then holding office to be removed; but it is not to be supposed that the legislature would have acted in this cautious manner if it had intended these persons to be eligible to this important office. The next question is, did the appointment vest in the Chancellor? It is certain the legislature intended the Chancellor to have the appointment in some cases, though the new succession had not arrived. It is said, that if O'Keeffe died he would have no such right of appointment; such a construction would stultify the legislature. I would read the act thus: that the chief clerk (plainly meaning O'Keeffe) was to be appointed, if there was no objection to him; if there was, in that case, the Lord Chancellor was to appoint a fit and proper person to be Assistant Registrar; the words "in that case" meaning in case of any vacancy occurring the Chancellor was to appoint a fit and proper person; and the word if, "and in that case if," I would read as "provided;" the clause would then read, and in that case—that is, of a vacancy occurring—O'Keeffe was to be appointed, provided the Lord Chancellor shall consider him to be qualified, if not then he was to appoint a fit and proper person, and it is impossible to contend that Kelly could take the office, discharged of that qualification of approbation by the Lord Chancellor, and that the exceptions were to cease in his favour. That the intention of the legislature is best expounded by another part of the act, is a rule of law fully recognised in the *King v. Poor Law Commissioners*, (6 Ad. & El. 7). On these grounds, I am of opinion the judgment of the court below should be reversed.

PERRIN, J.—The 4 Geo. 4, c. 61, created several ministerial offices; the 13th section provides for the appointment of "writing clerks;" and the 7th section provides a form of oath to be taken by officers and clerks of the Court of Chancery. These sections shew the relation that existed between the clerks in office and the writing clerks. The 42nd section provides for the appointment of a first clerk by the Registrars, with the approbation of the Lord Chancellor, and who was also removable by them with the Chancellor's consent. The Registrars were to pay the chief clerk £500 per annum, and all salaries and allowances to inferior clerks. The first clerk, or the Registrars, were to receive the fees of the office; the first clerk was thus quite distinguishable from the other or inferior clerks. It appears from a subsequent part of the act (section 27), that a person named John Daly who filled the office of chief clerk, being unable to perform the duties, that Yelverton O'Keeffe was appointed first clerk, with the approbation of the Lord Chancellor. Suppose that before the passing of the 6 & 8 Wm. 4, c. 61, that O'Keeffe was either promoted, or had died, or resigned, would the next in order be entitled to the office of first clerk? From the mode of appointment, the inferior clerk could not have succeeded. The great want of accuracy in the 11th section of 6 & 7 Wm. 4 c. 74, has rendered it difficult of construction, but it is clear that no appointment could be made but by the head of the office. Under the 4 Geo. 4, c. 61,

there was no right of succession; under the 6 & 7 Wm. 4, c. 74, none of the vacant clerkships were to be filled till the then number of eight was reduced to six, that is a positive enactment that there was to be no succession then. After the reduction to the number of six, the vacancies could only be filled by the appointment of the Chancellor, and so on, till a new succession had arrived; though, in one sense, Kelly, being at the head of the existing clerks, the first in order, and with a higher salary might be considered as chief clerk to answer the description in the 11th section, on consideration, I am not satisfied that he answers the description therein of chief clerk, he was not appointed with the approbation of the Lord Chancellor, nor was he entrusted with the responsible duties of the first clerk. It is not enough that Kelly is disqualified, it is a further question is Sugden entitled to the office, or, in other words, had the Chancellor the right of appointment; the words of the act are—"that the chief clerk is to fill the office, if there be no sufficient objection," if the Lord Chancellor be not satisfied that he was free from objection, he was to appoint a fit and proper person, but there is nothing to shew that the chief clerk only was to be appointed. We are not to suppose a *casus omissus*, if it be possible to avoid it. This statute, and the 4 Geo. 4, manifest an intention to enable the Chancellor to appoint; this is, I think, a strong argument to shew that such was to be the case in future. I am therefore of opinion the judgment of the court below must be reversed.

CRAMPTON, J.—I still retain the opinion I entertained in the court below. I think the judgment in the Queen's Bench was right; that Sugden has shewn no right to the office under the statute, and that Kelly is in by succession.

TORRENS, J.—I have arrived at the same conclusion as my learned brethren who have preceded me, and upon the same grounds. I think a satisfactory conclusion can be arrived at, by considering the state of the court before the passing of the 6 & 7 W. 4, c. 74. Under the provisions of the previous act, the first clerk, before he could receive his appointment, required the approbation of the Lord Chancellor, and could not be removed without it. O'Keefe alone was chief clerk, and no scrivener clerk could succeed, as there was then no right of succession in the office of Registrar. The 6 & 7 W. 4, legislated on this state of facts. Who are the chief clerks? Two; Daly, who in the 22d section we are told had been first clerk, and O'Keefe, who is there also designated as first clerk. The 11th section regulates all the offices of the Court of Chancery, and, in doing so, took into consideration the position of Mr. Kelly, and the other inferior clerks, and enacted that no subsequent state of facts should remove them; it then enacts that after a certain period those persons who had gone through a certain probationary state, should be appointed to the office of Assistant-Registrar, leaving to the Lord Chancellor the right to inquire into their qualification. If the Chancellor had first the power of appointment by approval, and after by selection, it is in my mind a strong argument to shew he was to have it in the *interim*, and that the

Crown, by express enactment, has given the Chancellor the power of appointment.

PENNEFATHER, B.—I shall consider the construction of the 11th section alone, but, in so doing, the provisions of the 4 Geo. 4, must be kept in mind, and, attending to the provisions of the 11th section, it appears to me clear from the last clause in the section, "that after the whole number of clerks shall have been appointed by the Lord Chancellor under this act, then such vacancy shall be filled by the senior clerk, to whom no sufficient objection shall be made," that the succession upon which the relator relies, could not take place till six new clerks had been appointed. Taking into consideration the express enactment, and general meaning of the legislature, I am also of opinion that the office of chief clerk was personal to O'Keefe, and the act is to be read as if it had said, that on a vacancy happening in the office of Assistant-Registrar, the same was to be filled by O'Keefe. If this be so, it follows plainly that Kelly can have no right. It remains then to be considered where the right vested. This section is not to be construed by the exact words, but by the purport and intention of the statute, and, considering the different parts of it so forcibly alluded to by my brother Richards, I think this section must be considered as having given to the Chancellor a power of appointment, not confined to the single case of the disability of O'Keefe, but whenever a vacancy should take place, reason and sense require this construction, and the cases cited by my brother Lefroy fully establish this position. If the intention of the legislature is clear and unequivocal, and if particular words are to be controlled by the intention the legislature had in view, I am satisfied the Lord Chancellor had the power of appointing a fit and proper person, till the time when the right of succession had arrived. I do not think there is in this case a *casus omissus*, or that such should ever be intended, where the legislature profess to deal with the subject for legislation. Attending to the words of the act, I think the crown gave the court the right of appointment.

PIGOT, C.B.—Considering the language of the 11th section of the 6 & 7 W. 4, c. 74, and the other portions of the act, I am of opinion there was no succession; and that at the time of the appointment of the plaintiff here, there was no chief clerk. The next question is, did the act confer on the Chancellor the right of appointment. I am forced to come to the conclusion there was a *casus omissus*, but whether the appointment be in the crown or the Chancellor, we must in this case assume that the crown did not interfere, and, not having done so, on the authority of *Harding v. Pollock*, I think the crown has given up the right of appointment, and as it does not appear from the statute the crown intended to reserve any right, we are warranted in holding that the appointment devolved on the Chancellor.

BLACKBURN, C.J.—I am quite satisfied that there is no succession in this office till the new order of clerks are complete. It is as plain as any proposition can be, that the crown has no right of appointment; the intention was to vest it in the

Chancellor, with two exceptions, Robert Long, the then assistant-registrar, and O'Keefe, the description of chief clerk meaning the latter as plainly as if he were named. The court is bound to adopt that construction which will effectuate the intention of the legislature, the authorities on this point are conclusive. I think there was a *casus omissus*, but that the crown has surrendered its right to the Chancellor.

Judgment of Queen's Bench reversed.

QUEEN'S BENCH.—MICHAELMAS TERM.

FENNELL v. DEMPSEY. Nov. 18.

Practice—Concurrent Writs—Irregular Arrest.

A plaintiff cannot act upon two concurrent writs of *ca. sa.* and *fi. fa.* at the same time. When a *fi. fa.* and *ca. sa.* having issued together, a small sum only was levied under the former, and before returning the *fi. fa.* the defendant was taken in execution under the *ca. sa.*; the Court discharged her out of custody.

The Court will restrain a defendant who declines to be put under terms, from bringing an action.

Writs of *ca. sa.* and *fi. fa.*, having issued together against the defendant, returnable at the same time, a levy was made under the latter, the proceeds, after deducting the expenses of the exertion, amounted only to £3, the debt being £40. Before the *fi. fa.* was returned, the defendant was arrested on the *ca. sa.*

Blackham, on a former day, having obtained a conditional order to discharge the defendant out of custody, on the ground that the *ca. sa.* could not be executed before the *fi. fa.* was returned.

F. Meagher now showed cause. The sale having proved inoperative, the plaintiff was entitled to have recourse to the *ca. sa.*, without waiting for the return of the *fi. fa.*, *Edward v. Ross*, (9 Price, 5); *Dicas v. Warne*, (10 Bing. 341); *Primrose v. Gibson*, (2 D. and Ry. 193.) The plaintiff has not acted with oppression, and the court will not interfere except in such a case.

Blackham in support of his rule. A *fi. fa.* and *ca. sa.* may issue together and be concurrent, but if one be acted upon, a return of that must be entered before a proceeding, can be taken upon the other. *Miller v. Parnell*, (6 Taunt. 370); *Hodgkinson v. Walley*, (2 Tyr. 174); *Edmond v. Ross*, (9 Price, 5); *Kans v. Bridgman*, (5 I. L. Rep. 222); *Wilson v. Kingston*, (2 Chit. 203). The cases cited at the other side do not apply, for in all of them the goods were in *custodia legis*; no seizure could therefore be made, and the parties had not elected to proceed under the *fi. fa.*

BLACKBURN, C. J.—Here is an execution executed, and before the plaintiff can have any knowledge of the amount of that levy, the defendant is taken on another writ, marked for the full amount.

Let the rule for the discharge of the defendant be made absolute, with costs, on the terms of his bringing no action.

Blackham having declined to accept these terms, his client preferring to bring her action,

BLACKBURN, C. J., said the court would follow the practice of the Court of Exchequer, as stated by Mr. Meagher, and restrain the plaintiff from bringing her action.

Rule absolute, with costs.

EXCHEQUER OF PLEAS.

FITZGERALD v. COATES.—Dec. 9.

Practice—Interpleader Act—Costs of Sheriff.

Where the sheriff has used due diligence the court will direct the costs of the rule to interplead, and of attendance on the motion to be paid by the party who shall fail on the issue.

Hemphill on behalf of sheriff, moved pursuant to a rule obtained under the Interpleader Act, an execution had been lodged with the sheriff on the 25th November last, under which he seized certain furniture, &c. On Nov. 27th a claim was put in by a third party to the furniture under seizure. The sheriff obtained the ordinary rule on the 6th of December.

O'Hagan appeared for the execution creditor.

Rollestone for claimant.

An issue having been directed, Hemphill applied for the costs of the order, and the present motion to be paid by the party who should fail on the trial. The practice of the Court of Queen's Bench is to give the sheriff his costs. There is a conflict of the cases in the Exchequer, but there is in court an order made by Baron Leffroy last Trinity Term for payment of the sheriff's costs by the unsuccessful party. The act vests the fullest discretion in the court as to the costs. Counsel also cited *Burke v. Darcy*, (9 I. L. R. 287.)

PENNEFATHER, B.—I shall declare the sheriff entitled to the costs of the rule and of this motion; the question as to which party is to pay him to abide the event of the trial. The sheriff has used great diligence here, coming in on the earliest opportunity.*

* Before Pennefather, B. in Chamber.

COURT OF CHANCERY.

SMITH v. CHICHESTER.—Nov. 30.

Judgments—Priority.

Judgments of the Exchequer rank in the same priority with those of the other Courts, obtained in or as of the same Term, the Exchequer judgment having relation to the first day of Term, although the day of the plaintiff's appearance named in the declaration, be subsequent to it.

This case came before the Court on exceptions to the Master's report. Several creditors having judgments against the defendant, all of which being entered during vacation, related generally to the first day of the previous Term, the Master, in considering the priorities of these judgments, postponed that of Messrs. Rundell and Bridges, being in the Exchequer, to those in the Courts of Queen's Bench and Common Pleas.

Christian, Q. C., for Rundell and Bridges, in support of the exception. The Master reported the Exchequer judgments *paisne* to those in the Queen's Bench and Common Pleas, because the record in the Exchequer shews the date of the appearance, which the others do not, but nevertheless they have relation to the first day of the Term. *Burrough v. Williamson*, (11 I. E. R., not published); *Stanford v. Cooper*, (3 Cro. 102).

Gayer, Q. C., for report.—The doctrine of relation does not take place where the record shews that the judgment could not have been recovered on the first day of Term. *Anonymous*, (3 Salk. 212); *Swan v. Broome*, (3 Bur. 1595); *Hynde's case*, (4 Co. Rep. 71. b).

Pilkington for another creditor, in support of the report, referred to *Purcheater v. Petre*, (3 Dougl. 274); *Miller v. Bradley*, (8 Mod. 190); *Huys v. Wright*, (Yelv. 35).

Rogers, in reply, cited *Att-Gen. v. Andrews*, (Hardres 23); *Doe & Davies v. Creed*, (5 Bing. 327); *Bragner v. Langmead*, (7 T. R. 20, 24); *Calvert v. Tomlin*, (5 Bing. 1); *Ex parte Birch*, (4 B. & C. 880); *Greenway v. Fisher*, (7 B. & C. 436); *Wilton v. Girdlestone*, (5 B. & Al. 847).

LORD CHANCELLOR.—In this case the judgment obtained by Messrs. Rundell and Bridges has been postponed to those of creditors who obtained judgments in the same term, but in different courts. It appears that all the judgments in question were entered in vacation, that of Messrs. Rundell and Bridges in the Court of Exchequer, and, according to the practice of that Court, the plaintiff states his own day of appearance, which in this instance was on a day subsequent to the first day of Term; and it is contended that a judgment upon a declaration, which on the face of the record appears to have been filed on a particular day, cannot relate to the first day of Term, or farther back than the day mentioned in the declaration. There can be no doubt that in point of law all judgments are considered as having relation to the first day of Term. The authorities are uniform with the distinction noticed in *Whittaker v. Whittaker*, (8 B. & C. 768); *Samuel v. Evans*, (2 T. R. 569). That where the proceedings are in the Queen's Bench by bill, they relate to the first day of Term, but that where

there is judgment on process by original, it relates to the first *essoign* day of Term. Thus, in *Stanford v. Cooper*, (Cro. Car. 102), a judgment was held to relate to the first *essoign* day, instead of to the first day of the full Term. That is a strong case, and shows the force given to a fiction of law, it being determined that even against a Statute solemnly acknowledged, the Court will give effect to the fiction of relation. A decree of this court is different, and in *Morrice v. Bank of England*, (3 P. Wms. 401, note F), the decree of the Court of Chancery being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of Term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree. But, with regard to judgments, among themselves their relation to the first day of Term, even in this court, is settled by *Robinson v. Tonge*, (3 P. Wms. 397). The general doctrine is contained in the case of *Bragner v. Longmead*, (7 T. R. 20,) which decides "That a judgment signed in any part of the Term, or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed." In that case Lord Kenyon says, "If we were now to consider for the first time, whether legal relations and legal fictions should be adopted, we would inquire into, and sift most minutely the foundations on which they could be supported, but it is now too late for us, sitting in a court of law in the eighteenth century, to consider whether or not that which has at all times been considered as law, should continue to be law now. In this case, we are bound by a current of authorities all speaking the same language." In *Javil v. Wiltshire*, (Willes, 428), a similar doctrine obtained when "the whole court were of opinion that the statute 29 Car. 2, c. 3, strengthens the case, for that statute was drawn by Lord C. J. Hale, and provided only for judgments affecting lands, in the case of purchasers, leaving them in all other cases to the course of the court, where, though entered after the death of the parties, they have relation to the first day of Term if signed in Term, if signed out of Term, to the first day of the preceding Term." The same doctrine is held in *Doe v. Magill*, (1 H. & Bro. 396,) and *Calvert v. Tomlin*, (5 Bing. 1; 2 Moo. Paine, 1 S.C.) that the statute of frauds has no relation between creditors, it was passed only for the protection of purchasers. For the general doctrine there is ample and unvarying authority. But it is now contended that though this is so in general, yet if there appears on the record any date which shows that judgment could not have been actually recovered on the first day of term, the relation is only to the day which appears on the record, and this is said to be founded on the authority of a dictum of Lord C. J. Holt in 3 Salk. 212:—"A judgment shall have relation to the first day of the Term, as if it were given on that very day, unless there is a memorandum to the contrary, as where there is a continuance of the cause till another day in the same Term." It is important to observe that what the dictum mentions as having the effect of preventing relation to the first day of Term, is a continuance, which is the act

of the court. In *Miller v. Bradley* (8 Mod. 190), it appears that a judgment was given on the last day of Term, and the plaintiff having issued a *testatum ca. sa.* on it, it was contended that that was irregular. But the court held—"This is a judgment of the first day of the Term in which it was obtained, by relation which is sufficient to ground a *ca. sa.*, and by consequence a *testatum ca. sa.*; and if there is no difference between an action by bill and by original, it is regular. As to the continuances being carried on from one Term to another, no such thing appears on the record, so this execution is regular. It is true, if the continuances had been entered no execution could be prior to such entry; and so is the case *Prince v. Haughton*, and *Dobson v. Bell*." So the case before C. J. Holt, and the case 8 Mod., do not carry the exception farther than this, that if there be a continuance on record, the doctrine of relation will not operate to carry the judgment farther back than the day of the continuance. *Huys v. Wright* (Yelverton, 35) was an action on an award made in Easter Term, that the defendant should cease all actions against the plaintiff, and should release all demands. The breach assigned was, that the defendant had not ceased his action, but had prosecuted it, and afterwards obtained judgment against the plaintiff in the same Term. The defendant pleaded *non assumpsit*; on a motion in arrest of judgment, it was argued that there was no breach, because the judgment related to the first day of Term. The court at first admitted that, but afterwards said that the defendant had filed a pleading confessing that the judgment had been obtained after the award. In fact, they did not refer to the record of the original judgment, and held they could not look at it. Lord Mansfield, in *Porchester v. Petrie* (3 Doug. 274), seems to have mistaken *Hynde's case* (4 co. 70 b.), which appears to have been the same in principle as *Huys v. Wright*, there the party having demurred to a pleading which alleged that the enrollment of a deed had occurred after a fine had been levied, and the court held that the demurrer admitted that fact. In *Porchester v. Petrie*, the question did not arise. In *Swan v. Broome* (3 Bur. 1595), a recovery was questioned on this ground: the return day of the writ of summons happened to be on a Sunday, on which day the tenant died; and the court held, that as it appeared by the record that the return day was Sunday, on which day judgment could not be given, and as the judgment could not relate to a previous day, the recovery was bad. All that is in conformity with the doctrine of relation, and the language of the Statute of Frauds, "that judgments of the King's Courts at Dublin do many times relate to the first day of the Term whereof they are entered, or to the day of the return of the original, or filing the bail" does not distinguish between the Exchequer and the other King's Courts. Now, the question is, whether there is anything in the practice of the Court of Exchequer to introduce a distinction between the judgments of that court and those of any other. I may say that no such distinction has ever yet been acted on. There cannot be found any case in which there is the slightest allusion to the doctrine, that

judgments in the Exchequer relate, not to the first day of the Term, but to the day on which the party came there. What is there to prevent the relation? Only that the party filed the bill on a particular day; the declaration is entitled generally, and there is nothing to shew that the party was not in court the whole Term. In *Dobson v. Bell* (2 Lev. 176), "Trover was laid the first day of Easter Term, and the declaration was generally of the same Term. Whereupon after verdict *pro quer*, this matter was moved in arrest of judgment; but upon making it appear that the bill was filed, and the declaration also delivered, both after the 20th day of April, the judgment was entered for the plaintiff without any amendment, though the declaration, being general, relates to the first day of Term, yet the bill, being filed at a day after, all relates to the filing of the bill by the course of the court; of which course, if error be brought, the court where the error is brought will take notice as to the customs of this court." Now, in the Court of Exchequer, what more is done than that you may file a declaration entitled generally of the Term. The course to be taken on warrants of attorney is pointed out in the books of practice. Howard, Ex. Pleas Pract. 302, says, "When the person who gives a warrant of attorney to confess judgment, dies before judgment is entered, if he dies in the vacation time, and the warrant of attorney was executed before the vacation, judgment may be entered any day before the essoign day of the ensuing Term, as of the preceding term, by making the day of appearance on any day in the preceding Term, subsequent to the day on which the warrant was executed." It seems, therefore, that the day of appearance entered is in the discretion of the officer of the court. It is not like a continuance, an act of the court appearing on the record. It is now too late to hold that judgments do not relate to the first day of the Term in which they were obtained, and it would introduce a novelty in practice. The Exchequer does just what the other courts do, as I have pointed out, and therefore, upon these grounds this exception must be allowed.

ROLLS COURT.

BLAKE v. FFRENCH.

FULTON, *Petitioner*, FARRAN, *Respondent*.—Nov. 13.

3 & 4 Vic. c. 105, s. 23.

Judgment Creditor—Petition—Charging Order—Payment of Money.

Where a charging order has been obtained by a judgment creditor upon funds reported to a creditor in a cause, the Court, where there is no controversy as to the right of the petitioner to the fund charged, will direct the fund to be paid to him without a bill being filed.

Seemle, that where there is a conflict of rights, the fund will not be transferred upon motion.

This was an application that two sums of stock, which, by an order bearing date the 19th day of February, 1848, and made in the cause of *Blake v. Ffrench*, had been transferred to the separate credit of the respondent Farran, a reported creditor

in the cause of *Blake v. Ffrench*, might be paid to Fulton, the petitioner. And, by an order bearing date the 18th of January, 1848, made in the matter of Fulton, petitioner, and Farran, respondent, the interest of the respondent in the fund standing to the credit of the cause of *Blake v. Ffrench*, was under the 3 & 4 Vic. c. 105, charged with payment of two judgment debts due to the petitioner, and upon the 12th of February, 1848, the charging order was made absolute.

By the said order of the 19th of February, 1848, made in the cause of *Blake v. Ffrench*, the sum of £977. 2s. 7d. was directed to be transferred to the separate credit of William Farran, the respondent.

Hamilton Smythe.—The question in this case is, whether the petitioner is entitled to have this sum paid out six months after the charging order was made absolute, without filing a bill. By the 3 & 4 Vic. c. 105, s. 23, it is enacted that "such charging order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment creditor." The language of the act gives the party the same benefit as if the fund had been charged in his favour by the owner. The case of *Burke v. Burke*, (7 I. E. R. 174,) is directly in point, and the order to transfer the fund was there made upon motion. *Whitfield v. Prickett*, (13 Sim. 259,) is not an authority against this motion. That and the other English cases all proceed on the practice, that it is not the course to pay out money to an assignee of a fund upon motion, unless by consent of the assignor. In this country, however, the practice is different, for upon an ordinary motion to pay out funds pursuant to an allocation report, it is usual to entertain motions upon behalf of persons to whom funds have been assigned, or in whose favour they have been charged. In the case of —, petitioners, and *Bridgeman* respondent, unreported, upon application by the judgment creditor (of a party who was tenant for life of a fund in court) for a receiver, or to have the dividends paid out, it was ordered that the dividend should be paid to the judgment creditor in satisfaction of his demand.

Richard Armstrong contra.—It must be admitted that this court has been in the habit of substituting equitable assignees of a fund, and making the payment to them of monies allocated to their assignor; but this practice appears not to be warranted except by consent. The practical inconvenience of parting with a fund, in which parties may be interested who are not before the court, is manifest, and a motion should not be elevated into a hearing of a cause, and a settling of rights and priorities of different claimants to a fund. When *Burke v. Burke* was decided in 1844, *Whitfield v. Prickett* was not before the profession, the report not having been published till 1846, and the same observation applies to the manuscript case cited. In *Westall v. Leslie* reported in a note to *Neate v. Pink* (15 Sim. 453), in which a lady entitled to an annuity which the receiver in the cause was directed to pay her, charged it with the repayment of £100 lent to her by one Carter, who presented a petition, praying that the re-

ceiver might be directed to pay him £100 out of the moneys coming to the annuitant. The Vice-Chancellor held, that as the lady appeared by counsel and opposed the petition, he had no jurisdiction to make the order; but that a bill must be filed. *Newton v. Askeu* (12 Jur. 766), shews that *Whitfield v. Prickett* is law in England, and supports Lord Langdale's reading upon the corresponding statute in England, and the jurisdiction under it. In the present case, the petitioner is under obligation to other persons to pay them out of the fund now sought for.

THE MASTER OF THE ROLLS.—In this case, on the 18th of January last, a conditional order had been made, that certain stock, which has subsequently been transferred to the separate credit of the respondent, by an order made in the cause of *Blake v. Ffrench*, should, under the 23rd section of the 3rd & 4th Vic. cap. 105, stand charged with the petitioner's demands. This conditional order was made absolute on the 12th of February following, the Master having, in the interim, made his allocation report, dated the 24th of January. I may here remark, according to a case decided in the Court of Exchequer, the conditional order was irregular; for that court will not make a charging order before an allocation report has been made, and I think that practice is convenient, but it does not apply in this case, for there has been no application to set aside the order, though more than six months have elapsed since the charging order. In this case, the owner is interested in supporting the order, for a much larger sum is due to Mr. Fulton than the sum sought to be transferred; but it is said, I have no jurisdiction under the act to order this stock to be transferred, and that a bill must be filed for that purpose. The cases of *Whitfield v. Prickett* and *Newton v. Askeu*, have been cited in support of that position. At page 768 of the report of *Newton v. Askeu*, in 12 Jurist, Lord Langdale expresses himself of opinion, that the charging order is, in effect, a stop order, and nothing more. When the late Master of the Rolls decided the case of *Burke v. Burke*, the case of *Whitfield v. Prickett* was not before him, not being then reported, and the difficulty I have in this case is to reconcile these decisions. I think, however, the best course to adopt is to follow the decision of the late Master of the Rolls in *Burke v. Burke*; and, on considering the 23d section of the act, I have no doubt he was right, for in this court I am constantly asked, on cross motions, to make sub-allocations. Now, if this be not the habit in England, the cases are quite reconcilable. It is argued I am not to give this charging order more effect than if the person himself charged it, but am I to hold that it is not to have as much effect? There is no question to be decided between the parties in a suit, if it were instituted, there being no controversy about rights. I think it is better for the suitors of this court to abide by the practice as laid down in *Burke v. Burke*, and if the practice of sub-allocation be not the practice in England, the cases are quite reconcilable. I wish it to be distinctly understood that if there were a conflict of rights, I do not decide that a bill should not be filed; and I do not wish

that this case should be made a precedent for a similar rule, under such a state of facts.

Order in terms of the notice.

EQUITY EXCHEQUER.—TRINITY TERM.

PUTLAND v. EVANS.—Dec. 5.

Personal Interrogatories, 115th Order.

The Court will not, in general, interfere with the discretion given by the 115th Order to the Remembrancer, as to the examination of parties by interrogatories in the office.

Mara moved that the defendant, Evans, might be at liberty to examine Mrs. Putland, the plaintiff, on personal interrogatories, notwithstanding the refusal of the officer to permit it. It appeared that the Remembrancer in the office had named a day up to which Mrs. Putland might be examined in the manner now applied for, and that the defendant had allowed that time to pass. It was further sworn that her evidence was material, and could not be replaced by that of any other person.

Longfield, Q. C.—The Remembrancer knows all the facts, and has refused this application, and the order gives no appeal to the court. The court certainly ought not to interfere, as it was evidently intended that the Remembrancer's decision on such points should be final.

RICHARDS, B.—This is an appeal from the decision of the Remembrancer, upon a matter purely within his jurisdiction and discretion. The general rule provides that the Remembrancer shall have power, at any time he sees fit, to direct such an examination as the present; apparently intending that the matter should remain constantly in his discretion. I do not say that we should not have jurisdiction to interfere under very special circumstances, but, before we so interfere, we must see very special circumstances. In this case we have not heard sufficient to induce us to interfere with the officer, the more especially as he is intimately acquainted with the cause, and can order the examination at any time he sees fit.

HORT v. BLOOMFIELD.—Dec. 17.

Practice—Liberty to Creditors not parties to suit to come in and prove. Clarke v. Jessop, (10 I. E. R. 40,) dissented from.

After the report and final decree in the cause, the court will not, at the instance of the plaintiff, grant liberty to judgment creditors to come in and prove their demands, with permission to object to the accounts and proceedings already had, unless upon consent of all the creditors.

Robert Johnston, on behalf of the plaintiff, moved, that notwithstanding the report and final decree in this cause, certain judgment creditors of the defendant and inheritor of the lands decreed to be sold might be at liberty to prove their demands. The notice was in the precise terms of that in the case of *Clarke v. Jessop and others* (10 I. E. R. 40). The bill had been filed previously to the new rules, and the various judgment creditors had not been made parties. Neither the judgment credi-

tors, nor any of the defendants in the cause, appeared on the motion. Counsel relied on the authority of *Clarke v. Jessop* (10 I. E. R. 40), and *Gillespie v. Alexander* (3 Russ. 136), referred to in the judgment in that case.

LEFROY, B.—With great respect to his honour the Master of the Rolls, the case of *Gillespie v. Alexander* cannot be relied upon as warranting his ruling in *Clarke v. Jessop*. The effect of the decree in the case before Lord Eldon was—not to undo any thing that had been done in the previous stage of the suit, but to leave matters in *statu quo*—but here *non constat*, that some of these creditors may not prove charges prior to those already reported, and thus unsettle the entire proceedings. To grant this application, would be to make a decree upon motions. Perhaps, if all the judgment creditors mentioned in your notice enter into a consent to be bound by the previous proceedings, I may grant the liberty you seek, but at present I say no rule.*

COMMON PLEAS.—MICHAELMAS TERM.

IN RE BOOTH AND OTHERS.—Nov. 24th.

Arbitration—Costs of Deed of Submission.

Where a matter is referred to arbitration, and complicated matters of law and equity are involved therein, fees to counsel for perusing and settling the deed of submission will be allowed on the taxation of costs between party and party.

In this case, Coates, on the 8th November last, had applied for an order that certain items in a bill of costs, disallowed by the taxing officer on taxation, should be allowed, or that the officer should be directed to review his taxation; and the court then directed the case to stand over, and that the taxing officer should report on what grounds he had disallowed the items.

It appeared that all matters in dispute between the parties had been referred to arbitration, and that the arbitrators had awarded in favour of the applicant, with costs; and, on taxation, the officer had disallowed certain items relative to the perusal by counsel of the draft deed of submission.

The taxing officer now made his report, as to his reasons for disallowing the above items, which was as follows:—"I disallowed in the said costs the items entitled 'draft instructions for counsel to settle deed, 5s. 4d.; attending counsel therewith, 6s. 8d.; paid his fee, £2 2s.;' because it is contrary to the practice in the taxation of law costs, between party and party, to allow any fee to counsel for the settling of a deed, the reason of which I apprehend to be, that a deed is not a document that requires the signature of counsel to give it effect. For instance, no fee was ever allowed to counsel in the taxation of costs, between party and party, for drawing a fine or recovery, or a deed to declare uses thereof, because the signature of counsel was not required to those documents. So in England, where the signature of counsel is not required to declarations, or to the plea of the general issue, no fee is allowed to him for drawing the pleadings;

* Pigot, C.B., Pennefather and Richards, B.B., were absent.

but if the pleadings be special, as a replication, or demurrer, &c., the signature of counsel is necessary before the pleading is filed, and then a fee is always allowed to counsel. In Ireland, where, by a rule of all the law courts, every pleading must be signed by counsel before it can be filed, a fee is always allowed to him for drawing declaration, the plea of the general issue, and every other pleading."

Coates now, with *R. Armstrong*, contended that the items ought to be allowed,—that the reasons assigned in the officer's report for disallowing them were fallacious,—that the deeds mentioned in the report meant deeds of conveyance, as the instances cited—viz, fines and recoveries, and deeds to declare their uses—and thus plainly shewed that the English practice was incorrectly stated; and although many pleadings in England do not require the signature of counsel, fees to special pleaders, gentlemen practising under the bar, were always allowed on taxation,—that the deed of submission was not a deed of a conveyance, but in the nature of a record, the foundation of the proceedings, and it was necessary it should be perused and settled by counsel, in order to the proper adjustment of the rights of the parties,—that serious questions of law and equity were in dispute between the parties to this arbitration, and that the deed of submission required to be drawn up with great care and accuracy,—that it was not within the province of a solicitor, however skilful, to settle such a deed on his own responsibility, and that he would not have been justified in so doing.

Fitzgibbon, Q. C., contra, resisted the application, and insisted that the items were properly disallowed,—that the deed of submission was not special, but of the ordinary character of deeds of this kind,—that it was unnecessarily prolix, the facts of the case not requiring any special deed, and that it might have been drawn in a much more concise form,—that if one party chose to employ counsel to settle his deeds, it was done for his own satisfaction, and that they had no reason for burdening others with costs unnecessarily incurred.

PER CURIAM.—This draft deed is not a mere formal copy to be signed by counsel, but appears to have been carefully and laboriously altered, and the other parties acquiesced in this deed. We think it right to allow the fee for perusing it, but in doing so we do not mean to interfere with the general rule set out in the Master's report.

No costs to either party.

PRENDERGAST v. LORD GLENGALL.—Nov. 25.

Sheriff—*Informal return of Fi. Fa.*

To a writ of fi. fa. the Sheriff returned the delivery of prior writs to his predecessor and to himself; seizure by the predecessor, in whose hands goods remained for want of buyers; and that there were not any other goods and chattels within his bailiwick at the time of the delivery to him of the said annexed writ, or at any time since, whereout he could levy the sum mentioned, or any part thereof. Held a bad return.

J. B. Murphy, on behalf of the plaintiff, applied for an order that the Sheriff for the

county of Tipperary should amend his return to a writ of *fi. fa.*, on the ground that the said return was irregular, informal, and defective. The *Fi. Fa.* was delivered to the sheriff on the 23d of October, 1848, returnable on the 2d of November, and was indorsed to levy the sum of £1066. 11s. 4d., besides damages and costs. To this the sheriff made a return, stating that on the 15th of February, 1847, and before the delivery to him of the said writ, a certain other writ of *Fi. Fa.* against the goods and chattels of the same defendant, at the suit of the Governor and Company of the Bank of Ireland, marked for the sum of £1,119, and returnable on the 15th of April, then next, was delivered to Lord Suidale, his predecessor in office. That on the 12th of November, 1847, and before the delivery to him of the said writ, a certain other writ of *Fi. Fa.* against the goods and chattels of the same defendant, at the suit of Timothy George Adams, marked for the sum of £667. 10s. 3d., and returnable on the 19th day of November then next, was also delivered to his said predecessor. That on the 31st of December, 1847, and before the delivery to him of the said writ, a certain other writ of *Fi. Fa.* against the goods and chattels of the same defendant, at the suit of John R. Byrne, marked for the sum of £381. 12s. 10d., and returnable on the 11th day of January then next, was also delivered to his said predecessor. And that on the 6th of January, 1848, and before the delivery to him of the said writ, a certain other writ of *Fi. Fa.* against the goods and chattels of the same defendant, at the suit of Hugh O'Callaghan, marked for the sum of £870. 2s. 5d., and returnable on the 11th of January then next, was also delivered to his said predecessor. That six other writs of *Fi. Fa.*, at the suit of other persons, against the same defendant, had been delivered to himself before the delivery of this writ, and that on the 23d of October, 1848, the writ at the suit of the present plaintiff was delivered to him, and the return then concluded as follows:—"and I further certify that by virtue of the said four first-mentioned writs, and according to the priorities thereof respectively, the said Richard, Lord Suidale, my predecessor in office, took and seized the following goods and chattels of the said Earl, to wit, 200 sheep, 20 cows, 14 horses, 3 carriages and harness, and a quantity of household furniture, of the amount and value of £800, and that these goods and chattels remained in the hands of the said Richard, Lord Suidale, for want of buyers, and that the said Earl had not any other goods or chattels within any bailiwick at the time of the delivery to me of the said annexed writ, or at any time since, whereout I could levy the sum therein mentioned, or any part thereof." This return is defective; it is argumentative and uncertain. It should have stated in positive terms that the defendant either had, or had not, goods in the sheriff's bailiwick. From this return it cannot be concluded whether, in point of fact, there were any goods which the sheriff could have seized. If there were not any such goods, the return should have been *nulla bona*. If there were any such, he should have seized them, so as to have given us an opportunity of issuing a *venditioni exponas*, selling the goods, and out of

the proceeds paying off the demands on other writs, according to their priorities. This return is clearly bad according to the authorities. In *Lorick v. Crowder*, (8 B. & C. 192), it was decided, first, that goods seized by a former sheriff, and not sold after considerable delay, should have been seized by the subsequent sheriff, under a writ subsequently delivered to him; secondly, that where the second writ was delivered to the sheriff, and he found that the officers of the former sheriff were in possession, it became his duty to inquire by what authority they were there; and thirdly, that the possession of the former sheriff is no more than the possession of any third person under a bill of sale. And in the same case, Bayley, J. says, "There cannot be any doubt that these goods were liable to the plaintiff's execution. Where a plaintiff sues out execution, and seizes under a *fiery facias* the goods of his debtor, and suffers them to remain long in the debtor's hands, a subsequent execution creditor may treat the goods as the goods of the debtor. The only question is, does the change of sheriff make any difference? and then he proceeds to say that the second sheriff should have asked to see the warrant, and when he found from its date that there had been gross delay, he should have treated the first execution as fraudulent and void, and have seized the goods. *Payne v. Drewe*, (4 East, 522,) is also an authority for this point. Then there is no difficulty as to the form of the action. In *Chambers v. Coleman*, (9 Dow. P. C. 588,) where the circumstances were similar to those of the present case, the sheriff having recited in order a number of writs previously delivered to him against the same defendant returned, that *by virtue of the said several writs, and according to the priority thereof*, he had seized the goods and chattels of the defendant, and that they remained in his hands for want of buyers. The sheriff here might have adopted that form, but, at all events, the present return is informal and bad.

D. Lynch and J. Pennefather, contra.—This return is perfectly good and valid, and the only one which the sheriff could have made under the circumstances, and it is the one which is most for the benefit of the execution creditor. The case before Lord Tenterden was the case of a false return. The question there, was not whether the return was good, but whether it was *bonâ fide*. Here there is no allegation that the return is false, and, if it be true, it is good on the face of it. The case cited from 9 Dow. is an authority for the present return. The return there was identical with the present return. Under all the rules of this court, the return must be taken to be true. (*Doherty, C. J.*—That is the very ground for this application that the return being true is informal.) No other return could be here made. The legal effect of this return is the same as if the Sheriff had returned that he himself had seized the goods under the former writs, and that they were in his hands for want of buyers. And the plaintiff cannot be prejudiced in any way, for it appears that there is only £800 worth of goods, and that there are prior executions to the amount of £3000. This return is fully warranted by precedent.

PER CURIAM.—The authority of the case before

Lord Tenterden is too strong for you to struggle against. The sheriff must amend his return.

Order granted.

EXCHEQUER OF PLEAS.

ASSIGNEE OF BROWNE v. BROWNE.—Nov. 8 & 24.
Practice—Assignment of judgment by Assignee of Insolvent—Conusee.

Where a judgment, the property of an insolvent conusee, is vested in his assignee under the Insolvent Act, the court will direct an assignment by the latter to a third party, to be enrolled without the judgment having been revived in the name of the assignee of the insolvent.

W. Brereton moved that the officer should be at liberty to enrol the memorial assignment of a judgment under the following circumstances. The conusee of the judgment had become insolvent, and the assignee had contracted to assign the judgment, but the officer refused to enrol the memorial assignment without the special order of the Court.

LEFROY, B. having intimated a doubt, whether the proper course would not have been for the insolvent's assignee to revive the judgment, and thus bring himself into privity with the record, directed the case to stand for the full Court.

Nov. 24.—Brereton.—The effect of the Insolvent Act is to vest the legal and equitable estate in the judgment in the assignee, and the act gives him a perfect a legal title as any revival by *scire facias* could confer. Where a judgment was assigned to new trustees under 1 W. 4, c. 60, the court directed a memorial of the assignment to be enrolled. *Burrowes v. Hogan*, (2 I. L. R. 369). Counsel also cited *Collis v. Mahon*, (Jones, 132, S. C. 3 I. R. 3 s. 144,) in which case the Bankers' Act, 32, G. 3, c. 14, was held to vest a judgment legally in the trustees, without a memorial enrolled. *Forster v. McKee*, (1 J. & Sy. 347-8.) The uniform practice in the Queen's Bench is to enrol such assignments as a matter of course.

PIGOT, C. B.—My difficulty at first arose from the terms of the second section of 9 Geo 2, c. 3, which seems to contemplate that assignees only—who have become such by memorials duly enrolled—should have execution, and the other remedies on the judgment. The terms of the fourth section, however, seem sufficiently large to let in the present case, and those referred to in argument. We shall therefore make the order, the memorial to rectify the vesting order.

BALLINA UNION v. WALSH.—Nov. 22-23.
Pleading—Tender.

A declaration in debt contained four counts, three of tenders to the first three, on which issues were taken and found for the defendant; to the fourth count was pleaded:—"As to the said sum in the last count of the declaration mentioned residue of the said several sums above demanded over and above the said sums in the first, second, and third counts mentioned, the said defendant says he does not owe the same, or any part thereof, to the plaintiff."

plaintiffs, in manner and form as the said plaintiffs have thereof," &c. On issue on this plea, held that plaintiffs should have shewn debt beyond the sums contained in the first three counts.

Where defendant told plaintiff's agent that an amount more than sufficient to cover the demand was in a desk in the room, and desired his son to hand the amount to the agent; and the son rose to do so, but was interrupted by the agent, saying, that he would not at all take the money, as a third person had forbidden him to do so. This refusal dispensed with the necessity of producing the money, either in number or specie.

Held also, that evidence of such a transaction was sufficient to support a plea of tender.

Qu. Whether the consent of the Poor Law Commissioners to an action for rates, as required by 6 & 7 Vic. c. 92, s. 2, should be given under their seal; and if so, whether a defendant can avail himself of the non-production of such sealed assent at the trial.

Qu. Whether a tender of rates to a collector on a Sunday is a good tender. Semble, a tender to a rate collector, whose appointment continues, binds the guardians, though they may have expressly ordered him not to take the money.

THIS was an action of debt brought by the Guardians of the Ballina Union against the defendant, as immediate lessor of certain tenements within the union, of less annual value than £4. There were four counts in the declaration, of which the first was for sums due out of the division of Crossmolina; the second and third for two separate rates in the division of Binghamstown; and the fourth for £50 for rates due out of lands in the union generally. The bill of particulars claimed £43 10s. To the first, second, and third counts, the defendant pleaded separate pleas of tender; and to the fourth, "as to the sum of £50 in the fourth count mentioned, residue of the said several sums above demanded, over and above the said sums in the first, second, and third counts in said declaration mentioned, the said defendant says he does not owe the same, or any part thereof," &c. Issue was joined upon all the pleas; and the defendant paid into court £43 10s, on the pleas of tender, being the total amount claimed by the bill of particulars. The case was tried before the Chief Baron, at the sittings after Trinity Term, 1848; and on the issue upon the fourth count, the plaintiff proved an offer by the defendant to pay a sum of money on account of rates: being, in fact, the money claimed by the first count of the declaration. On the issues taken on the second and third pleas of tender, the defendant proved that he and his son had met the rate collector in an hotel, who, upon being questioned, said that he would not receive rate from the defendant, having been instructed by the attorney of the guardians not to do so; that the defendant rejoined, the rate due from him must be under £50, and that there was that sum in a desk of his in the room, from which he desired his son to take the money and give it to the collector, who could afterwards account for it; that the defendant's son thereupon was proceeding towards the desk, but the collector said he could not at all take the money; whereupon the defend-

ant's son sat down without producing it. It further appeared, that on the next day, which was Sunday, a regular tender was made to the collector, who refused the money, on the grounds he had previously assigned. A document under the hand of the secretary to the Poor Law Commissioners was also admitted in evidence, authorizing the bringing of the action; and also a draft order to the same effect, initialed by the Chief Commissioner. To this evidence the defendant objected, it not being under the seal of the Poor Law Commissioners. The Chief Baron, in his charge, left it to the jury to say whether the tenders put in issue had been proved, stating to them his opinion as to what was a legal tender. He also told them to find for the plaintiff on the fourth count, if they should be of opinion that an admission of rates being due had been made by the defendant. To the former part of his Lordship's charge the plaintiff objected, and to the latter the defendant; but his lordship refused to vary his charge. The jury found for the defendant on the pleas of tender, and for the plaintiff on the fourth count of the declaration. And now, pursuant to liberty reserved by the learned Judge, the objections on both sides came on to be argued.

Joseph Reeves, for the defendant.—We contend, first, that the plaintiff has not shewn the assent of the Poor Law Commissioners to this action, as he was bound to do by the 6 & 7 Vic. c. 92, s. 2. The Commissioners of the Poor Law are clearly a corporation (10 & 11 Vic. c. 99, s. 10), and, as such, can do no act without seal (Steph. Comm. vol. 3, p. 126); *Mayor of Ludlow v. Charlton*, (6 M. & W. 815). Besides, the 10 & 11 Vic. c. 90, s. 11, expressly provides, that all rules, regulations, and orders shall be made by them under their seal. So likewise does 1 & 2 Vic. c. 56, s. 121. (*Pennfather, B.*—What right has the defendant to avail himself of such a defence, supposing the seal to be necessary? Can you distinguish between this case and that of an action brought by assignees of a bankrupt, without consent of the creditors, where it is settled the defendant has no right to complain?) (*Lefroy, B.*—The object of the clause is, to protect the public from the waste of their funds in costs, and not to protect parties who do not pay their rates.) The consent is made necessary for the protection of the ratepayers, of whom the defendant is one; and also for the protection of landlords, to prevent their being harassed with unnecessary and expensive litigation in the superior courts, when they might be sued by civil bill. The cases, therefore, are not analogous. Secondly, we object, that the direction of the Lord Chief Baron on the fourth count was wrong; for that he should have required the plaintiff to prove a demand beyond the sum claimed in the first, second, and third counts, and should have told the jury not to find for the plaintiff unless they thought his admission referred to a sum different from those mentioned in them, *Compere v. Hicks* (7 T. R. 727); *Taylor v. Cole* (3 T. R. 296); *Churchill v. Day* (3 Man. & Ry. 71; 1 Chitty, 447; Bul. N. P. 17a). As to the objections raised to the evidence of the tenders in this case, the defendant is clearly entitled to retain his verdict. We proved a good tender on Sunday, and the 7 Wm. 3, c. 17, does not apply to such

persons as a collector of poor rates, *Drury v. Defontaine* (1 Taunt. 181); *Sandiman v. Breach* (7 B. & C. 96); *Rex v. Whitnash* (7 B. & C. 596); *Scarfe v. Morgan* (4 M. & W. 270). Even if the tender was bad, as being made on a Sunday, the collector should have objected on that specific ground; and by not doing so at the time, he has waived the objection, *Bull v. Parker* (2 Doed. N. S. 345); *Polglass v. Oliver* (2 Cr. & Jer. 15). At all events, the tender proved on Saturday is quite a sufficient one.

Whiteside, Q.C., with *Otway*, for the plaintiffs.—The seal of the Commissioners is not absolutely necessary, either by the statutes or from their being a corporation, *Mayor of Thetford's case* (3 Salk. 103); *Smith v. Birmingham Gas Company* (1 Ad. & El. 526). And even if it were, the defendant has no right to take advantage of its absence. As regards the plea to the fourth count, the principle contended for by the defendant may be true, when pleas going to the cause of action have been pleaded to the other counts; but it does not apply where the pleas are merely in mitigation of damages, as is the case with a plea of tender. Here we allege that there is, in reality, only evidence of a dispensation with a tender, which should have been pleaded. Such was the plea in *Douglas v. Patrick* (3 T. R. 684). The cases on bills of exchange, in which notice is necessary, are precisely in point; and in them an allegation of notice will not be proved by evidence of a dispensation with notice, *Burgh v. Legge* (5 M. & W. 418). (*Pennefather, B.*—The difference is, that the plea of tender puts in issue an offer of payment; and if the formality be dispensed with, may be proved by any evidence shewing that fact.) (*Lefroy, B.*—Precisely so; for in those cases you mention, they relied on notice in pleading, and proved a waiver of it; whereas here they plead a tender, which the dispensation with the mere formality enables them to prove.) It appears from the evidence that at the time the supposed tender was made, the collector had been, so far as that sum was concerned, discharged from his office of agent to the guardians, and they, therefore, were not bound by the transaction with him. (*Pigot, C.B.*—The collector was not dismissed, but was ordered to refuse; is not, therefore, his refusal the refusal of the guardians?) Counsel relied on *Dickinson v. Shee* (4 Esp. 67); *Thomas v. Evans* (10 East. 101); *Phillips v. Innes* (4 Cl. & Finn. 234); *Krans v. Arnold* (7 Moore, 59); *Betterbie v. Davis* (3 Camp. 70).

Richard Reeves, for defendant, was not called on.

Pigot, C.B.—We are all of opinion that the verdict for the defendant, on the pleas of tender, should stand; and that the verdict for the plaintiff, on the fourth count, should be set aside. As regards the pleas of tender, a great deal has been urged upon us, and we have been asked to reconsider what we are inclined to hold as settled law; viz., that a party, to whom money is offered, may dispense with the actual production of it, or the offer of the precise amount, and by such dispensation make an otherwise informal tender good. Such being the law, the evidence that went to the jury in this case was quite sufficient to show that there had been an offer by the defendant, and

such a waiver by the collector, of the actual production of the money, as we hold to be sufficient evidence to support a plea of tender. But, then, it is questioned, whether the authority of the collector was not at an end at the time of the tender, and that therefore the tender to the collector does not affect the guardians, there being no connexion between him and them; and it has also been argued that the tender should have been made in the collector's office. But even if the guardians had duly attempted to withdraw the authority of the collector, I should have found some difficulty in allowing that such withdrawal would be sufficient to vitiate the present tender. It would lead, I think, to much collusive and oppressive conduct if it were allowed that the collector might receive from one person, and reject from another. It is a mistake to suppose that the collector is an agent of the guardians, voluntarily retained, and whom they may direct and order at their pleasure. The collector is appointed by virtue of the act of parliament, and derives his authority and functions from its enactments, more than from any orders or directions of the guardians; and it is his duty, at all reasonable times, to receive payment of the rates, whether in his office or not. It would be most dangerous to say, that if the guardians choose to receive money from one person, and not from another, that a tender by the ratepayer to the person lawfully authorized to receive shall not protect him from the consequences of such wrongful conduct. Here, however, there is no sufficient evidence of a withdrawal of the collector's authority. The guardians have not intimated their order, as far as appears; and no direction from attorney, or other person, would be sufficient to interfere with the collector. There has, therefore, been no withdrawal of authority shown; and, even if there had been, I should be unwilling to allow it to vitiate the tender. As for the tender on Sunday, we do not think it necessary to consider it, as the jury have found the tender on Saturday to have been good, but we do not wish to encourage money dealings on the Sabbath. As regards the question on the fourth count, and the plea to it, we are of opinion, upon the cases cited, that the plaintiff should have shewn a demand beyond what was covered by the pleas of tender, and that, not having done so, the verdict on it must be for the defendant. Upon the question as to the assent of the commissioners being under seal, the case being decided for the defendant on the other points, it becomes unnecessary for us now to form a determination.

RICHARDS, B.—I concur in the judgment of my Lord Chief Baron. Without, however, intending to say, that, if the authority of the collector to receive rates had been properly and lawfully withdrawn by the Board of Guardians, a tender to him would then be valid.

LEFROY, B.—Without doubt, if the authority of the collector were properly and legally withdrawn, and due notice of such withdrawal given, a subsequent tender to the collector would be ineffectual; but, until then, it would be extremely inconvenient and mischievous, as my Lord Chief Baron has remarked to deprive the public of the right of paying to him.

Verdict for defendant.

COURT OF CHANCERY.

MURRAY v. RICHARDSON.—Dec. 11, 12.

Will—Codicil—Revocation.

A. by his will, bequeathed, one-seventh of a fund to B. for life, with remainder to her daughter. The residue of the fund was bequeathed to the sisters of B. for life, with remainder to their children, with an executory limitation over in default of children, in the nature of cross remainders. By his codicil, A. revoked the bequest of one-seventh to B. and her daughter, and declared his intention that they should take no benefit under his will. Held a revocation of the interest of B. under the executory limitation.

THIS case came before the court on exceptions to the Master's report. The question raised by those exceptions was, whether an executory devise, in the nature of cross remainders, was revoked by a codicil. The Master reported that it was revoked, and to this report exceptions were taken. The will (which was very verbose) is, so far as material, sufficiently set out in the judgment of the Lord Chancellor.

John Brooke, Q.C., with *Gresson*, for the exceptions, referred to *Dosedem Dearle v. Hicks* (8 Bing. 475, S. C. 1 Moo. & Scott, 759); *Francis v. Collier* (4 Russ. 383); *Roach v. Haynes* (6 Ves. 153); *Darley v. Langworthy* (3 Bro. P. C. 359).

Gilmore Q. C., with *Hughes, Q.C.*, and *J. C. Lowry*, for the report cited *Persse v. Daly* (9 I. E. R. 508); *Murray v. Johnson* (3 Dru. & Warr. 143); *Read v. Backhouse* (2 Russ. & My. 546).

Gresson, in reply, cited *Doe Dem Murch v. Marchmont* (6 Man. & Gr. 813); *Newman v. Lade* (1 Yo. & Col. C. 680); *Beauclerk v. Meade* (2 Atk. 167).

Dec. 12th.—**LORD CHANCELLOR**—I have read through the will and codicil, and the case seems one of some difficulty. Both documents seem to have been prepared with great care, and it is impossible to mistake the intention of the testator. He devised his leasehold lands to trustees therein named, to hold upon trust, to pay certain portions to some of his sisters (he having then six) and the children of a deceased sister, Mary Lawson; he then disposes of the surplus of the rents and profits, but appears to contemplate that disposition continuing only during the time those portions shall remain unpaid; and, after their payment, he bequeaths the rents and profits as follows:—"One-seventh part thereof to the said Charity Ashmore, during her natural life, and from and after her decease, to such child or children, male or female, lawfully to be begotten, as she shall leave at the time of her death, share and share alike, if more than one, his, her, or their heirs, executors, administrators, or assigns. One other seventh part to the said Amelia Johnston for and during her natural life, and from and after her decease, then to the child or children, male or female, of the said Amelia Johnston, lawfully begotten, whom she shall leave at the time of her death, share and share alike, if more than one, and to his, her, or their heirs, executors, administrators, and assigns. Another seventh part thereof to the said Elizabeth Walker for and during her natural life, and from

and after her decease then to her present daughter, Eliza Walker, her heirs, executors, administrators, and assigns." The disposition to her is thus different from the disposition to the other sisters, giving an interest to the daughter *nominatim*, while the shares of the other sisters are given to their children generally. However, this difference appears to be immaterial. He then gives three other sevenths to his sisters Catherine, Anne, and Sarah, in the same manner as those given to his sister Amelia, and the remaining seventh to the "child, or children, of the said Mary Lawson who should be living at the death of the said testator, share and share alike, if more than one of such issue, and to their executors, administrators, and assigns; and if there should be but one of such issue living at the death of the said testator, and if but one child, the seventh remaining portion to that one child, her or his heirs, executors, administrators, or assigns." Then comes the following clause of accruer as it is called, being an executory devise of the property, "and in case of the death of any of my last-mentioned sisters without leaving a child, or children, living at her death, it is my will and intention that the share or proportion of such sister, or sisters, so dying without any child living at her death shall go to and be received by the surviving sisters or sister, together with such child, or children, of the said Mary Lawson, who, if more than one, are all to be considered as one person, and to take but one person's share only, and which shares and proportions are to be vested in my surviving sisters and the children of the said Mary Lawson, for such estates, and with such remainders, and subject to such limitations over in default of a child, or children, as are herein before specified, with respect to the original seventh part so devised to them respectively; and in case of the death of any of the children of the said Mary Lawson, without issue, then his, her, or their share of the said part shall be equally divided among the survivors of them." He then charges his lands with an annuity of £60 for the said Eliza Walker, the elder, and a sum of £1,000 to Eliza Walker, the younger, in satisfaction of some trust money of theirs misapplied by him; and in case all his sisters, and their children, should die without issue, he devises all the lands to his right heirs; then, after some bequests, he devises all the residue of his property to such of his sisters as should be living at his decease, and the children of any of his deceased sisters as should then be living, share and share alike, the children of such deceased sisters, if more than one, to be taken and considered as one person only, and to receive only one person's share. After this he makes a disposition with respect to two sums of £200 and £400, which he directs to be paid by John Blair and James Lawson, to entitle their families to the benefits thereby bequeathed them, which sums he orders to be applied in payment of his debts, or to be divided amongst his sisters. On this portion of the will there can be no question—the codicil creates the whole difficulty. There is no doubt of the intention; he considered that Mrs. Walker had disentitled herself to any benefit from him, and seems to have taken special care to exclude her from all such benefit. If he has failed, it is not

from want of words, for two or three times in his codicil he has mentioned that intention. After reciting and confirming some part of his will, the testator proceeds—"Whereas, I have by my said will left and devised unto the said trustees named in the said will, certain lands, tenements, and premises therein mentioned, upon the trust in my said will mentioned, and upon this further trust, to permit and suffer my said sisters, Charity Ashmore, Amelia Johnson, Elizabeth Walker, Catherine Ashmore, Anne Ashmore, Sarah Blair, and the children of my sister Mary Lawson, which should be living at my death, to have and receive all the surplus of the rents, issues, and profits of my said lands, after paying and satisfying three sums of £36 yearly, mentioned in my said will, and exceeding the sum of £250, which make together the sum of £286, until by the means in my said will mentioned, the whole of the respective portions of my said sisters then living and unpaid, shall be fully paid and satisfied." "I now, by this my said codicil revoke, annul, and avoid the said devise or bequest, so made in favour of the said Eliza Walker, her portion having been heretofore paid, and her conduct towards me of late having forced me not only to revoke the said recited devise or bequest, made by my said will in her favour, but to withdraw all regard and natural affection which I have heretofore had for her." Can anything indicate more expressly the opinion of the maker of the codicil? The bequest above-mentioned was only of the surplus profits till the charges should have been raised, but then he seems to go step by step through the will, and proceeds to revoke the devise of one-seventh to her. "And whereas by my old will I further ordered, that after payment of the respective portions of my sisters, named for the purpose in my said will, the trustees therein mentioned should permit and suffer my said sister, Elizabeth Walker, during her life, and after her decease her present daughter, Eliza Walker, her heirs, executors, administrators, and assigns, to take and receive one-seventh part of the whole of the rents and profits of my said towns, lands, &c., I now, by this my codicil, revoke, annul, and make void the said devises or bequests, made by my said will in favour of my said sister, Elizabeth Walker, and the said Eliza Walker, and each of them; and I order and direct, and my intention is, and I hereby leave and bequeath the said one-seventh, so by my said will intended for the said Elizabeth Walker during her life, and after her death for her daughter, the said Eliza Walker," amongst the other sisters. He then goes on—"As to all the rest, residue, and remainder of my estate and effects, not heretofore or by my said will particularly disposed of, together with that part of the residuum of my fortune which I have by the residuary clause in my will left to the said Elizabeth Walker and her child, I give the same to such of my said sisters who shall be living at my death, and to the children of any of my deceased sisters as shall be then living, save and except the said Elizabeth Walker and her child or children, to whom I do not intend or mean to give anything; share and share alike, the children of each such deceased sister, if more than one, to be

considered as one person only, and to receive only one person's share." "And I hereby, by this my codicil, revoke and make void the residuary clause in my will, so far as it relates to the said Elizabeth Walker, her child or children." So then on this nothing can be plainer than the testator's declared intention, that Mrs. Walker is to take nothing by the will. He expressly revokes, first the surplus, next the one-seventh, next the residuary gift, and last of all excludes her from any share of the sums of £200 and £400, and he declared his intention to give her nothing. If there had been a mere revocation of the seventh, it might have been more difficult to decide that such revocation could operate to revoke the clause of accretion. The testator may not have considered that clause as relating to Mrs. Walker. It is plain that as to her person, that clause did not apply; it may even be a question whether that accretion clause refers to any of the three mentioned after the bequest to Mrs. Walker; so it may be that he did not think it applied to her, and though in sound construction it might apply, it may be a question whether he thought it did. So that if it depended on the words of revocation alone, it might be and it is very properly argued, that the codicil did not revoke the accruing share—that the revocation was only of the one-seventh, and that the words were sufficient to carry out the revocation so far as that. But the whole scope of the codicil leaves no doubt of the intention, and his using those words—"Elizabeth Walker and her child or children, to whom I do not intend to leave or give anything." What is the meaning of those words? Are they mere recital, or are they not a declaration of the intention of the codicil? I think I am warranted in giving them the latter effect; if so, the accretion clause is revoked; formal words are not necessary if the intention be clear. There is something very like this in *Symson v. Purton*, (Cro. Jac. 115)—"When one had made his will in writing, and devised his land to Anne Hide and her heirs, and afterwards being sick and lying upon his death-bed, (because Anne Hide did not come to visit him) affirmed that Anne should not have any part of his lands or goods. It was held by all the court that it was not any revocation of the will, being but by way of discourse, and not mentioning his will. But the revocation ought to be by express words, that he did revoke his will, and that she should not have the lands given unto her by his will, or such like words, which might shew his intent to make an express revocation thereof." Now, are there not here such words, manifesting such an intention? But I confess, if it had not been for those words, I should have followed the argument of the counsel for the exceptions, and if they desire it, I will send a case to be tried by a court of law.

IRVINE v. ROGERS.—Nov. 13, 14, 15

Power of Revocation—Execution—Trustee—Caveat. W. assigned his property upon certain trusts, reserving a power of revocation, and afterwards by his will directed his executors to take measures to have the assignment set aside as fraudulent.

and then made a different disposition of the property included in the deed. Held that this was an execution of the power of revocation.

Costs were given against a trustee who, having a benefit under the instrument revoked, compelled the plaintiff to establish the will.

Henry Ward, the testator in this cause, being seized and possessed of certain freehold and chattel leases, and of a sum of money in stock, by deed of the 1st September, 1846, reciting that the stock had been transferred to W. T. Rogers, sub-demised the lands comprised in those leases to Rogers—reserving a nominal rent and reversion—upon trust as to both lands and stock, and subject to an annuity of £20 to Rogers as remuneration for his services, for Henry Ward for life, and after his death, in the first place to pay off a mortgage debt, and subject thereto, to retain the said annuity of £20 to himself, to pay to Maria Balfe, a daughter of H. Ward, an annuity of £10: after her decease, to pay an annuity of £20 to her son, H. Balfe, and his children, as therein mentioned; to pay to plaintiff G. A. Irvine, another daughter of H. Ward, an annuity of £20, to her separate use for life, with remainder as she should appoint; to John Byrne his executors administrators and assigns, an annuity of £20, during the term thereby granted; to Catherine Hopkins an annuity of £20 for life, with remainder as she should appoint; and to pay one moiety of the residue of the rents and profits to G. D. Ward, a son of H. Ward, and the other moiety of the said rents to the plaintiff, for her separate use for life, with remainder to her issue as tenants in common, and for want of such issue, as she should by will appoint; and upon trust as to the other portion of the lands for H. Ward for life, with remainder to Samuel Ward, his heirs and assigns. In this deed was contained the following power:—"Provided, however, and these presents are upon this condition, that it shall and may be lawful for the said Henry Ward, by any deed or deeds, or by his last will and testament, or any codicil or codicils thereto, by him duly executed in the presence of two or more credible subscribing witnesses, to annul, revoke, make void, change, or alter any grant, limitation, matter, thing, of any or every nature or kind soever herein contained, according to his free will and pleasure, these presents, or anything herein contained, to the contrary in anywise notwithstanding." The bill alleged fraud and undue influence in procuring the execution of this deed, Ward, the testator and the grantor in the deed, being a very aged and infirm man. These charges were not sustained in evidence; but it was proved that the plaintiff, in consequence of suspicions as to the nature of this transaction, having caused a search to be made in the Registry Office, discovered a memorial of this deed, wherein no mention of the clause of revocation was made; that the testator, Ward, on being informed of this memorial, expressed both surprise and anger, and shortly afterwards, by his will dated the 10th of October, 1846, bequeathed his stock to the plaintiff; and after describing his leasehold interests, recited that he had been induced to execute the said deed

of the 1st Sept., 1846, "by which said deed I have been made to dispose of my said houses in College Street, Fleet Street, and Exchange Street, contrary to my intentions and wishes, the said deed having been untruly read to me, at a time when from bodily weakness and infirmity, I was unable to read the same myself; and, whereas I consider the same to have been most fraudulently and wickedly obtained from me, I hereby direct my trustees and executors, hereinafter named, to use their best exertions, and take all the steps which may be necessary to have the said deed set aside and cancelled." He then bequeathed his freehold and leasehold interest to the plaintiff and R. Kelly, upon trust, "in the first place, to adopt all measures necessary or requisite to have the said deed set aside;" and in the next place, as to the freehold houses to J. Ward absolutely, and as to the residue upon trust, to pay thereout an annuity of £10 to Maria Balfe, to her separate use for life, with remainder to her son, H. Balfe, and his children, as therein mentioned; and an annuity of £30 to C. Hopkins for life, and subject to the said annuities in trust for the plaintiff, to her separate use; and after bequeathing to C. Hopkins some articles of furniture, and to his eldest son, H. T. Ward, and his sons, G. D. Ward and T. W. Ward, and his daughter, C. Smith, 5s. each; and having appointed the plaintiff and Kelly executor and executrix of his will, and made the plaintiff residuary legatee. The testator died on the 15th October, 1846. The validity of the will was contested in the Prerogative Court by G. D. Ward and Caroline Smyth, on the ground of want of mental capacity in the testator, and of imposition on him, but was eventually established in February, 1847. G. D. Ward was the heir-at-law of H. Ward, the elder sons having died in his lifetime. The bill in this cause was filed the 12th March, 1847, praying that the deed of 1st September, 1846, might be declared to have been revoked by this will, or that the deed might be declared fraudulent and void. The defendants Rogers, Hopkins, Byrne, G. D. Ward, H. Balfe, by their answers, denied fraud in obtaining the deed, and suggested the mental incapacity of the testator at the time of making his will; and further relied on the non-execution of the power by the will, even if it were valid, and no evidence was offered to shew it otherwise.

Brewster, Q.C., with Christian, Q.C., and Drury for the plaintiff.

J. D. Fitzgerald, Q.C., with Francis Fitzgerald, for the defendant, Catherine Hopkins.—The testator must shew an intention to exercise the power. It is not sufficient to shew an intention to execute the deed. (*Lord Chancellor.*—Does not this power leave the testamentary capacity of Mr. Ward, very much as it would have been if the deed had never been executed?) This is not a testamentary deed. *Attorney-General v. Jones* (3 Pri. 368), and such cases are, in effect, overruled, *Thompson v. Brown* (3 My. & K. 32). (*Lord Chancellor.*—I do not apprehend that this is a testamentary deed, but does it not leave the testator a testamentary power as extended, as that he would have had if the deed had not been executed?) This is not an execution of the power, *Boughton v. Sandelands* (3 Taun.

342); and it should be apparent on the face of the deed that it was the testator's intention to execute the power. *Denn v. Rouke* (2 Bing. 497, S. C.; 5 B. & C. 720); *Scrope's case* (10 Rep. 143b). (*Lord Chancellor*.—It is a question of intention. Can anything be more manifest than the intention in this will? Suppose he had used the very words of the power, would they be stronger to mark the intention?) *Cross v. Hudson* (3 Bro. C. C. 468); *Thompson v. Simpson* (8 I. E. R. 59; 1 Sug. Pow. 440-448, 5th ed.) The question is not whether the party intended to revoke the prior deed, but did he intend to exercise the power. *Farmer v. Martin* (2 Sim. 502) is an authority quite in point, and must govern this case.

Christian, Q.C. for plaintiff.—This is a question of intention; but not such as is contended for by the defendants, who must shew that the testator had no intention of exercising the power, *Wade v. Paget* (1 Sug. Pow. 419; 1 Bro. C. C. 364); *Denn v. Roake* (5 B. & C. 720, S. C.; 8 D. & Ry.); *Brookman v. Hales* (2 Ves. & Bea. 45); and the statute of 1 Vic. c. 26, shews the high regard the legislature has paid to the intention of the testator.

Drury, in reply.—This will, being an act that can only be done in exercise of the power, it will be deemed such, *Fitzgerald v. Falconbridge* (Fitzgibbon 207). If the will be considered without the words of annulment, it would be a clear revocation. These words merely express disapprobation, and do not alter the operation the will would have if without them. Cited *Bath v. Montague*, (3 Ch. Ca. 122, 86 S. C. 2 Free. 193.)

Dec. 15.—LORD CHANCELLOR.—If the defendants desire it, I will send this case to a court of law, but my present impression is in favour of the plaintiff. For the defendants the case of *Boughton v. Sandelands* is strongly relied on. A deed of settlement was executed 1st May, 1799,—by parties who believed themselves then legally married, in pursuance of an agreement before marriage. Now, that settlement did not contain any power of revocation; it was “to the use of such person or persons, and for such estate or estates, and to, for, and upon such uses, trusts, intents, and purposes, and under and subject to such powers, provisions, and declarations as the said G. Boughton and Eliza, his wife, by any deed or deeds, &c., should jointly direct or appoint, and in default of, and subject to any such joint direction, limitation, or appointment,” in strict settlement. The parties, having discovered that their marriage was void within the English Marriage Act, intended to marry again and make a new settlement, and for this purpose a recovery was suffered in pursuance of a new deed executed in 1800, which recited their intention to revoke and declare void the previous settlement. The parties imagining that they had the power of doing so in consequence of the invalidity of the marriage—settled the estate to such uses as Eliza Boughton should appoint; and, in default of appointment to trustees for her during life, with remainder to the use of her right heirs. It is evident that deed was not made for the purpose of acting on the power of appointment contained in the first settlement. An issue was directed by the Court of Chancery to the Court of Common Pleas, to

try the validity of the settlement made by the second deed. At first, it was attempted to support the second deed as an appointment under the first; but counsel gave up that question, as the new deed could not refer to any authority in the old. By the second deed, the husband and wife professed to “rescind, revoke, and declare absolutely null and void the said several indentures of the 6th August, 1798, and the 1st May, 1799, respectively, and all the covenants, &c., in or by the said indentures, or either of them, limited, declared, or contained.” It would have been a strong measure in that case to support the second deed as an exercise of the power of appointment in the first, which the parties had professed to rescind. Yet Sir Edward Sugden does not agree with the decision in that case, and after quoting it, says (1 Sug. Pow. 423), “Yet it is observable that their intention was to make a new settlement, and although they treated the first as void, yet they recited an intention, not merely to rescind, but to revoke the deed; and, in the witnessing part of the second deed, they directed, limited, and appointed, as well as granted the estate, and the limitation in the premises appears to be to the lessee, and his heirs generally, with the usual words of all their estate, although the habendum is to him and his heirs for the life of the lady.” The case of *Farmer v. Martin* (2 Sim. 502) creates more difficulty. That case arises on a power of revocation. The marginal note is—“A. having a power to appoint £10,000 among his younger children, appoints it to them equally, reserving to himself a power of revocation as to £5,000, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards A., by a deed to which he was also a party, revokes, with her consent, the last appointment as to £2,500, and in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms C.'s title to the remainder under the former appointment. Held that the appointment of the £5,000 being void, the appointment of the £2,500 must also fail.” Now, that case was decided on the ground that the parties to the last deed shewed an intention to treat a corrupt appointment as valid. The Vice-Chancellor says, “My opinion is that the instrument of 1819 was intended to be what it appears to be, that is, an execution of a power which the parties supposed to exist, but which, in point of fact, did not exist, and not as an original appointment.” The Vice-Chancellor also observes, that the party did not repeat the words “in pursuance of all powers,” in the appointment. He says, “It would be a most extraordinary thing to hold, that because the father in this instrument has used a general expression in the clause of revocation, namely, he does so ‘in pursuance of all powers, &c.’ could revoke without repeating those words when he comes to make the appointment, it is to be taken as an absolute appointment to Ann of £2,500.” That case has since been criticised by Sir E. Sugden, who expressly says it should have been decided otherwise. In 1 Pow. 425, he says, “Now, it will be observed, that the power included all the father's children, and therefore Ann became

an object of it; and the appointment to Eleanor of the £5,000 was unsustainable, in consequence of the improper agreement with the father. It was, therefore, contended, that the last appointment operated as a new appointment, or confirmation, to Eleanor of the £2,500 not appointed to Ann, and if not, that it was wholly void, as Eleanor did not intend to act, except under the appointment to herself of £5000. The Vice-Chancellor was of opinion that the last appointment could not operate as an original execution of a power [that is, of the power of revocation and new appointment, treating the appointment to Eleanor of the £5000 as invalid]. He was of opinion, from the recital, that there was no otherwise an intention to deal with the property than by the execution of a supposed power of revocation, and a new appointment under a like supposed power of £2,500 to Ann, and a ratification to Eleanor, not an appointment of £2,500 absolutely to her, but only a declaration that this instrument should not impeach her title to the remaining £2,500 under the former appointment to her. He held that Eleanor and her father acted only upon the supposition that she had a complete title by the appointment to her of the £5,000, and did not mean to give her any new title, and therefore thought it impossible to consider this instrument as an appointment *de novo* of the £5,000 between the two. Although the father referred to all powers in the revocation of the appointment as to £2500, yet as he did not intend the instrument to operate as an appointment to Eleanor of the £2500, under the power in the original settlement—that is, by force of the power of revocation and new appointment, the deed could not be considered an absolute appointment to Ann, and he held that she took nothing under it. His opinion was, that the last appointment was intended to be what it appeared to be—that is, an execution of a power which the parties supposed to exist, but which in point of fact did not exist; that is, they suppose the father to have a power to revoke the appointment of the £5000, and not as an original appointment. Eleanor only supposed she was confirming what the father might appoint. He held, therefore, that Eleanor and her sister, the original appointees, took the whole of the £10,000 under the original appointments. The principles laid down in this case are right, but it may be doubted whether they were rightly applied." This authority being questioned so forcibly by Sir Edward Sugden, and the present case being a mere question whether a will shall have any operation because the testator does not appear to recollect his power, I do not feel much embarrassed by it. There the parties supposed they had a certain power, and professed to exercise it, not having such power in fact; and it decides that such an intended exercise of a power cannot be referred to another power which they really possessed. It is not similar to that of a party having a power, not professing to execute any other, but doing an act which without that power he could not do. *Farmer v. Martin* does not govern the present case, it is at most an exceptional case, and I am not disposed to carry the exception farther. I will decide

this case on the general doctrine. In *Denn v. Roake*, Lord Tenterden says—"Although, therefore, we may think that the testatrix intended that the entirety should go in strict settlement on the family of her sister, yet we think it possible to suppose that the testatrix had no intention to execute the power, and if the intention to exercise the power be doubtful, the will cannot, in our opinion, be deemed an execution of it." These observations are fully answered by Sir E. Sugden in his treatise on Powers. vol. I. 425. What are the facts of this case? Henry Ward had under the deed a power of revocation; that is, he had by the deed a complete testamentary power. If in executing his will, he had been silent as to the deed, it must then have been taken to be an execution of that power. The defendants say it is not an execution, because he mentions that deed, and directs his executors to take all means in their power to set it aside for fraud, and therefore that he cannot be considered as acting on the authority contained in it. This will, which has no operation save by the deed, deals with property comprised in it; and declares an intention to alter that deed; and there is no authority, to the effect that this shall not be deemed an alteration, because the testator seems to have thought he could get rid of the deed by other means than by a revocation. It was very ingeniously argued by Mr. Christian, that where a party has settled property with a mere power of revocation and afterwards by will exercises that power, the property passes by his will, not by the power, and therefore that a party cannot be considered to take under an instrument, where he takes under a will revoking that instrument. It does not seem inconsistent that the testator might wish by the exercise of his power to *alter, revoke, and rescind* the deed for the future, and avoid it for the time past, on the ground of fraud, I can find nothing shewing that the testator did not mean to exercise the power contained in that deed, but as there seems sufficient difficulty in the matter to warrant further inquiry, if the defendant wish, I will send a case to a court of law. It was contended that W. T. Rogers, as a trustee, was entitled to his costs, and G. D. Ward also claimed his as heir-at-law, brought before the court to have the will established against himself. W. T. Rogers, having taken a benefit under the deed, and forced the plaintiff to go into evidence to establish the will, even after the litigation in the Prerogative Court, is liable to costs, but the plaintiff, not having made out the case of fraud charged in the bill, must pay costs of the suit so far as they are occasioned by his putting forward that case.

Let the plaintiff have her costs of this suit against the defendant, W. T. Rogers, so far as the same relate to the proof and establishment of the will of the said Henry Ward, the said W. T. Rogers not to be liable to the extra costs occasioned to the plaintiff by the examination of witnesses by the said Catherine Hopkins, which extra costs the plaintiff is entitled to against the defendant Catherine Hopkins alone. Let the defendants, J. Byrne, G. D. Ward, and H. Balfé respectively abide their own costs in this cause; and so far as the plaintiff's bill sought to set aside the said deed for fraud, let

the same be dismissed, and let the said W. T. Rogers and Catherine Hopkins be entitled as against the plaintiff to the costs of so much of the said bill as is hereby dismissed, and let the said defendants be at liberty to set off the same against the costs hereby decreed against them.

Reg. Lib. Hearing, 100, p. 258.

ROLLS COURT.

WALSHE v. SHEEHY.—*Nov. 22.*

WALSHE, the petitioner, had been solicitor for the respondent, and on the taxation of the petitioner's costs, allowances were claimed by the respondent, which the Taxing Master refused to make, on the ground that he had no authority, that question not having been submitted to him by the requisition to tax.

D. R. Kane, Q. C., now moved for an order for the payment of the costs as taxed.

Hughes, Q. C., contra, submitted that the Taxing Master ought to have allowed all just allowances, *Lawler, Minors*, (F. & K. 73.)

Reeves, R., in reply, relied on *Anon.*, (2 Ves. Sen. 45.)

MASTER OF THE ROLLS.—I am asked to make an order for the payment of the whole sum taxed, no allowance having been made to the respondent for just credits, and I am asked to do this on a point of special pleading on the import of the requisition. I shall not make such an order, but refer it back to the Taxing Master, to make just allowances, and if any be made, I shall make the petitioner pay the costs of the reference.

Petition Book, 26, p. 92.

O'KEEFFE v. HOLMES. TANGLEY v. HOLMES. GOOD v. HOLMES. HACKITT v. HOLMES.—*Dec. 12.*

Several suits—Order staying proceedings—Costs of defendants—Liability of plaintiffs to.

Where there are several creditor's suits, and a decree having been obtained in one, proceedings in the others are stayed. The plaintiffs in the suits which are stayed are personally liable in the first instance to pay the costs of the several defendants, who are not obliged to wait till the funds are realized under the decree in the prosecuted suit.

Chatterton in this case applied on behalf of a defendant in the second and third causes, that the plaintiffs in those causes might be directed to pay him his taxed costs. Several suits had been instituted against the defendants, and a decree having been obtained in the first cause, by order bearing date the 23rd of June, 1848, the proceedings in the other causes were directed to be stayed, and that the parties should be at liberty to come in and prove their demands in the first cause. The case of *Loflie v. Forbes*, (2 L. E. Rep. 443,) is a clear authority, that when a suit is stayed, as in the present case, the defendant is entitled to have his costs paid by the plaintiff, and is not bound to wait until funds are allocated or realized in the first cause.

McObay, for the plaintiff in the second cause, relied on *Uniacke v. Rochford*, (1 Moll. 216.)

Joseph Reeves, for the plaintiff in the third cause. It would be a very great hardship to compel the plaintiff to pay those costs before the funds are realized, as it appears she has very little property except the subject matter of the suit. *Loflie v. Forbes* is contrary to principle and authority, for the order to stay proceedings does not of itself make the plaintiff personally liable to the defendant's costs. In *Croker v. Copley*, on the authority of which *Loflie v. Forbes* was decided, a conditional order had been obtained to dismiss the plaintiff's bill, and if the defendant in the present case had so moved, there would have been an adjudication as to the costs. In *Damer v. Earl of Portarlington*,* (2 Phil. 30,) it was made part of the order that the costs should be paid by the plaintiff; and, on appeal, that part of the order which made the plaintiff personally liable, was reversed, although the plaintiff acted improperly by going on with the suit after an order that proceedings should be stayed. That is an *a fortiori* case, for here no improper conduct is imputed to the plaintiff.

MASTER OF THE ROLLS.—There may be a hardship in the present case, but *Loflie v. Forbes* was very well considered. I should be slow to alter the practice of this court, as to do so would be productive of great mischief. It is very desirable not to break in on a rule which checks the institution of several suits. Sir M. O'Loughlen says, in the case to which I have alluded, "every suitor who comes here for relief necessarily makes himself liable to the rules and practice of the court. One of the rules is, that where two suits are instituted, and a decree has been pronounced in one of them, under which the plaintiff in the other can have effectual relief, the court will stay the proceedings in the second cause, and oblige the plaintiff to prove his demand in the first." I have made orders upon the authority of that case. The party who now applies is a trustee, a mere formal party, who has not been made a defendant through his own default, and there would be more injustice in refusing than in granting this application.

Order Book, 277, p. 336.

NANGLE v. NANGLE.—*Dec. 19.*

Witness—Practice—90th General Order.

The Court will make an order that a witness may be allowed to read over the interrogatories to which he is to be examined, notwithstanding the 90th General Order, when it is sworn the witness is deaf, and could not otherwise be examined.

Deasy moved for an order, that James Shannon, a witness in this cause, might be permitted to read the interrogatories for his examination.

The affidavit of P. Scott, the solicitor for the plaintiff, stated that Shannon was a material wit-

* The case of *Damer v. Portarlington*, is also reported in (15 Sim. 380,) and in (2 Phillips, 262,) on appeal from the Vice-Chancellor of England. See also *McHardy and wife v. Hitchcock*, (12 Jur. 781,) on appeal from the Master of the Rolls.

ness, and that he believed said Shannon was altogether deaf; that he had served a notice for examining the said Shannon, and that Henry Quinan, the Examiner-in-Chief, informed deponent that under the 90th General Order the said Examiner was precluded from permitting the said Shannon to read the interrogatories, and that if the court do not make an order, it would be impossible to examine the witness at all.

The Master of the Rolls granted the order.

EQUITY EXCHEQUER.

CLEARY v. CLEARY.—Dec. 5.

Practice—Re-hearing.

Liberty will be given to the heir-at-law of a deceased minor, to avail himself of an order of rehearing which had been made upon the petition of the minor, even though the former was a party to the suit from its institution, and affected with notice of all the proceedings, and though the minor claimed only by purchase from him.

THIS cause came before the court upon an order for re-hearing made upon the petition of Mary Cleary, a minor, defendant. The minor died before the cause was re-heard, and a question arose, whether the father and heir-at-law of the minor could avail himself of the order, under the following circumstances:—The original bill had been filed the 8th of February, 1822, by Patrick Cleary, the younger against his eldest brother, James Cleary, for an administration of the assets of their father, Patrick, the elder. There was a decree to account in that cause, pronounced the 21st of April, 1825. Before any further proceedings were had, the defendant, James Cleary, died intestate and without issue, leaving his brother, John Cleary, his heir-at-law. In November, 21, 1825, Patrick, the younger, filed a bill of supplement and revivor, charging by way of supplemental matter, that James Cleary had purchased an estate in Limerick for £12000, of which sum £8000 was portion of the assets of Patrick, the elder; and the supplemental bill prayed, that the said sum of £8000 and interest thereon might be declared well charged upon the said estate, and for a sale. In February, 1830, a conditional decree was pronounced against John. In October, 1830, Patrick, the younger, died, and the suit was revived by his widow. In February, 1835, an absolute decree was pronounced against John Cleary. On 27th of May, 1841, the Remembrancer made his Report, finding that Patrick the elder had died possessed of considerable assets, and that John had invested £8177 16s. in the purchase of the estates in Limerick. The cause came on to be heard upon the report unexcepted to, but in November, 1841, the report was sent back to the Remembrancer, to charge interest on the sum of £8177, and such further proceedings were had thereupon, that on February 8th, 1842, there was a decree confirming the report, and directing a sale for the purpose of raising £11000, the sum found due for principal, interest, and costs. In January, 1843, a supplemental bill was filed, charging, that on proceeding to effect a sale under

the decree, it was found that John Cleary, pending the suit, had conveyed away the legal estate in the lands, by a deed of marriage settlement, dated the 22nd of May, 1827, and that a supplemental bill was rendered necessary for the purpose of bringing before the court those whose rights had accrued under the settlement, pending the suit, and, amongst others, Mary Cleary, a minor. In January 19, 1846, a decree was pronounced in the supplemental cause, and the plaintiff was declared entitled to the benefit of the former decree, and it was referred to the Remembrancer to ascertain the sum due on foot of the former decree, &c., liberty being reserved to Mary Cleary and another minor to come in and falsify the accounts. A discharge was filed on part of Mary Cleary, the minor, and she afterwards presented a petition for rehearing. On that petition the ordinary rule was made. But before the cause was re-heard, Mary Cleary died, leaving her father, the said John Cleary, her heir-at-law.

Henn, Q.C., for plaintiff contended that John Cleary had no right to avail himself of the order for rehearing. He had been a party to all the proceedings from the institution of the suit—he never sought a rehearing on his own behalf, nor set up any claim under the settlement of 1827; but, on the contrary, in his answer to the supplemental bill, denies ever having executed the settlement, or, if ever, only under the influence of intoxication, and impeaches those very deeds under which the minor, Mary Cleary, claimed. (*Pennefather, B.*—John may say, my daughter, Mary Cleary, was a purchaser for valuable consideration under those deeds, and I am entitled to stand upon her rights, though I have been a party to all the proceedings in another capacity.) John Cleary claims by descent from a party who has no title, save as a purchaser from himself. The only necessity that existed for her being before the court was, because of the legal estate being in her, and whatever equity she had was clearly bound, inasmuch as she claimed solely through a party whom all the proceedings in the cause affected. (*Pennefather, B.*—That is assuming that she was bound by the proceedings; if she was so, John, her heir-at-law, was equally bound; but, for the purposes of this argument, we must assume that she had a right to be reheard.) Suppose that Mary had died before the supplemental bill was filed, John would have been bound by the proceedings, and the court would not have granted him a rehearing. Can he be in a better position than if a supplemental bill had never been filed?

PENNEFATHER, B.—Has not a purchaser with notice from a purchaser without notice a right to stand in the place of his vendor?

LEFROY, B.—You are, in fact, calling upon us to decide on this preliminary motion the main question in the cause; namely, whether the rights of the minor were affected by the proceedings. We will rehear the cause.*

* Before Pennefather, Richards, and Lefroy, B.B. The cause was afterwards compromised.

QUEEN'S BENCH.

EXECUTORS OF ACKLAND v. GRANT.—Nov. 10.

Practice—Executors—Security for Costs—3 & 4 Vic. c. 105.

THIS was an application on behalf of the defendant, that the plaintiffs, who were executors, and resided out of the jurisdiction of the court, should give security for costs pursuant to the 3 & 4 Vic. c. 105, s. 56.*

F. Meagher for the motion.

C. H. Woodroffe, contra.—The act vests a discretion in the court, and the defendant ought to have an affidavit of merits.

PER CURIAM.—This statute puts executors and administrators upon the same footing as ordinary plaintiffs, and makes them liable to pay costs, unless where the court, in the exercise of its discretion, shall otherwise order.

Meagher applied for the costs of the motion.

PER CURIAM.—The order is always silent as to costs.†

LESSEE OF HICKMAN v. BEHAN.—Dec. 16.

Practice—Ejectment—Defence—Bankrupt Lessee.

A defence taken by a bankrupt against whose assignee judgment has been marked, was set aside, and the name of a solvent under-tenant in possession, against whom judgment had been also marked, allowed to be substituted instead.

Griffin moved, that the defendant in this cause should give security for costs, or that, in default thereof, the defence taken in his name should be set aside and judgment marked forthwith for the plaintiff, notwithstanding such defence taken. The affidavit of the agent for the principal lessor of the plaintiff stated, that the lessee in the original lease of the premises in the ejectment mentioned, died, having bequeathed said lands to the defendant, who was then in receipt of the profits thereof, but not in the actual occupation of them. It then stated that the ejectment was brought for one year's rent due to the 1st May, 1848—that the defendant had filed his schedule in the Insolvent Court on the 27th March, 1848, and that a docket of bankruptcy had issued against him on the 15th of April, 1848—that by his schedule he had admitted that a year's rent was due—that his assignees in both the Insolvent and Bankrupt Courts had been served with the ejectment, and that no defence had been taken in their names, and judgment was accordingly marked against them—that the bankrupt

* The 3 & 4 Vic. c. 105, s. 55, enacts "That in every action brought by an executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a Judge in any of the superior courts, shall otherwise order, be liable to pay costs to the defendant, in case of being non-suited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

† See *Wilkinson v. Edwards* (1 Scott, 173;) *Godson v. Freeman* (Tyr. & Gr. 35)

alone had taken defence, and that he verily believed there was no legal defence, but that same had been taken for the purpose of vexatious delay, *Lessee Hoy v. Dillon* (5 Ir. L. R. 243).

W. Brereton, contra.—*Hoy v. Dillon* was in the Common Pleas, and this court and the Exchequer invariably refuse such motions. Besides, in that case, there was two years' rent due, and the defendant was in possession; here he is not, and his under-tenants look to their lessor to defend the ejectment for them. If his defence be set aside, they will be turned out of possession, as judgment has been marked against them. This motion is late. Defence was taken 18th November, and notice of this motion was not served until the 14th December.

MOORE, J.—Let this defence be set aside, and let some person, a tenant in possession of the lands, and in solvent circumstances, be at liberty, if so advised, to take defence within one week, in his own name instead of the bankrupt. No costs of this motion.*

COMMON PLEAS.—MICHAELMAS TERM.

COCHRANE v. HOLDEN.—Nov. 20.

Plaintiff resident out of jurisdiction—Security for costs—Unconditional assent.

When the defendant gives the preliminary notice required by this court, that the plaintiff resides out of the jurisdiction shall give security for costs—if the defendant assents thereto, such assent must be unconditional, and no further proceedings can be taken until the security be given.

Chatterton moved that the plaintiff, being out of the jurisdiction, should be compelled to give security for costs. The preliminary notice required by the practice of this court had been served on the plaintiff immediately on appearance, and before the declaration was filed, requiring him to give security; to which the plaintiff's attorney replied, that he would not take any steps in the action save filing the declaration and entering the rule to plead, until security for costs was given. He then filed the declaration, and entered the rule to plead.

Mockler contra, submitted that there was no occasion for the motion, as the plaintiff had already undertaken to do all that was required of him by the motion, and that the plaintiff was entitled to make the reservation he did, and which could in no way prejudice the defendant, as the plaintiff reserved the right only of entering rules to plead, and did not seek to enter the rule for judgment—that there would be a three days' summons to measure the security, so that the defendant would have ample time to prepare his plea.

PER CURIAM.—The plaintiff had no right to make the reservation; his assent to the preliminary notice should be unconditional, and if unconditional, no proceedings whatever could be taken until the security for costs was given.

Application granted, with costs.

* Before Judge Moore in Chamber.

ROLLS COURT.

KING v. BROWNRIGG.—PHINN, *Petitioner*. BRADY, *Respondent*.—Dec. 19.

Cross Motion—Costs.

Neither the costs of a petition to charge a fund in court, nor of a cross motion to draw money out of court which has been so charged under the 23rd section of 3 & 4 Vic. c. 105, will be granted in a case where the respondent does not appear.

J. S. Townsend moved, in this cause, to have money paid out of court to the several parties, pursuant to the Master's report.

Orpen moved a cross motion, entitled in the petition matter, and under the 3 & 4 Vic. c. 105, s. 23, for payment of part of the funds reported due to the respondent, Brady; and the question was, whether the costs of the petitioner which had been presented by the petitioner Phinn, and of the cross motion, should be allowed the petitioner. Counsel cited *Guinness v. Armit* (3 Ir. L. Rep. 359), and argued, that if a charge had been made by the respondent, and a bill had been filed to raise that charge, the costs of the suit would be paid to the plaintiffs, and that under the 23rd section of the act the charging order is given the same effect as if the fund had been charged by the debtor himself.

MASTER OF THE ROLLS.—I have considered this case, and think I cannot give the costs, either of the petition or of the cross motion for which Mr. Orpen contended. I shall grant the motion in accordance with the decision of the late Master of the Rolls in the case of *Burke v. Burke* (7 I. E. R. 174), but will refuse so much of it as asks the costs; and in this I follow a decision of the Court of Exchequer in the case of *White v. Heron* (5 I. L. Rep. 165).

COMMISSION OF OYER AND TERMINER.

QUEEN v. DUFFY.*—Dec. 16, 18, 19, 21, 23, 28, 29.

CORAM PERRIN, J. AND RICHARDS, B.

Held, on motion to quash the indictment, that at common law the pendency of a former indictment did not prevent the crown from calling on the prisoner to plead to a subsequent one for the same offence, and that the 9th section of the 9 Geo. 4, c. 51, has not altered the law, except in cases where notices of the prosecutor's intention to prefer a bill of indictment in the adjoining county have been duly served, pursuant to the 7th, 8th, and 9th sections of that act.

Therefore, where a bill of indictment was preferred to the grand jury of the adjoining county, for an offence committed in a county of a city, under the provisions of the 9 Geo. 4, c. 51, and found there, but no notices were served, nor the informations removed from the custody of the Clerk of the Peace for the city. Held that a new indictment might be preferred in the city.

Plea in abatement, that A., one of the grand jury who found the indictment, was not an inhabitant, or resident, or freeman, or burgess of the city

of Dublin, or possessed of, or entitled to any lands, &c., or any rateable property. Held that the plea not having negatived every qualification, the court would presume him qualified.

Semble per Perrin, J., that the 3 & 4 Wm. 4. c. 91, applies to grand jurors at Commissions of Oyer and Terminer and Gaol Delivery.

Semble two or more pleas in abatement can be pleaded together in a criminal case.

An indictment under the 11 & 12 Vic. c. 12, charged that the prisoner did compass, imagine, &c., to depose the Queen, and such compassing, &c., "did express and declare by publishing a certain printing, containing in one part thereof, amongst other things, according to the tenor following, setting out a portion only of the printing."

Held on demurrer to the indictment, that this mode of laying the felonious publishing was sufficient, and that it was not necessary either to set out the whole printing or to aver that the intention was expressed by the printing set out.

Held, that the several printings were not distinct felonies, and therefore the counts of the indictment were not open to the objection of duplicity. That as the intention was sufficiently expressed by the articles themselves, there was no necessity for any inuendo.

Held that the 2nd, 4th, 5th, and 6th counts in the indictment, which alleged the compassing to have taken place on a certain day, and to have been then and there expressed by divers overt acts thereafter mentioned, and which then proceeded to set out overt acts committed on that day and on several days subsequent, were, so far as related to all the overt acts subsequent to the day of the compassing, bad, as being repugnant and insensible.

Held, that the publications were properly laid as overt acts.

The prisoner was indicted under the 11 & 12 Vic. cap. 12, entitled, "The Crown and Government Security Act." On the 8th of July, 1848, he had been arrested and committed to Newgate, on a charge of feloniously publishing, within the county of the city of Dublin, certain printings in the *Nation* newspaper, on informations sworn by John Hawksley, Martin Reilly, and Charles Vernon, who were bound by recognizance to prosecute and give evidence against the prisoner; and at a Commission of Oyer and Terminer for the county of the city of Dublin, on the 8th of August, 1848, a true bill was found against the prisoner for the offences previously found. At the Commission of Oyer and Terminer for the county of Dublin, in October following, a new bill of indictment was preferred, for the same offences, to the Grand Jury of the county of Dublin, before whom John Hawksley, Martin Reilly, and Charles Vernon, gave evidence, which bill the Grand Jury found to be true; and the first-mentioned indictment was, upon motion of the Attorney-General, quashed by the court. Writs of *habeas corpus* to remove the prisoner from the custody of the Sheriff of the county of the city of Dublin to the custody of the Sheriff of the county of Dublin, were issued by the crown, and the prisoner was brought to the

* Reported by J. Blackham, and W. J. Dundas, Esqrs., Barristers-at-Law.

bar of the court in the custody of the Sheriff of the city of Dublin, and was about to be arraigned, when it was objected by the prisoner's counsel that he could not be arraigned when in the custody of the Sheriff of the county of the city of Dublin, and that the writs of *habeas corpus* could not then be acted on, not having been issued ten days previous to the sessions, as required by the statute 6 Geo. 4, c. 51, which objection the court ruled with the prisoner. At the conclusion of the same sessions for the county of the city of Dublin, the prisoner applied that he might be discharged, as no indictment was then pending against him in the county of the city of Dublin; but in consequence of the indictment found by the Grand Jury of the county of Dublin, the court refused that application. The prisoner was now again indicted before the Grand Jury of the county of the city of Dublin. It appeared from an affidavit sworn by the Crown Solicitor, that the previous indictment in the county had been abandoned, in consequence of a letter containing matter of a felonious nature, written by the prisoner, and that no notice of the intention of the crown to remove the indictment to the adjoining county had been served on the witnesses, or persons who had sworn informations or entered into recognizance to appear and give evidence, that the persons who had sworn informations had attended before the County Grand Jury for the purpose of giving evidence against the prisoner, and that the informations and recognizances returned to the Clerk of the Crown, on the 10th of July last, had never been removed from his custody. A new bill for the same offence having been now sent to the City Grand Jury for the present commission, was found by them to be true.

Butt, Q.C. now moved that this Indictment be quashed.—The question in this case arises upon the construction of the 6 George 4, cap. 51, which enables any prosecutor to send up bills, for any offence committed in a county of a city, to the next adjoining county, and the third section provides, "that it shall be lawful for any prosecutor to prefer his bill of indictment for any offence committed within any county of a city, &c. in Ireland to the jury of the county next adjoining to such county of a city &c., sworn and charged to inquire for the king for the body of such adjoining county at any sessions of Oyer and Terminer and General Gaol Delivery, and that every such bill of indictment found to be a true bill by such jury, shall be valid and effectual in law, as if the same had been found to be a true bill by any jury sworn and charged to inquire &c. for such county of a city &c." The act contains no express direction that the proceedings are to be transferred to the county, however in England it is the constant practice, and in the case of *Reg. v. Mellor and another*, (Rus. & R. 144) it is assumed that when the bills are found in the county, such a transfer takes place, and that would seem to be a necessary implication, for the sixth section provides, that the prisoner shall be transferred, by writ of *habeas corpus*, to the custody of the sheriff of the next adjoining county, and the court may issue process to compel the attendance of witnesses there. The seventh section provides, "that recognizances entered into by witnesses shall be for-

feited if ten days previous to the holding of the next court of Oyer and Terminer they shall have notice of the intention of the prosecutor to remove the indictment into the county, and the parties bound shall not attend in the county," and the eighth section provides, "that notice left at their place of abode shall be sufficient, and if the witnesses attend, the recognizance is discharged;" that provision is for the benefit of the prosecutor as between him and the witnesses, and it may be waived by the attendance of the witnesses gratis. The concluding part of the ninth section provides, "that after the delivery of any of the said notices it shall not be lawful for any person or persons to prefer any bill of indictment, or to return any inquisition for any offence mentioned in the said recognizances, &c., at or to any sessions of Oyer and Terminer or General Gaol Delivery for any such county of a city, &c." It is clear that when once the prosecutor has made his election, the proceeding cannot be brought back to the city, and this was enacted to prevent changing backwards and forwards, which might be made an instrument of great oppression. *Queen v. Traynor*, (1 Cr. & D. C.C., 237,) which was a trial for libel at Drogheda, and (Hayes Crim. Law, 908.) In the present case there are bills of indictment pending in both the county and city which may be most injurious to the prisoner, for if in the case put there were at the same time two judges sitting in Trim and two in Drogheda, can it be contended that the prisoner should be exposed to the hardship of his trial going on in both together? In the present case recognizances have been entered into by Hawkesley and Reilly, the election has been made. (*Perrin, J.*—Does not the ninth section raise the very serious question, whether the Queen is bound? It appears to me there is not any case where the Queen can be considered to come under the description of person.) The second section provides, "that it shall be lawful for the court, at the prayer or instance of any prosecutor, &c.," the word "prosecutor" there must be considered to include the Attorney General prosecuting on the part of the crown, and if so he must be considered to come also within the meaning of the word "person." (*Perrin, J.*—What are the facts which bring this case within the ninth section?) There are no circumstances which bring the case within the express words of the act, but it is clearly within the spirit of it, for although there may not have been any notices served on the witnesses, the notice being to secure their attendance, if they attend without notice the recognizance is discharged; it is the duty of the prosecutor to serve these notices, and to have the informations returned, can it be contended, that if he does not do what he ought, that he can go back to the city and obtain an advantage which he otherwise would not have?

Attorney-General contra.—The prisoner having been arrested in July, remained in the custody of the sheriff of the county of the city of Dublin up to the present time; no application was made under the act to transfer the proceedings or to change the venue; a bill was preferred to the City Grand Jury, and afterwards quashed, owing to the discovery of a letter which it was considered necessary should be inserted in the indictment, a bill was then sent up to the county, but no notice was given under the

act, nor any further proceeding taken on foot of it. The present indictment has been found by the Grand Jury of the county of the city, and the application is to quash that bill. There are cases in which bills may be found in one of several counties, such as for a larceny committed upon a coach, and the pendency of a bill in one county could not be considered an answer to an indictment in another, but I do not mean to say that the Court would not have jurisdiction to prevent the prisoner from being harrassed, if such were the case, by these proceedings. It is not alleged that the act in terms applies to the present case; the provision in the ninth section, "that it shall not be lawful for any person to prefer a bill of indictment to the county of a city" applies to those cases only where notices have been served under the act, and there is no provision in the statute, that, if a bill be found in one jurisdiction, another cannot be preferred to a different one. Putting the case most strongly against the Crown, if a private prosecutor swore informations, and gave notice of his intention to proceed at a commission of the next adjoining county, that would not limit the Crown, and such prosecutor could not be compelled to enter into the recognizance required by the thirteenth section. (*Perrin, J.*—The Crown may not be bound by the act, but if it once take advantage of it, as it may, would it not then be bound by all the rules a subject would be bound by?) In the case of *Att. gen. v. Wilson*, (Jebb's Cr. cases reserved 313) a recognizance was entered in to for the performance of public works, the Attorney-general proceeded by civil bill, there was an appeal, and the judges held that the provisions of the statute requiring security for double costs, did not apply to the Crown, so that the Crown may take advantage of some acts of Parliament, without being bound by all their provisions; this statute contains no provision, that where a bill is found in a county there shall not be any bill preferred to the city; the case does not come within the words or spirit of the act—the object of the Crown is to have a trial, and not to delay, this application should therefore be refused.

Napier, Q. C., in reply.—There is at present a valid proceeding in the county, will the Court then, pending that proceeding, which is capable of being carried into effect, permit another to be taken? It is conceded, that if any one of the notices required by the act had been served, it would not be optional with the party to go back to the city; can it be contended that if a party does not give these notices—if he violates the act, he will be at liberty to reserve a power of violating another part of it? The argument is, that if he neglects to serve notices, or the witnesses do not attend, that he may go back to the city and begin afresh, but that if he performs what the act directs for the purpose of having the bills properly found, that then he is not to be at liberty to go back, it is not by the service of the notices the Court gets jurisdiction but by the finding of the bills, the third section must be considered as extending to the case of prosecutions by the Crown, the words used are sufficiently large, and a private prosecutor proceeds only by the sufferance of the Attorney-general, who may interpose at any time; by the sixth section of the *habeas corpus* act, (Hayes, 367,) the Court is required to set at liberty a prisoner if

not tried the second term, the present is the third term since an indictment was preferred for the same offence, here there is a good indictment in the county, and it would be a hardship to the prisoner if the Attorney-general could have the power of going into every court and issue process in each. The Attorney-general before the present Commission could have obtained a transfer of custody to the county under the fourth section; in the case of the *King v. Traynor*, the transfer was at the prayer of the Attorney-general. (*Richards, B.*—Had the indictment been found there?) It had, there is no reason why powers should be given to private prosecutors, and not to the Attorney-general, the words are sufficiently large to include every prosecutor, it would be unjust to have two concurrent jurisdictions. Is a violation of the act to be considered a sufficient argument for the interpretation of a statute injuriously to the prisoner? the case should be considered as if the Crown had done that which the act directed.

Solicitor-General in reply.—At the commission in August it became the duty of the Crown to postpone the trial on the ground of newly-discovered evidence; in October the trial was prevented by the interposition of the prisoner's counsel, who raised the formal objection that notices had not been served. The first section of the 6 G. 4, c. 51, declares that on "motion on behalf of his Majesty," and "on motion on behalf of any prosecutor, &c.," taking a plain distinction between prosecutions by the Crown, and by a private person, and in those parts of the statute where the Crown is not named, it is not intended to be bound; it is provided that recognizances shall be entered into by the witnesses, in order to secure a trial, and to prevent a failure of justice; if all the preliminary arrangements are completed, the proceedings are transferred, and it is under such circumstances alone that any argument could arise against bringing the case back to the city. If the argument on the part of the prisoner is well-founded, a bill might be found in the county, the witnesses might not attend before the petty jury, and as by the act it is at the next court they are bound to attend, they need not come to any other; and there would be a total failure of justice, if no bill could be preferred in the city. The county of Clare is the next adjoining county to Limerick, if a Judge of Assize came into the court at Ennis, and found a bill upon the books, he could not take any notice of it if the prisoner was not in custody in Clare, or if the bill was found without the notices prescribed by the act, in Limerick the prisoner is found in gaol, and the judge being bound to deliver the gaol, would ask why an indictment was not sent up, would he listen to a statement that a bill was found at Ennis, without also inquiring, whether the necessary preliminaries had been complied with, or could it be said that the prisoner could not ever be tried in either? for the witnesses would not be bound to attend in Ennis, if notice had not been served upon them.

Dec. 18.—*PERRIN, J.*—In this case the prisoner has been called on to plead to an indictment found by the Grand Jury of the county of the city of Dublin at the present Commission, charging him with felony, and with compassing to depose the Queen, and

levy war against her Majesty. The prisoner obtained a copy of the indictment, at the desire of his counsel, and moved by his counsel that it should be quashed, because it is alleged there is another indictment pending, charging the same offences, which was found by the Grand Jury of the county of Dublin at the last Commission, held in the month of October, which indictment was preferred by the direction of the Attorney-General, acting for her Majesty, under the powers and provisions of the 6 Geo. 4, c. 51, and to which, as appears from the affidavit, the prisoner declines to plead, and objects to be arraigned, and it is insisted on his behalf that this statute obliges the crown to abide by that indictment or venue, and prohibits her Majesty from preferring an indictment to any other jury for the same offence in the county of the city of Dublin; and that the indictment ought to be quashed, and the Queen stopped from proceeding any further upon it. The statute 6 Geo. 4, c. 51, by the 3rd section, enables any prosecutor to prefer his or her bill of indictment, for any offence within any county of a city or town to the Grand Jury of the next adjoining county, and provides that the bill found by that Grand Jury shall be as valid and effectual as if found by that of the city. It appears to me that the Attorney-general may prefer bills for an offence committed in a city to the next adjoining county, under that section, and may avail himself of the benefit of the statute, which is merely enabling, not disabling; for though the king shall not be bound by a statute unless specially named, he may take the benefit of it though not named; there are several cases to that effect cited in the (11 Report, 68 a.) It was held that the king may take advantage of the statute of *Nisi Prius*, though he is not bound by it; also the statute of Magna Charta, which provides that the Court of Common Pleas shall be held at some certain place, does not bind the king. In the case of the *King v. Traynor*, (1 Cr. & Dix. 237,) ruled by Mr. Justice Burton at Drogheda, the Attorney-General was held to be a prosecutor within the third section of the act. The fourth section enables the Court of Oyer and Terminer, to transfer the indictment found in a county of a city, if it appears that any indictment is proper to be tried by a jury of any next adjoining county, and the court may, at the prayer of the prosecutor or defendant, order such indictment or inquisition, and the several recognizances, &c., relative to such indictments and inquisitions, to be filed with the proper officer, to be by him kept among the records of the Court of Oyer and Terminer for such next adjoining county, and cause the defendant to be removed by writ of *habeas corpus* to the gaol of the next adjoining county, as if the offence was committed there. The statute seems to provide for three cases. The 4th section has no bearing on the present case, nor has the 5th; the 6th enables a judge of any of the superior courts, King's Bench, Common Pleas, or Exchequer, upon application ten days next before the holding of any sessions, &c., to cause the prisoner to be removed by writ of *habeas corpus* to the custody of the sheriff of the city to the sheriff of the adjoining county. So far as I have read, there is no express prohibition in the

act against preferring or finding a bill in the county of a city, after one found in the county. It is plain it was not illegal before the statute to have a second bill found, though another was pending for the same offence, and though the Court is bound to take care that the prisoner shall not suffer any disadvantage or inconvenience, there are clear authorities that the mere fact of the existence and pendency of an indictment for the same offence is not a sufficient ground to call on the court to quash a fresh indictment. There is a case referred to in the *King v. Stratton*, (Doug. 239,) *Rex v. Webb*, (3 Burr. 1468,) and also reported in (1 Bl. Rep. 460,) which is a plain authority on this point. The defendant was indicted for perjury, and the case having been removed by certiorari, stood for trial; in the meantime a new indictment was preferred, and the court declared its opinion that a motion to quash the indictment was not of course, and the rule made was, that the first indictment should be quashed, and the second stand in its place. There is another authority on this point, the case of *Rex v. Swan and Jeffries*, (Fost. 104.) It was an indictment for murder; the trial was postponed, and in the meantime the Attorney-General, being satisfied from the evidence that Swan was in the service of the deceased, considered it advisable to prefer another bill; the prisoner pleaded in abatement, and also over to the felony; the case was argued before Mr. Justice Wright and Baron Foster, who were of opinion the charge must be answered. "That the pendency of a former indictment is no answer nor any reason why he should not plead to the last indictment, notwithstanding the pendency of the former, for *autrefois arraign* is no plea in this case. The king, by his counsel, must be at liberty to prosecute in such a manner as will best answer the ends of justice, and the court must take care that the prisoner is not exposed to the inconvenience of undergoing two trials for the one offence." That is a decision on record, and it seems necessarily to rule the present case, unless the law is altered by the statute; and if it be no answer, by way of plea, so it is no ground for calling on the court to quash the indictment. It is, however, insisted that the provisions of the statute distinguish this case, and that though it was not illegal before the statute to have a second indictment found, while another was pending for the same offence, that the law has been altered in that respect. As far as I have referred to the 3rd, 4th, and 6th sections, I find nothing in the statute prohibiting a person who prefers a bill under the third section from afterwards preferring another in the county of the city where the offence was committed, and nothing annulling or invalidating that indictment when found. Here the bill was found by the county, and pending that, another appears to have been preferred under the authority of the third section. There was no proceeding under the 4th or 6th sections—none by order of the court under the 4th, and the prisoner was not removed under the 6th, which was the objection taken at the last Commission, and held valid by the court. It is insisted that the 7th, 8th, 9th, and 13th sections either express or sufficiently evince such prohibi-

tion. The statute directs that the recognizances of the prosecutors or witnesses who do not appear after notice shall be forfeited; and the eighth section provides that notice left at their place of abode shall be sufficient; by the 9th section it is enacted that the magistrates before whom the informations were taken shall, after ten days' notice, return the recognizances, &c., to the Court of Oyer and Terminer for the next adjoining county, and that after the delivery of these notices it shall not be lawful to prefer a bill at the sessions of Oyer and Terminer for the county of the city; and the 13th section enacts, that such persons shall enter into recognizance in £40, &c. It is insisted that the latter clause of the 9th section makes it unlawful for any one, after an indictment found by the county, to prefer an indictment in the county of the city. The statute has no such provision; it is, that "after the delivery of any of the said notices, &c., it shall not be lawful to prefer any bill of indictment in the county of the city." Here it is stated on affidavit that no notices were served; therefore, the case plainly does not come within the terms of that enactment, which is, that after the delivery of said notices it shall not be lawful to do so. It was argued, on the part of the prosecution, that the object of this provision was to assist the prosecutor, not to restrain that officer from preferring the indictment, and that the provision is not after preferring or finding a bill or indictment, but after notice, which not having been delivered here, the provision does not apply; and further, that the Queen was not intended to be bound by such provision, the word used being "person." Before the passing of this statute, it was not illegal to have a second bill found during the pendency of the first, and it would be difficult to hold that where there is no express provision in the act, we should imply one restraining the crown from sending up a second bill in the place where the offence was committed. Still, the Court will prevent a vexatious use of that proceeding. There are several cases where parties have the option of preferring indictments in one of several counties, as if a larceny is committed upon a coach travelling, or an offence upon the borders of the counties, and no authority has been cited to shew that any one of the indictments were invalid. It has been contended that though the Queen may take advantage of this statute, the crown is not bound by the prohibitory clause in the 9th section, or by the 13th section, by which recognizances are to be given. I am of opinion, that there is nothing in the statute which prohibits the Attorney-General from sending up a fresh bill in the county of a city, although a bill has been already found, and may be pending in the county. Here no notices have been served, therefore the case is not within the terms of the statute, and we cannot imply an intent to bind or restrain the crown by general words. Suppose this case, that a private person prefers a bill, and serves notice, and the Attorney-General was of opinion that another bill ought to be preferred in the county of the city, as in the case of *Res. v. Swan and Jeffries*, is there anything in the act to restrain or take away this power, this common-law right of the crown? I do not think there is. I

think we cannot imply such a provision, the effect of which would be to deprive the crown of the power of enforcing the due administration of justice; nor do I think it makes any difference where the indictment in the county has been preferred by the Attorney-General, if upon further consideration, whether in consequence of the rule made in the Queen's Bench in the case of the *Queen v. Martin*, as to the interest of a burgess, or to avoid the question as to whether a trial could be had in the county, or for any other sufficient reason he considers another indictment to be necessary, if he is of opinion the new bill is better adapted to the case than the former one, I do not think there is anything calling on us to prevent him from prosecuting in the manner he thinks will best answer the ends of justice. I do not think we can hold, upon motion to quash this indictment, that we should imply a prohibition restraining the crown. Looking at the subject matter, and the authorities, we do not find any provision contained in the act, either express or by necessary implication, abridging the right of the crown to send up a second indictment. It was argued by the counsel for the prisoner, that the proceeding was arbitrary, and might be unjust, to give the Attorney-General the power of changing the venue, which would be the effect of the construction we are inclined to give the statute; but we cannot, even if such an argument were well founded, extend the provisions of the act, or import into it what it does not contain. It is said the proceeding is harassing and oppressive. No such abuse is complained of here; for, though in the argument it was said to be so, no fact is put forward shewing such to be the case. Nothing that I have heard, save that the prisoner made considerable preparation for his defence in the county. It is not said that it will be thrown away, or not be applicable to the present trial, or that he will be deprived of the benefit of it; nor is there any allegation that a fair trial cannot be had in the city. It will be our duty to take care that the fresh indictment will not deprive the prisoner of the benefit of the *Habeas Corpus* Act; indeed I cannot see how it will have that effect. The prosecutor is ready to go to trial, and the delay is caused by the prisoner declining to plead. It is not alleged that he is not prepared, or that the indictments, though not precisely alike, are not substantially the same. The only material alteration is one of which no one can complain, that the present is shorter than the former. The other objection is the pendency of the second indictment, and that exists merely by the resistance to the motion of the Attorney-General to quash it; but we will take care the second indictment shall not prejudice the prisoner in whatever manner it is to be effected. I am of opinion, therefore, that we cannot comply with this application, as it appears to us contrary to the authorities, and not warranted by the provisions of the act.

RICHARDS, B.—Concurring as I do in the judgment pronounced by the senior member of the court, I should content myself with merely expressing my assent, were it not that this being a novel question, and one arising upon the construction of a somewhat recent statute, and on which

there have been but few decisions, I consider more proper to state briefly what has been passing, in my own mind on the subject. The first section of the 6 Geo. 4, cap. 51, relates to indictments, or informations, in the superior courts—such as the Queen's Bench, Common Pleas, or Exchequer—and enables these courts, upon application on behalf of her Majesty, or of any prosecutor or defendant, to give orders for the striking of a special jury, &c. In that section the crown is expressly named, notwithstanding that the general term “prosecutor” is also used; and that gives colour to the argument, that where it was intended to include the crown, it was done so in express terms, and that the term “prosecutor” was not considered by the framers of the act as sufficient to include or comprise the crown. But, on the other hand, in the second section, the general term “prosecutor,” as there used, must be construed to include the crown, as well as all others. That section empowers the superior courts to direct that issues joined in all actions and prosecutions depending therein shall be transferred for trial from the jurisdiction of a city or county of a town to the next adjoining county. Now, I find every information by her Majesty's Attorney or Solicitor-General included in this section; but how is the necessary order to be obtained for a transfer of such issues? It is to be obtained “at the prayer of any *prosecutor*, or plaintiff, or of any defendant;” it is not at the prayer or instance of the Attorney-General prosecuting for the crown, and of any prosecutor, &c., but of any “prosecutor.” So that the term “prosecutor,” as there used, manifestly includes the crown, or rather the Attorney or Solicitor-General prosecuting for the crown. It is impossible to read the language of the second section and come to any other conclusion. So that if the naming the crown in the first section affords an argument one way, the including the crown in the second section, in the general term “prosecutor,” is equally an argument the other way. But there is an enabling statute intended for the benefit of all plaintiffs, prosecutors, and defendants; and finding that it was in the first two sections manifestly intended to include the crown, and that the term “prosecutor,” in the second section, was used for that purpose. I confess I would feel very great difficulty in holding that the 3rd section should receive a construction limiting its operation to prosecutions carried on by private prosecutors alone. There is no reason suggested why the legislature should have intended to exclude the crown from the benefit of that section; and prosecutions by the crown were as much within the mischief intended to be remedied as those by private persons. In truth, all prosecutions are carried on in the name of the crown. The third section is general. The fourth section is where an indictment is, in fact, found; and provides that in all such cases the Court of Oyer and Terminer, &c., may order the indictments and inquisitions, &c., to be handed over to the proper officer of the next adjoining county, together with all documents, &c., relating to such indictment. But how is that to be done? Just in the same way as was before directed by the 2nd section, at the

prayer of any prosecutor or defendant. It cannot be argued that the word “prosecutor,” in that section ought not to bear the same meaning as in the 2nd section, or that the right should be confined to the private prosecutor and to the party prosecuted, but should not be vested in the crown prosecuting *pro bono publico*. By the 13th section it is provided, that the “*person*” seeking to change or remove the proceedings shall enter into recognizance for payment of costs, &c.; and it has been suggested that this section may be resorted to, for the purpose of interpreting within the limits contended for, the previous part of the act. No doubt the section cannot apply to her Majesty, for I admit it could not be the intention of the legislature to include the crown in that section. It would be absurd to require the crown to enter into recognizance; besides the word used in the section itself is “*person*,” not “*prosecutor*.” That section was plainly intended to apply to private prosecutors only; but it would be too much to hold from that, that none of the preceding enabling sections of the act included the crown. It has been, next, argued,—and it is the more important question for our consideration—that if the Attorney-General once avails himself of this act, by proceeding to obtain a transfer under it, he cannot afterwards again resort to the limited jurisdiction; and the 9th section has been relied on in support of that position. The argument is, indeed, founded upon that section alone; for, independent of it, there is no ground to contend for any such proposition. My brother Perrin has referred to several cases for the purpose of shewing that the pendency of one indictment cannot be relied as an answer to any other indictment for the same offence; and, in addition, I would refer to 2 Hale, P. C. 351. Now, I confess I am strongly disposed to be of opinion that the ninth section was consequent on the third section. That section (the third,) was conversant with cases where no bill had been found, and where a transfer was made in that stage of the proceedings from the limited jurisdiction; the several other sections, seventh and eighth, rendered it obligatory on the witnesses, &c., to attend at the Court of Oyer and Terminer in the county to which the case had been so transferred. The 9th section requires the magistrates before whom the recognizances had been taken, to return all such to the same county upon receiving ten days' notice, and consequent upon such change, it was enjoined by the 9th section, that no person should afterwards prefer a bill to the limited jurisdiction. That was enacted to prevent confusion, and a possible defeat of justice, by preferring a bill in the jurisdiction where neither the prosecutor nor witnesses were bound to attend. I would therefore rather incline to be of opinion that the 9th section was not intended for a case circumstanced as the present. But whether the 9th section would preclude a prosecutor, in a case plainly falling within its provisions, from resorting again to the limited jurisdiction, is a question upon which it may be unnecessary to express any opinion, inasmuch as I think it plain that that section could in no point of view be considered as extending to any case except

where the notices prescribed by the statute had been served. But where no notice has been served, the case cannot be considered as falling within it. The defendant availed himself of an omission similar in principle at the last Commission. The writ of Habeas Corpus not having been sued out 10 days before, he insisted he could not be legally transferred to the county, and here no notice has been served under the ninth or any of the other sections of the act, nor has the prisoner been transferred, nor pleaded to the indictment preferred in the county; and the only thing done within the county jurisdiction has been the mere preferring and finding the bills of indictment by the county grand jury. I would be slow to hold that any prosecutor, whether private person or the crown, would be precluded, pending such inchoate and incomplete proceeding, from abandoning the county jurisdiction, and preferring an indictment in the city; and I think the prosecutor ought not to be considered, under such circumstances, as having made his election so as to bind him for ever, supposing the ninth section to have the effect as to cases falling directly within it. But it has been further argued by the Attorney-General that in no case could the Crown be bound by the restrictive provision contained in the 9th section. Generally speaking, where the words used in an act of Parliament are "person or persons," the crown is not bound. Supposing, however, the 9th section to bear the construction contended for on the part of the defendant, in regard to cases coming plainly within its operation, it may, I apprehend, admit of some question, I will say of a very grave and serious question, whether the court would not feel itself authorized to apply the principle to be extracted from such a provision as that, to crown prosecutions—I mean, prosecutions carried on by the Attorney-General, as well as to all others in cases where the Attorney-General had availed himself of the general provisions of the statute. But entertaining the opinion which I do upon other parts of this case, it is unnecessary to consider that question, and all I shall say at present is, that it is not my intention to express any opinion upon it one way or the other. With respect to the allegation of hardship and oppression and the like, my brother Perrin has shewn that no inconvenience to the prisoner can result from the course taken by the Crown in this case. If we found the proceedings were adopted for the purpose of oppression, or to prevent the prisoner from having his case disposed of, although the pendency of one indictment would not at law be any bar to the preferring of a second indictment for the same offence, I should hope the court would possess sufficient power to prevent the abuse of sending up indictments *toties quoties* in different jurisdictions, for the purpose of embarrassing a prisoner in his defence, or delaying him from being delivered from the charge against him. But that is not the present case, and whatever the reasons of the Attorney-General may be, it has not been even suggested that any hardship has been caused to the party charged by the course adopted; and we will take care that the prisoner shall not be in a worse position, with reference to the period of his trial, by the present proceeding, than if he were

tried under the indictment preferred in the county.

The prisoner being now called upon to answer the indictment, pleaded the following pleas in abatement:—"And now on this day, that is to say, Monday, the 18th day of December, in the year of our Lord 1848, the said Charles Gavan Duffy, being led to the bar of the court here by the High Sheriff of the county of the city of Dublin, and having heard the said supposed indictment read protesting that he is not guilty of the offences in the said supposed indictment specified, or any of them; for plea in abatement nevertheless saith that he ought not to be compelled to answer the said supposed indictment, and that the same ought to be quashed, because he saith that Walter Sweetman, one of the jurors aforesaid, by whom the said supposed indictment was found a true bill as aforesaid, was not, at the time of his being sworn on the grand inquest aforesaid, nor at the time of his finding the said supposed indictment a true bill, as aforesaid, an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or seised of any estate of freehold in the said county of the city of Dublin, and this he the said Charles Gavan Duffy is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed, and so forth.

"And for a further plea in this behalf, the said Charles G. Duffy, protesting as he hath above protested, saith that he ought not to be compelled to answer the said supposed indictment, and that the same ought to be quashed; because he saith that Patrick Boylan, another of the jurors aforesaid by whom the said supposed bill of indictment was found a true bill, as aforesaid, was not, at the time of his being sworn on the grand inquest aforesaid, nor at the time of his finding the said supposed indictment a true bill, as aforesaid, an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a Burgess of the said city, or seised, possessed of, or entitled to any lands, tenements, or hereditaments within the said county of the city, for any estate of freehold, or any less estate, or entitled to any property within the said county of the city, in respect of which he, the said Patrick Boylan, was liable to be rated to the relief of the poor, or for county, parish, or municipal taxes, and this he, the said Charles Gavan Duffy, is ready to verify; whereupon he prays judgment of the said indictment, and that the same may be quashed, and so forth.

These pleas were verified by the affidavit of Mr. Duffy, and to both of them the crown demurred.

Dec. 19.—Butt, Q.C., before the argument, on behalf of the prisoner, applied to the court that the Attorney-General might be directed to take some course with respect to the indictment in the county.

Attorney-General.—If the plea in abatement to the indictment found by the City Grand Jury is allowed, it will have the effect of quashing it; therefore the crown should not yet be called on to take any course as to the county indictment. There is no intention of harassing the prisoner. If the

general issue was pleaded, and a trial could be had, the case would be different.

PERRIN, J.—We will not, at present, call on you to quash the county indictment; and will, therefore, hear the demurrer.

Attorney-Gen.—The first objection is in point of form; for the prisoner has no right to plead two separate pleas, therefore these pleas should be overruled for duplicity (1 Chitty, Crim. Law, 434). Only one plea can be pleaded to an indictment or information; the rule is the same in civil cases (Archbd. Civil Pleading, 2nd ed. 305). A defendant shall not plead two pleas in abatement (Com. Dig. Abatement, s. 3). These pleas are also bad in substance. In a plea of this description, every qualification which would shew competency in the juror must be negatived, otherwise the plea must be overruled. There is no statute regulating the qualifications of a grand juror at Commissions of Oyer and Terminer. At common law, the only qualification was that he should be *homo probus et legalis*, or *liber et legalis*; he need not be an inhabitant, or possessed of freehold property. This plea contains no allegation that the juror is not *liber et legalis*. In the Sheriff's return annexed to the writ, he is described as of Grafton street, in the city of Dublin, and consistently with anything alleged by the prisoner, he may be a merchant carrying on business at the house of a partner; and, though not having a residence or rateable property in it, may be properly described as of the city of Dublin. Upon a statement submitted to the judges, reported in (*Russell & R. Cr. Cas. 177*), it was decided that a grand juror need not be a freeholder, and the practice in England has since been, not to require grand jurors to be freeholders. *Kirwan's case* (31 St. Tri. 575) was an indictment found by the Grand Jury of the county of the city of Dublin; there was a plea in abatement that many of the grand jurors were not freeholders. Upon the argument, it was conceded upon the authority of the *dictum* in 2 Hale, P. C. 155, ed. 1800, that a freehold was a necessary qualification for a juror of a county at large, but it was argued by the Attorney-General, that in the city, if the grand jurors were freemen, it would be sufficient, and that qualification not having been negatived by the plea, the demurrer was held good. The supposition was, that the word *liber* had something to do with the quantity of the estate; but it properly means a man not tainted, as contradistinguished from a villein. The first statute upon this subject is 13 Ed. 1, cap. 38, Statute of Westminster, entitled, "How many and what sort of persons shall be returned as jurors of petit assizes." The next statute is 21 Ed. 1, c. 2, entitled, "*De eis qui ponendi sunt in assises*," and provided that the Sheriff shall not put any person on the grand jury in their county who had not lands to the value of forty shillings; but, according to Coke (2 Inst. cap. 38, 447-8), if any party be returned contrary to this act, he cannot be challenged, but the remedy is against the Sheriff. There is no case of an indictment being quashed in consequence of a defect in a juror, except one founded on the 11 H. 4, c. 9, which provided that any indictment found contrary to the provisions of it should be quashed

(Coke, 3 Inst. Treason, 33, 34); see *W. Withpole's case* (Cro. Car. 134, S.C. Sir W. Jones, 198). In 2 Hawk. P.C. b. 2, c. 25, sec. 16, is the only authority which would seem to shew that non-residence is an objection. He says, "The indictment must be found by twelve men, at least, every one of whom ought to be of the city, and freemen, and liege subjects." He refers to *Plack's case* (2 Rolles, Reps. 82), and the objection taken there was, that the indictment was not found by twelve *proborum et legalium hominum*, as well as that they did not reside. In the present case, Mr. Boylan may be properly described as of the city of Dublin, though he does not reside. The present Jury Act (3 & 4 Wm. 4, c. 91) does not apply to grand jurors of Commissions of Oyer and Terminer, and is confined to juries for the trial of issues, and grand juries at sessions of the peace, &c. It may be argued, that the third section uses general words which would extend to all grand jurors; but, being used in a limited sense in the first section, they must bear the same meaning in the third. Besides, this act does not contain any provision that an indictment shall be quashed for any defect in a grand juror. So that it either does not apply at all to the present case, or if it does, the indictment should not be quashed. The 33rd. section provides, that any Sheriff, &c., is hereby indemnified for impannelling and returning any man named in the jurors' book, though he be not qualified or liable to serve on juries; and if any Sheriff return any man to serve, &c. (except on the grand jury at any assizes) such man's name not being so inserted in the jurors' book, &c. he shall be fined. This is an express exception as to grand juries. It would be a great inconvenience to hold, unless expressly provided by the statute, that a defect in a grand juror would vitiate an indictment; for there is no means of ascertaining who are on the jury, as the Sheriff may return whom he pleases. If a property qualification were necessary, the Sheriff might return a proper person, who might change his residence and part with his qualifications before serving, and finding the bill, and that might be kept concealed from any person except the prisoner. In the case of the *Queen v. Whitehead* (7 Q. B. Rep. 582), the question was not argued, as the sentence was wrong; therefore, this plea should be overruled, as bad in form and substance.

John O'Hagan, in support of the plea in abatement:—As to the objection to the form of the plea, as containing double matter, there is a distinction between dilatory and peremptory pleas. Several dilatory pleas may be pleaded, (2 Hawk. 266, Ed. 1824.) who refers to the year book, 446, fo. 15; and the objection applies only to cases where there are two pleas triable in different ways, *Sheridan and Kirwan's case*, (31 St. Tr. 575.) As to the substance of the plea, first, Mr. Boylan is not an inhabitant of the county of the city of Dublin; we deny not only residence, but also occupancy of any kind; the word inhabitant is the very largest that can be used, and is so defined, (2 Coke Inst. 702.) It must be admitted, that every qualification not included in the terms of the plea must be deemed excluded; but by the allegations we have expressly excluded such a state of

facts as that of a merchant carrying on business at the house of a partner, for such a person would come within Lord Coke's definition of inhabitant. By the common law, grand and petty jurors must be in possession of property, and, by occupancy or residence, be of the county for which they are returned to serve, (1 Chitty Crim. Law, 308; 2 Ld. Hales P. C. 154; Coke's 3 Inst. 30-31; 2 Hawk. 299.) An indictment must be found by twelve men at least of the same county, freemen, &c., (2 Hawk. 207, E.; 4 Bl. Com. 302; Complete Jurymen, 11-16.) The statements of these text writers do not go beyond the exigency of the writ, and the statement in the caption of the indictment. The writ commands the sheriff to return good and lawful men of the body of the county, and the caption is bad if it does not state that the jurors are good and lawful men of the body of the county, *Forbes' case*, (Sir T. Raymond, 433;) *King v. Cole*, (2 Keb. 284 & 292;) *King v. Sparrowhawk*, (3 Keb. 807.) The words *de comitatu* are the most essential; it will be assumed that a man is *probus et legalis*, but not that he is of the county. These words cannot mean a party who does not reside, for grand jurors are presumed to have local knowledge of facts, and they may present without any indictment. In the Jurymen's Guide, Sir J. Hall, Solicitor-General in the time of William 3, at page 32, says, "To what end is a jury to be returned out of the vicinage, &c.? A man cannot see by another's eye, nor hear by another's ear." How, then, can it be presumed that the duties of jurors are to be performed by strangers; is the Sheriff of Dublin to go to Cork, Canada, or Jamaica for grand jurors? If the argument on the other side is good, he may go to the Quay, and select a grand jury out of a ship from Canada or Jamaica. In all the old statutes, (13 E. 1, c. 38; 21 Ed. 1, c. 2,) it must have been assumed that the jurors were not only of the county, but were also possessed of property in it. They were passed to prevent persons being annoyed by being summoned on juries; how could a person be annoyed if he did not belong to the place, or was not possessed of property in it? Throughout all the statutes, residence has been assumed. By 2 H. 5, stat. 2, c. 3, a party must be possessed of lands or tenements of the yearly value of forty shillings. This statute, being general in its terms, was held to extend to cities, boroughs, and towns, and being found inconvenient, was partially repealed by 23 H. 8, c. 13, which was not in force in Ireland, and this statute qualified every person who enjoyed the liberties of any city, &c., wherein he dwelt or made his abode. What was the necessity for that statute, if the sheriff of the city could go for jurors into the county adjoining. In *Lord Russell's case*, (3 St. Tri. Fol. Ed. 634, the argument used was, *ex necessitate*, that a sufficient number of jurors could not be had, and in *Sheridan's case*, the argument was based on the necessity of the party being of the county of the city, and it was held that to be a freeman was a sufficient qualification, and the plea was bad as it did not negative that fact; and the 4 G. 1, cap. 15, was relied upon as establishing the fact that freedom was not sufficient, and that a party should be a freeholder, as that act

would have been unnecessary if the argument, that a grand juror need not reside, is well founded. The legislature has recognized the principle, that jurors must be of the county, resident in the county, and have property in it. The 3 & 4 W. 4, c. 91, prescribes the qualifications of jurors. They must be resident merchants, freemen, and householders. As to the necessity of residence, *King v. Adlard*, (4 B. & Cr. 772;) *King v. Inhabitants of North Curry*, (4 B. & Cr. 953.) If an indictment was found at Recorder's Court or sessions of the peace, it would be a good plea in abatement that a party was not resident; how can it be contended, then, that at the more important sessions of Oyer and Terminer the grand jurors may be called from the four quarters of the globe? As to the objection made, that the indictment cannot be quashed on this ground, even if there was no case on the point, the court would be slow to hold as law that a party could be convicted and executed upon an illegal indictment, and that there was no means of taking advantage of it. As to the case referred to, (*Russell & R.*, C. C. 177,) it was the opinion of the judges that it was not necessary that a grand juror should be a freeholder; it was probably considered that if possessed of leasehold property it would be sufficient. But that case does not warrant the assertion that a grand juror need not be possessed of any property whatever. No case has been cited, no authority, no dictum, to shew that a grand juror need not have any property or be an inhabitant of the place, and, on the other hand, we have the words of the writ, the statement in the caption of the indictment, the recognition by the ancient statutes, and the peculiarly local functions of grand jurors. Mr. Boylan is a stranger, and this indictment should be quashed, for it is the prisoner's right to have the bill found by twenty-three good and lawful men of the county in which the cause of action arose. If he part with his land, he may be challenged, and that answers another objection, that although a party may be a good juror at the time of his return, he may have parted with his qualification before finding the bills. In the present case, the greatest care should be taken to have all the proceedings regular, as the offence of treason has been made treason-felony by the statute. In all cases in a county of a town, jurors must be at least freemen, and in some cases that was not sufficient, (Gilbert, C. P. 95.) In a corporation, freedom and not freehold makes men *libros homines*, and the same proposition is laid down (Bacon's Abridgement Tit. Juries, E. 3.) At common law, the fact of a man being a *liber homo* was evidenced in a city by being a freeman, in a county by having a freehold, *Sheridan's case*, (31 St. Tr. 583; Mr. Justice Day's judgment, p. 621. Bacon, Abr. Juries, A. vol. 4, new edition, 525-6.) So important was it that a party should be possessed of a freehold, that at common law freehold in ancient demesne or that of a minor, was not sufficient, (Hard. 311.) It would be strange to say that a man who, under the late Jury Act, 3 & 4 W. 4, c. 91,) could not appear on a petty jury, would be qualified to serve on grand juries. In *Re Nolan*, (2 I. & S.) *Sheridan's case* decides that a freeman is *liber homo*, but the court is now called

on to go farther, and say that one who does not possess any such qualification can be a grand juror.

Napier, Q.C., same side.—This is a question of great consequence; and it is admitted by the Attorney-General, that there is not any legislative provision by which any one not entitled to rateable property can be a grand juror of the city of Dublin. There is no principle of common law, nor authority of any text writer, which would warrant such a proposition. *Kirwan's* case went off on the ground that being a freeman by charter is sufficient to answer the requirement of the law. In all the statutes it is required, that in addition to being a freeman, a grand juror should have a property qualification. A plea is the only way in which a prisoner can take advantage of this objection; for he cannot interpose until called upon to answer the indictment; and as to the objection for duplicity, 2 Hawk. cap 23, sec. 128; Coke, Litt. 303, a.; *Chitty v. Dendy* (4 N. & M. 842). (*Perrin, J.*—That would only vary the form of the objection, and would rather apply to the order of pleading several matters, and not to the pleading of several matters of the same value at the same time.) In *Sheridan's* case it was so done, and no objection was taken. As to the substance of the plea, the older statutes did not constitute the qualifications of jurors, they applied rather to the cases where a party having a freehold was possessed of the necessary qualification (Fitzherbert Nat. Bre. 165; Coke Litt. 157 b.) A grand juror must be a freeholder.

Sergeant O'Brien, in reply.—The plea is bad in form as being double. The cases in the note to 2 Hawk. Pl. C. 23, s. 128, are cases of appeals. In criminal cases, a prisoner cannot have any greater privilege in pleading than in civil, and such a plea would be bad for duplicity. As to the substance, it is conceded that Mr. Boylan might, consistently with anything stated in the plea, be possessed of very considerable chattel property. The proposition has not been considered, that it is sufficient if a grand juror is good and lawful. If extreme cases have been put, a case may also be suggested, and one more likely to occur. A person who has served upon the grand jury, who has taken the oath and discharged the duties of the office, may give information to the prisoner that he was not duly qualified. If the principle contended for be sanctioned, no precaution on the part of the Sheriff would avail, and the ends of justice would be defeated. All the *dicta* cited from Lord Coke refer to the cases of petty juries, and do not, therefore, apply. Wherever a juror was disqualified, there was a distinct and clear enactment, as appears by the ancient statutes; and unless there is such an enactment, a party cannot be considered as not properly qualified. The statute of 2 Hen. 5, st. 2, c. 3, rendering a freehold qualification necessary, applied to capital cases only, and would seem to support the proposition, that in cases not capital, no qualification was necessary. If the legislature deemed any qualification necessary, it would have imposed a penalty on the party acting without it. The plea, in the present case, should have denied that Mr. Boylan was a good and lawful man; and not having done so, is bad. It is said that the

word "inhabitant," includes the case put by the Attorney-General, of a person carrying on business at the house of his father; there is no authority that such a person is an inhabitant; *King v. Adlard* (4 B. & Cr. 772) would seem to decide that he was not an inhabitant.

Perrin, J.—In this case, a plea in abatement has been filed to the indictment, which states, that two of the grand jurors by whom the bills were found, Mr. Sweetman and Mr. Boylan, were not inhabitants of the county of the city of Dublin, or resident within it, or freemen, or seized of any estate. My observations will be principally directed to the objections made to the qualification of Mr. Boylan, because they are more full than the others. The plea states that he was not, at the time of being sworn, or the finding of the bills, an inhabitant of the county of the city, or resident within same, or a freeman, or burgess, or possessor of, or interested in any lands, freehold or leasehold, or possessed of any property in respect of which he is liable to be rated, &c. To this plea the Attorney-General has demurred, and insists that it presents no valid objection to the indictment, nor any reason why the prisoner should not be tried, and for this reason, that the plea does not shew that Mr. Boylan is not a good and lawful man of the city of Dublin. This case was argued with great ability and propriety, especially by Mr. O'Hagan, the junior counsel on behalf of the prisoner. In considering the validity of the plea, it must be observed, that when a party pleads in abatement particular matters of disqualification, he admits the existence of all matters which are not denied by the plea; he rests on the objections assigned, and cannot bring forward any others. We think the authorities cited rather shew what the law was, than what it is; and that the statutes referred to in argument have been repealed, or consolidated, by the 3 & 4 Wm. 4, c. 91, but we considered it right, and due to the learned counsel who cited them, to read and examine them. I will not, therefore, discuss them in detail, but will proceed to examine the objections assigned—first, that Mr. Boylan is not an inhabitant of, or resident within the city of Dublin, or possessed of, or entitled to, rateable property within it. Although it may be true that he is not possessed of rateable property, or an inhabitant of Dublin, yet he is not named by the name of Patrick Boylan, of the city of Dublin, merchant; and, though not an inhabitant, he may be an extensive merchant carrying on his trade there; he might be conversant there, in business hours every day, in the shop of a partner or parent, as manager or conductor. A case has been referred to by the counsel on both sides, and very well remarked on by Mr. O'Hagan—the *King v. Adlard* (4 B. & Cr. 772) which shews, that without being an inhabitant or resident, a man may be *of a place*. The defendant carried on his trade at the house of a partner, and was in the habit of resorting there on working days, and sometimes remained at night but did not sleep; it was held that he was not an inhabitant or resident. There is also another case in the same book to the same effect, page 959, *Rex v. Inhabitants of New Curry*, where there is an observation by Justice

Holroyd which shews that a person may be conversant and *commorant* in a city, and carry on business there, yet, if he sleep outside it, would not be an inhabitant or resident. It appears to me that case decides that the word *inhabitant* does not necessarily embrace a person carrying on business in the place. The next objection is, that Mr. Boylan is not possessed of, or entitled to any property in the city liable to be rated. Now, this objection is confined, and does not deny that he is a merchant possessed of property; and, consistently with anything pleaded, he might be possessed of merchandize of great value, though not rated in respect of it. The next objection is, that he is not a freeman or burgess. With respect to that, the plea does not deny that he is, in the words of the precept, a good, honest, and lawful man of the city of Dublin; but it denies that he is a freeman of the city of Dublin—that is, he is not a freeman by tenure or by birth. It is important to consider, that by the law of the land, all men not stigmatized by crime are now freemen, except outlaws and convicts; that vassalage and villeinage being abolished and at an end, all the subjects of this country are freemen, not by tenure from any one, or by charter from the crown, but by the law of the land. Therefore, as I before observed, this plea does not deny that Mr. Boylan is a free, good, and honest man of the city of Dublin; for he may be of the city of Dublin, though not an inhabitant or resident in it. If a man resides in one place, and transacts business in another, he is a man of one place or the other (Com. Dig. Abatement, F. 25; Felwyls. Dig., and see Barnes, 162), therefore, as *Canadians* (to meet a case cited in argument) would not answer that description, I do not think they could be fairly described as merchants of the city of Dublin. In order to detract from the ability to serve as a grand juror, some disqualification must be averred. Now, here Mr. Boylan may be the eldest son of a resident merchant of considerable property, and he may conduct his business. I did not intend to notice the objection to the form of the plea, as I would rather decide this question on the substance; but I may mention, that I consider the form of it is borne out by the precedent in *Kirwan's* case, though perhaps not strictly, and if the two objections had been put in one plea, on the authority of that case it would be sufficient. A man may not have a rood of ground, or rent a house in Dublin, he may not be liable to any taxes, yet he may be a principal merchant in the city, and may have property to a considerable amount in the Custom House; he may be a manager of one of the banks, and he may be on the special jurors' book by the 24th section of the 3 & 4 Wm. 4, c. 91. And though all the allegations in the plea were true, as to the necessity of a grand juror being a freeholder, I need not observe upon that, after the opinion expressed by the Judges in the case in *Ry. & Russ. R.*, followed, as it has been, by the Acts of Parliament affecting Great Britain upon that subject, and which contain no provision that would affect the opinion there expressed, that a freehold qualification is not necessary. The objection in the present case seems to be taken from the late statute, although, in the course of the argument, it was assumed that it had no bearing on the subject.

The matter is not very clear, but my opinion is, that the statute does affect the question. In *Nolan's* case the point was not pressed by counsel in the argument, and, when attention was called to it, was given up; and it was remarked by one of the Judges, that it was not considered necessary to decide that point; and when we look to the title of the act—to consolidate and simplify the laws relating to the qualifications of jurors and the formation of juries—it would be difficult to say that the legislature did not mean to make some provision with respect to grand jurors. "The act provides that the Sheriff shall not, in any *venire facias*, or precept," (which is the process by which grand jurors are summoned) "return the name of any person not qualified to serve on juries according to the act; and the first section provides what shall be the qualifications of those liable to serve. There are frequently to be met through the act the words "trial of issues," and that, of course, confines that part of the statute to petty juries. The words used in the first section are, "such persons, &c., shall be liable to serve on grand juries, in Courts of Sessions of the Peace;" and in the 10th section it is enacted, "that every precept for the return of jurors shall direct the Sheriff to return a competent number of good and lawful men of the body of the county qualified according to law." That section seems to me to comprehend persons summoned on grand juries; for the precept of this court is not distinct for grand and petty jurors. By the 11th section, the Sheriff is not to return the name of any person not contained in the jurors' book, whence it would seem to be a fair inference that all persons who are directed to be put on that book are to be deemed and supposed to have the necessary qualification, though it is not by any means conclusive upon it. The 20th section provides, that want of freehold shall not be ground of challenge. The 24th and 33rd sections appear to me very important in considering this question; particularly the case of a merchant having a residence outside of the city, and coming in to carry on his business; or if he be the son of such a person; for the Sheriff is to take from the book the names of the sons of persons, &c., persons who have served the office of grand jurors, the eldest sons of such persons, and he is to put them on a list,—for what purpose? for the purpose of having a list whence the grand juries are to be called, or the special juries empannelled. The 33rd section enacts, that the Sheriff shall be indemnified for returning any person who is named in the jurors' book, and in all the sections where the legislature intended to confine the term "sessions," to "sessions of the peace," it is so expressed; in this section, the meaning of the term must be, sessions of Oyer and Terminer, and general gaol delivery, there being nothing to confine it. He may, therefore, call persons not inserted on the jurors' book. Above all, the 24th section qualifies the eldest sons of merchants and persons carrying on wholesale trades, possessed of £5,000, to be put upon special juries, not by virtue of any personal qualifications of their own, but as the eldest sons of such persons. My opinion is, that this act does contemplate grand jurors as well as others, and that it does not prohibit the return of a person circumstanced as I have observed in the early part

of my observations. The just inference, therefore, is, that any person qualified to serve as a special juror, may serve, and is liable to be returned as a grand juror; and it is every day's experience, in counties, that the eldest sons of noblemen and persons of rank are sworn upon grand juries, although they may have no personal qualification. I am of opinion, therefore, that this plea is deficient, and that neither Mr. Sweetman nor Mr. Boylan are shewn to be disqualified.

RICHARDS, B.—In this case, I have very little to add to what has been said by my brother Perrin. As to the objection made by the counsel for the crown to the form of the plea, I content myself by saying, that I concur in what has been already stated; and, with respect to the substance of the plea, I also concur in the judgment pronounced. After as careful an examination of all the cases and authorities to which we have been referred, as time would permit, I cannot find that it has ever been held—except where made necessary by statute—that grand jurors should have any particular qualification in point of property. A grand juror should be a *liber homo*, a freeman as contradistinguished from a villein; he should be taken from the body of the county for which he is called on to act. It is laid down (2 Hale, 155), that at common law it is necessary for a grand juror to have a freehold, and the same doctrine is repeated elsewhere, and appears to have been admitted by the counsel in the case of *King v. Sheridan* (31 St. Trials); but it is no where laid down what the amount in value of that freehold should be. If I might venture to account for the notion, that at common law a grand juror should be a freeholder, while the value of his freehold does not appear to have been in any degree material, I would say that such an opinion prevailed, because in early times the distinguishing characteristic of a freeman was a frank tenement. A villein could not be a legal juror, and a man who held lands in frank tenement could not be a villein; so that it was only important to consider whether a man was a freeholder, and not the amount of his freehold, and this view receives confirmation from the recitals contained in the statutes 13 Ed. 1, c. 38, and 21 Ed. 1, c. 1. The 21 Ed. 1 prescribes a qualification for grand jurors, but it was not intended to interfere with cities or counties of towns, many of which had, by charter, been invested with privileges long before. The tests adopted in counties for considering whether a man was a *liber homo* would not answer for, and could not be applied to cities; and other tests were necessary, by which the same thing might be ascertained. The form of the 2 H. 5, c. 3, being general, was held to extend to cities, but was found so inconvenient that the legislature, by the 23 H. 8, repealed that statute, so far as related to cities and towns. The act of Henry 5 was extended to this country by Poyning's act, while the 23 of H. 8, was not passed till after; therefore the 2 H. 5 remained the law in Ireland till the 3 & 4 Wm. 4, c. 91. However, the statute of Henry 5—even if not repealed—could not apply to the present case, so far as it proposed to deal with the criminal law; for it was confined to capital cases, and the present is not such an one. I now come to the case of the *King v. Sheridan*, which

decided, that except in cases within the statutes (the 2 H. 5 not being then repealed), a grand juror of a city need not have a freehold, it was argued that a freeman of a city must be regarded in the same light as a freeholder of a county at large; but I apprehend that it cannot now be argued, that a man may not be *liber*, and good and lawful, without being a freeman. I should find it very difficult to say what person at common law is disqualified from acting as a grand juror at Commissions of Oyer and Terminer, no law or case laying down that any qualification is necessary beyond what I have stated. The 3 & 4 Wm. 4, c. 91, enacts, that the several persons qualified in manner therein mentioned shall be liable to serve on grand juries in Courts of Sessions of the Peace, and that manifestly extends only to courts inferior to those of Oyer and Terminer and General Gaol Delivery. It was not intended that this act should extend to assizes or sessions of Oyer and Terminer, and I would refer to the 33rd section, which contains an express exception to that effect. It was the general policy of this act, that all qualified persons should be put upon the jurors' book; yet here is a section which enables the Sheriff to go out of this book. Possibly it was thought unnecessary to pass any law as to the amount of the qualifications of grand jurors at assizes, regard being had to the class of persons who usually served, though it might be necessary to do so in case of Sessions of the Peace. Upon the whole, I consider the term *liber homo*, as applied to jurors, was used to distinguish the freeman from the villein; and as the latter no longer exists, I would say that every liege subject, not disqualified, is a *liber homo*, in the eye of the law and qualified to serve. It was insisted that a juror cannot legally act as such unless he be of the body of the county, and that consistently with the allegations in the plea, Mr. Boylan cannot be considered as of the body of the county. Now, I take it, that consistently with anything in this plea contained, Mr. Boylan may be a merchant in the city, he may have a partner there, and, though he may have his residence outside of the city, he may spend the entire day in transacting his business there; he may be a director of some of the banks, and may have a share in the concern, and I should call such a person of the city of Dublin, although he may not be an inhabitant, or freeman, or possessed of any rateable property in it; he is described on the panel as of the city of Dublin, merchant, and that, if true, entitles him to be a juror, and is not negatived in terms, or in substance, by any allegation in the plea. Extreme cases may and have been put in the course of the argument, but when such occur, if ever they do, the court will know how to deal with them. The present question is, whether Mr. Boylan is of the city of Dublin, merchant—whether he may not be so, consistently with this plea; and if he be, the case put, of the Canadian sailors is an extreme one which does not apply, and has no bearing on the question. My brother Perrin has referred to the case of the *King v. Adlard*, and the opinion expressed by the Judges in the case in *R. & Ryan*; it is unnecessary for me to allude further to them. For these reasons, therefore, I concur in the judgment of the court.

The court having pronounced judgment of *respondent oster*, the prisoner was now again called upon to plead to the indictment.

The first count of the indictment stated, that the jurors for our lady the Queen upon their oath present that Charles Gavan Duffy, after the passing of an Act of Parliament made and passed in the eleventh year of the reign of our sovereign lady Queen Victoria, &c., feloniously did compass, imagine, invent, devise, and intend to deprive and depose our lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom, and the said felonious compassing, imagination, invention, device, and intention, he, the said Charles Gavan Duffy, then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain number of a certain public newspaper called the *Nation*, which said printing is entitled "The Business of To-day," and contains, among other things, according to the tenor and effect following, that is to say (setting out one portion of the article complained of); and in another part thereof, according to the tenor and effect following, that is to say (setting out another portion of the same publication); "And the said felonious compassing, imagination, invention, device, and intention, he, the said Charles Gavan Duffy, afterwards, and after the passing of the said Act of Parliament so passed, &c., on the *seventeenth day of June*, in the said eleventh year of the reign aforesaid, at, &c., did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called the *Nation*, which said last-mentioned printing is entitled "The Uses of the Union," and contains, among other things, according to the tenor and effect following, that is to say (setting out a portion of the second publication), and so on throughout all the articles.

The second count stated, that the said Charles Gavan Duffy, after the passing of the said act, &c., on the *third day of June*, &c., feloniously did further compass, imagine, invent, devise, and intend to deprive and depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said last-mentioned felonious compassing, imagination, invention, device, and intention did then and there feloniously express, utter, and declare, by *divers overt acts and deeds* hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring into effect his most evil and wicked felony and felonious compassing, imagination, invention, device, and intention, last aforesaid, he, the said Charles Gavan Duffy, on the said *third day of June*, in the eleventh year of the reign, at, &c., did feloniously publish in a certain other number of a certain other public newspaper called the *Nation*, a certain other printing of and concerning a certain other treasonable revolution by him, the said Charles Gavan Duffy, &c., then and there feloniously devised and intended to be carried into effect by force of arms, and by traitorously levying war against our said lady the Queen, and to deprive and depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the United

Kingdom, and of and concerning the said war so intended to be levied as aforesaid, which said last mentioned printing is entitled "The Business of To-day," and contains, among other things, according to the tenor and effect following, that is to say (setting out the publication as in the first count); "and further to fulfil, perfect, and bring into effect his said last-mentioned most evil and wicked felony and felonious compassing, imagination, invention, device, and intention, aforesaid, he, the said Charles Gavan Duffy afterwards, and after the passing of the said act, and on the *seventeenth day of June*, in the year, &c., at, &c., did feloniously publish in one other number of the said public newspaper called the *Nation*, a certain other printing of and concerning a certain treasonable revolution by him, the said Charles Gavan Duffy, &c., then and there feloniously devised and intended to be carried into effect, in order to deprive and depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom, which said last-mentioned printing is entitled "The Uses of the Union," and contains, among other things, according to the tenor and effect following, that is to say (setting out another portion), and so through the remainder of the publication. The third count was similar to the first, and the fourth to the second, but stating the publications as overt acts.

The fifth count stated "that the said Charles Gavan Duffy, after the passing of the said act of parliament, made and passed in the eleventh year of the reign of our said sovereign lady Queen Victoria, entitled 'An Act for the better security of the Crown and Government of the United Kingdom,' on the third day of June, in the eleventh year of the reign of our said sovereign lady Queen Victoria, with force and arms, within the united kingdom, at the said parish of St. Thomas, in the county of the city of Dublin aforesaid, feloniously did further compass, imagine, invent, devise, and intend to deprive and depose our said lady the Queen from the style, honour, and royal name of the imperial crown of the united kingdom, and the said last-mentioned felonious compassing, imagination, invention, device, and intention, did then and there feloniously express, utter, and declare, by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, perfect, and bring to effect, his most evil and wicked felony, and felonious compassing, imagination, invention, device and intention aforesaid, he, the said Charles Gavan Duffy, on the said third day of June, in the said eleventh year of the reign aforesaid, and on divers other days and times after the said third day of June, to wit, on the seventeenth day of the same month of June, in the eleventh year of the reign aforesaid, on the twenty-fourth day of the same month of June, in the twelfth year of the reign aforesaid; on the first day of July then next following, on the eighth day of the same month of July, on the fifteenth day of the same month of July, on the twenty-second day of the same month of July, and on the twenty-ninth day of the same month of July, in the twelfth year of the reign aforesaid, at, &c., feloniously did publish divers other printings in divers numbers of a certain

public newspaper called *The Nation*, of which he the said Charles Gavan Duffy then and there was the proprietor and publisher, and also divers other writings of him the said Charles Gavan Duffy, by him then and there written, the said last-mentioned printings and writings containing, amongst other things, incitements, encouragements, advices, and exhortations to the liege subjects of our said lady the Queen in that part of the united kingdom of Great Britain and Ireland called Ireland, against our said sovereign lady the Queen, to rise and rebel and treasonably depose our said sovereign lady the Queen from the style, honour, and royal name of the imperial crown of the united kingdom, to deprive and depose against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity." The sixth count was similar to the fifth, but stating the intent to be to levy war.

The prisoner demurred generally to each count. Joinder in demurrer by the crown.

Dec. 23.—*Sir Colman O'Loughlen* for the demurrer.—The indictment in this case consists of six counts, which, however, resolve themselves into three, as the 1st and 3rd are nearly similar, and so are the 2nd and 4th, and the 5th and 6th, only laying different intents. This is the first question ever raised to the form of an indictment under the Treason Felony Act; for the objection raised in the *Queen v. Martin* was by writ of error after judgment, and by the 9 Geo. 4, c. 54, sections 31 and 32, it is provided, that if the counts of an indictment follow the words of the statute creating the crime that will be sufficient after judgment, therefore, that case did not apply. By the 3rd section of 11 & 12 Vic. c. 12, the offence charged in the present indictment is defined; and that section provides "That if any person shall compass, imagine, invent, devise, or intend to deprive or depose the Queen from the style, honour, or royal name of the imperial crown of the United Kingdom, or any of her Majesty's dominions, or to levy war against her Majesty within any part of the United Kingdom, in order, by force or constraint, to compel her to change her measures or counsels, or in order to put any force or constraint upon, or in order to intimidate either house of Parliament, or to move or stir any foreigner or stranger with force, to invade the United Kingdom, or any other her Majesty's dominions, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, &c." It is clear from the words of the statute that two things are essential; first, the compassing any of the intentions mentioned; and, secondly, the expressing, uttering, or declaring such compassing in the manner pointed out by the act. Both must combine; for there is this distinction between treason felony and treason alone. Treason consists in the compassing, but to constitute treason-felony there must be the compassing and the expression of it; for the words used in the act are, "and such compassings," &c. Treason-felony may be committed in three distinct ways—first, by printing or writing;

secondly, by open and advised speaking; thirdly, by act or deed. The printing and speaking are not overt acts, they are crimes in themselves. That must be the construction; the principle is laid down in *Dwarris on Statutes* (578 Ed. 1848), that where the words used in a subsequent part of the section are larger, they may include the preceding words—where smaller, they cannot, referring to the cases of *King v. Bolton* (8 B. & Cr. 74, and 5 Rep. 119). By the fourth section, no one is to be prosecuted, &c., "for open and advised speaking only, unless, &c.," which clearly shews it was the intention of the legislature that open speaking should constitute a crime, and not be an overt act. The two counts last in the indictment were bad for confounding these three crimes, which were made distinct by the act; besides the felonies were stated in too general a manner. These counts were nearly similar, merely varying the intent, the 5th charging the compassing to depose the Queen, the 6th compassing to levy war. The words of the count are, that the said Charles Gavan Duffy, after the passing of the act, &c., did feloniously compass and imagine, &c., to depose the Queen, and did express that felonious intention by divers overt acts, &c. The only overt acts alleged are publications, and if the distinction be correct that there are three crimes, these counts are bad as confounding them. These counts are also bad being too general; the publishing, &c., is part of the *corpus delicti*, and the writings should be set forth, *Sacheverell's case* (15 St. Tr. 466). All the words and writings supposed to be criminal must be specified in the indictment. In high treason the words need not be set forth, as the crime consists in the compassing alone, *Zenobio's case* (6 T. R. 162); but in an indictment for libel, the words must be set forth (2 East. P. C. 1122). In an indictment for writing a threatening letter under the 15 & 16 G. 3, cap. 21, it was held that the letter should be set out; also for burglary, the instrument forged must be set forth, as being part of the *corpus delicti*, *King v. Sparling* (1 Strange, 498); *King v. Popplewell* (ibid. 686); *King v. How* (ibid. 699); *King v. Chene* (4 B. & Cr. 902; 2 Hawk. cap. 25, sec. 59), who refers to 3 Inst. 41, which was an indictment under the Statute of Heresy, and Lord Coke held it to be bad, as "a general indictment is insufficient in law, albeit the words of the statute are general." The words of the present indictment are precisely similar to that case, and must, therefore, be bad. By the 7th section of the act it is provided, that any one prosecuted for felony should not be prosecuted for treason on the same facts. If the words, &c., are not set forth, how could a party, upon a subsequent trial, shew that he had been already tried for the same offence? By the 4th section it is provided, "that the words used should be set forth on oath, and that no person should be convicted unless, &c." Now, if the words used are necessary to be set forth in an information, in a preliminary stage of the prosecution, it would seem that they should be also set forth in the indictment. The last two counts are therefore bad on this ground alone. The other four counts cannot be supported, they are bad for duplicity and for being too general. As to the objection of duplicity,

it can only be taken advantage of by demurrer and the same rule applies in civil as well as criminal cases. In *King v. Roberts* (Cather, 226), which was an information against a ferryman for taking more than the regular tolls, it was held that every extortion was a separate offence, and they should not be all joined. All the cases are collected in Gabbett's Crim. Dig. vol. 2, p. 234. In *Campbell and Haynes v. Queen* (1 Cox, 279)—though not exactly in point—the doctrine of duplicity, as stated in that case, was affirmed on a writ of error, and Lord Deunman takes it for granted that the rules in civil and criminal cases are the same. The next question is, do these four counts charge the prisoner with one or several offences? and that will depend on the construction of the act, if three several offences are created, each count cannot contain them. The first count sets forth several different articles, and each of these constitute a distinct felony. The words of the act are “by publishing” or “writing,” in the singular number, and if one article only was published, that would be a complete offence in itself. This statute is highly penal, and must be construed strictly. (*Perrin, J.*—What do you say to the fifth section?) That section enables the prosecutor to charge different felonies in the same indictment, but not in the same count. There is a similar provision in the Embezzlement Act (9 Geo. 4, c. 55, sec. 41), which enables a prosecutor to charge three acts in the same indictment; that statute has never received a judicial determination in a court of error, but the practice has been not to charge different offences in the same count (Arch. Cri. Pl. last ed. 275). *Queen v. Purchase* (Car. & Mar. 617), is not exactly in point, but, coupled with the uniform practice, bears out this view; besides, where different offences are charged in the same count, the grand jury may find the bills on one article, and the petty jury find the prisoner guilty on another. These counts are also bad, for not setting out the writings and words which form the gist of the offence. These counts do not set forth the articles, only part of them; and there is not any averment in that part, that the prisoner did declare such compassings, &c., with the meaning attributed to them, for any thing appearing he may have expressed them in a certain other part not set forth. There is no *colloquium*, no averment of extrinsic facts, and when these are not averred the crown cannot go into evidence of them. Thus it is set forth in the articles that “when the French revolution,” &c., “that the two repeal associations should be dissolved, and that had never more devoted disciples,” “Loyola,” &c., and there is no averment what the French revolution is, what the repeal association, or who Loyola was. It is laid down by *Hale and Foster* that to constitute treason there must be publishing expressive of a traitorous design then in existence. [Counsel also referred to *Hale*, 118; *Foster*, High Treason, cap. 1 sec. 6; *Watson's case*, (32 St. Tr. 579); *Thistlewood's case*, (33 St. Tr. 684).]

Dec. 28.—Baldwin, Q.C.—This indictment contains six counts; the first four set out the publications charged as felonious, the fifth and sixth are general. It was argued by Sir Colman O'Loughlen that these counts, though objectionable under the

Treason Felony Act (11 & 12 Vic. c. 12), would be good counts in treason,—taking the distinction between treason, and treason-felony, that in the former, the compassing alone was the offence; in the latter, it was a compassing by publication, which, being incorporated into the offence, should be stated. If we consider what the intention of the statute was, these counts are right, if they follow the precedents in treason, there is no distinction. The general scope and state of the law under the 36 Geo. 3, is applicable to this act. The compassing to depose, or to levy war, were not substantive treasons until they were made so by the 36 Geo. 3, they were merely overt acts of treason. The crime of treason is stated by Abbott, C. J., in his charge to the grand jury in *Thistlewood's case* (33 State Trials, 684) to “consist in the compassing, imagination, or intention to perpetrate the acts, and not in the actual perpetration of them;” that under the 36 Geo. 3, the law further requires “that the party shall express, utter, or declare his intention, by publishing some printing or writing, or by some overt act or deed. The law has thus wisely provided, that in cases of this kind, which manifestly tend to the most extensive public evil, the intention shall constitute the crime; but the law has, at the same time, with equal wisdom, provided that the intention shall be manifested by some act tending towards the accomplishment of the criminal object.” It is contended that by the 11 & 12 Vic. the crime of compassing, as created by the 36 Geo. 3, under the Treason Felony Act, has become three treasons—three distinct classes of crime—compassing by printing or writing, compassing by open or advised speaking, and compassing by any overt act or deed. I admit there must be an expression of the compassing, but the publication is only the evidence, only one portion of the crime; but there is but one class of crime evidenced by any of these three modes of proof. The third section of the 11 & 12 Vic. is relied upon on the other side, and it is said, that throughout it contemplates the publishing as the offence, that the words are, “if any person shall express, utter, or declare,” by any of the three following modes, that is, “by publishing, by open and advised speaking, or any other overt act.” Where larger words occur in the subsequent portion of the section, they should be construed to mean things *ejusdem generis* with those previously enumerated. The section would then read thus:—by open or advised speaking, or by any overt act or deed *whatsoever*; and the latter word should be incorporated in the sentence. The 4th section is altogether conversant with evidence, and enacts, that “no person shall be convicted of any such compassings, &c., in so far as the same are expressed by open and advised speaking only.” The 5th section enacts, that it shall be lawful in any indictment for any felony under this act to charge against the offender any number of the matters, acts, or deeds, by which such compassings, &c., or any of them, shall have been expressed,” &c. The expression *felony* in the singular there means the compassing; if the argument on the other side be true, it should be *felonies*; and we would then have as many felonies as there are evidences of it. It is said the concluding words “or

any of them," are large enough to admit of the construction contended for. How can they possibly be applied to the felony with the same effect as to the "printings and publishings" which are the expressions of the offence? The law appears to me to be, that the felony is complete by the compassing alone, and that any number of matters may be urged as expressions of the intention. The mode of laying the offence in the indictment is identical with that under the 36 Geo. 3. This is admitted to be a good count in treason. (*Perrin, J.*—Suppose the indictment contained a charge of compassing only, could you have judgment?) There are two things necessary to constitute the offence; but there is only one offence, the evidence of which must be stated in the indictment. There are mental treasons, and the law requires that some evidence of the intention, or proof of the offence, should be stated in the indictment. The 36 Geo. 3 applied to England alone, a portion of it is, by the 11 & 12 Vic. c. 12, extended to Ireland. The intention of the legislature was to abate the punishment applicable to treason, by assigning the latter to the class of felonies. These counts would be good under the 36 Geo. 3, as for treason, and are so under the 11 & 12 Vic. c. 12, which makes the treason a felony. The offence is the compassing under the 36 Geo. 3, and there is the same language in the 11 & 12 Vic. It is absurd to contend that what was a single offence on the 1st of April became a threefold offence on 1st of May; and it is now too late to say that every proceeding under the 36 Geo. 3 has been erroneous. In *Watson's case* (32 State Trials, 87-89) it was objected that no overt acts were set out. (*Perrin, J.*—That indictment was not under the 36 Geo. 3.) The 7th section shews that the intention of the legislature was, that the offences should be identical; it enacts, that no indictment shall be deemed bad because the facts or matters therein contained shall amount to treason. If we can shew that there can be no distinction, then there is but one crime evidenced by the writings; and in that case not to set out the writings *in extenso* is more in accordance with the practice of the court, and less embarrassing to the prisoner. The articles set out clearly amount to treason under this act. In the *Queen v. Martin* (1 Ir. Jur. 54), all the articles were set out in full, only some here, and there the general counts were held to be good. (*Perrin, J.*—My Lord Chief Justice expressed no opinion as to the general counts; he merely observed that they were conformable to the precedents in high treason under the 36 Geo. 3.)

Butt, Q.C., in reply.—This indictment contains six counts. The first and third are framed on the provisions of the statute 11 & 12 Vic. c. 12, relating to publishing "by printing or writing," and are similar, with this exception,—that the first states the felonious compassing to be with the intent to depose the Queen; the third, with an intent to levy war against our lady the Queen, in order by force and constraint to compel her to change her measures and counsels; and both counts state the expression of the intent by feloniously publishing, &c. These counts are bad upon three grounds; first, the writings by which the compassings are said to be expressed are not set out with sufficient cer-

tainty; secondly, they severally charge distinct felonies in a manner not allowed by law; and, thirdly, the printings and writings are not introduced with the inducements and averments necessary to fix the felonious meaning imputed to them by the indictment. With respect to the first objection, the first count alleges nine distinct printings, seven of which are set out partially, two (the 3rd and 9th) are entire. From the mode adopted of stating these writings, it is impossible to say whether they constitute an offence within the meaning of the statute. It is only necessary to read the language of the act to shew that the publishing the printing or the writing is a necessary ingredient.—"If any person shall compass, &c., and such compassings shall express, utter, or declare, by publishing any printing or writing," &c. This shews that the expressing and uttering was the previous offence. The "expression" is as much a term of art in an indictment under this act, as the word "murder" in an indictment for that offence. This being a new felony created by this act, it is only confusing to refer to the forms of indictments in cases of treason. A man might be indicted under this act when he could not be indicted for treason, as if the limitation of three years given by the 1 & 2 Geo. 4, c. 24, Ir. had passed. If then the publishing of the printings or writings be a material ingredient in the offence, the writings or printings should be set out. In 1 Hale, 169 it is said, that "in the narrative of the offence all circumstances should concur which are necessary to ascertain the fact and its nature" (*Dyer*, 198); *King v. Horne* (Cowp. 672); and it is important the court should have the whole writings complained of before it, when the amount of punishment is so much in its discretion. In 2 Hawk. c. 25, s. 57, p. 310, it is said, "that the special matter of the whole fact ought to be set forth with certainty, that it may judicially appear to the court that the prosecutor has not gone on insufficient premises." In this case it is impossible to say whether the grand jury have not found the bills on improper evidence, perhaps on the portions of these articles not set out; and in 2 Hawk. P.C. c. 25, s. 59, it is said "every indictment must charge a man with an offence particularly and certainly expressed; for no one can plead to an uncertain charge, neither can it appear that the facts given in evidence are the same of which the indictors have accused him, neither can it judicially appear to the court what punishment is proper for an offence so loosely expressed. "And in *Sacheverell's case* (15 State Trials, 1), it was said, the particular words supposed to be criminal ought to be expressly specified. Cases of libel afford the most natural analogy; and in these the words asserted to be libellous must be set out fully, *Wright v. Clements* (3 B. & Al. 503); *Gutale v. Matthews* (1 M. & W. 495); *Woods v. Brown* (6 Taun. 169, S.C.; 1 Marsh. 522); *Zenobio v. Astell* (6 T. R. 162). In *King v. Nield* (6 East. 417), Lord Ellenborough doubts the authority of *King v. Fuller* (1 Bos. & Pul. 180), and says, "I do not know any case where an offence consists in words when the same general and compendious method of describing it has been deemed sufficient, without stating the words in writing necessary to

constitute the offence." In *Wright v. Clements* Bayley, J., says, "A defendant in a case like this has a right to expect that the plaintiff, in his declaration, will set out the very words used, or so much as he means to rely upon." That case fully establishes the principle of the rule contended for. It is quite consistent with the statements in this indictment that the guilty portions are not set out. (*Perria, J.*—The case of the *King v. Williams*, which was an indictment for publishing Paine's *Age of Reason*, is a strong authority against you. I will go this length with you, that if the portions of the articles set out do not express a treasonable intent, the count must fail.) In *Clements v. Fisher* (7 B. & C. 459), the declaration was held bad for not averring that the words were spoken "of and concerning the plaintiff." In criminal cases no *colloquium* is necessary, but every averment necessary to constitute the crime must be set out. It is by the writings and printings in this case that the prisoner is said to have expressed, uttered, and declared his intention, and is different from cases of libel in this respect, that here the court cannot look to the import of the words. This principle will be found fully established in several classes of crimes. In cases of forgery, before the 2 & 3 Wm. 4, c. 123, s. 3, the instrument forged should be set out; and the same rule existed in cases for administering unlawful oaths before the 27 Geo. 3, c. 15, s. 7. In perjury, before the 31 Geo. 3, c. 18, s. 1, and in indictments for false pretences the same rule will be found. *Murray's case* (2 Strange, 1127); *Perrot's case* (2 Mau. & Sel. 379); *Young v. The King in Error* (3 T. R. 102). If a prisoner be indicted under the statute of Ed. 3, it is necessary to set out the overt acts, which before that statute was unnecessary, the compassing being considered as the treason, and the overt acts the means made use of to effectuate the intention (Foster, 193). In *Kelyng* 8, it is laid down that if the indictment alleges one overt act it is sufficient, and that the prosecutor may prove as many others as he thinks fit. The 36 Geo. 3, Eng. first required the setting out the overt acts. There is no analogy between the overt acts under the statute of Edward and this act; the overt acts under that statute and that of 12 & 13 Wm. 3, c. 2, Eng. (2 Anne, c. 5, s. 1, Ir.) were merely evidence. If it be true, then, that the printing or writing is the gist of the offence, the grand jury have not, on this indictment, given the court the means of knowing whether it has been found on sufficient evidence. The omitted passages of these articles may be those on which the grand jury have acted. The indictment should shew on what articles the bills were found (4 Went. Pl. 199), and no view of the writings themselves will supply the defect. It will be argued, that there being two writings fully set out, it will be sufficient (Foster, 194), and the analogy of treason will be relied on, *Lowick's case* (13 State Trials, 267). Assuming these counts bad on the first point, there are two articles free from this vice. In *Layser's case* (16 St. Trials, 93), it is said that if the overt act be badly laid, it should be taken as if it were out of the indictment, and no evidence should be given thereon. The cases of assignments of perjury are analogous; and if one perjury be

well assigned, judgment may be given thereon: *Queen v. Rhodes* (2 L. Ray, 886). This case was commented on, and approved of by, Lord Denman in *Queen v. O'Connell* (11 Cl. & F. 379); *Queen v. Harris* (1 Car. & Mar. 665). If this count, as regards these two articles, be good, the court will treat this demurrer as divisible, and call on the prisoner to answer the good portions only. This was the old practice of the courts, and the recent authorities shew an inclination to return to it. These letters cannot have the meaning attributed to them; there is no allegation to shew the guilty intent, and there is nothing in the writings themselves to bear the meaning attributed to them. Does the statute of the 36 Geo. 3 enable the prosecutor to charge any publication as an overt act not permitted by the statute of Edward? The Attorney-General should go further, and say whether this be a treasonable writing, within the statute 11 & 12 Vic. c. 12, and if it have two meanings—one an innocent, and the other a guilty intention—the prosecutor should set out clearly the guilty intention. There is no precedent of an indictment under the 36 Geo. 3 which adopts this mode of setting out the publications. The writings in this and the third count are set out as publications, and not as overt acts. If your Lordships should think that one portion of the count is good and another bad, the proper judgment is that we should answer the good part, *Monkman v. Shepherdson* (11 Ad. & El. 411); *Hinde v. Gray* (1 Mau. & Gr. 201, note); *Pinkney v. the Inhabitants of Rutland* (2 Saund. 379; Com. Dig. Pl. c. 32); *Briscoe v. Hill* (10 M. & W. 735); *Queen v. Burraston* (4 Jur. 698), shews that where there are several acts laid as one offence, there may be a demurrer to the whole. The precedents in *O'Coigley's case* (26 State Trials, 1191), *Despard's case* (28 State Trials, 345), *O'Connor's case* (26 State Trials, 1191), *Watson's case* (32 State Trials, 1), *Brandreth's case* (32 State Trials, 755), *Thistlewood's case* (33 State Trials, 681), all infer but the one declaration, but the one compassing. *Watson's case* is no authority against us, as the evidence was given on the third count, which was for levying war, and therefore no authority either as to the general count. The compassing is laid on the 3rd of June, and that the prisoner further expressed it by publications on subsequent days. The act allows of several felonies being charged in an indictment under its provisions, but confines the party to one compassing. The only mode of satisfying the statute is to lay all the acts as one transaction, with a *continuando* on the following days, *Thistlewood's case*. The second count is bad for repugnancy; the time is in this case essential (2 Hawk. P. C. c. 25, s. 27, 324). The publications are laid as overt acts, first, on the 3rd of June, and that the prisoner did "then and there" feloniously publish, &c., and then, that to fulfil the said last-mentioned compassing, on the 17th day of June he published, &c., and so on several subsequent days. The word "feloniously" is not laid except to the first act, although several acts are stated to have been committed at subsequent periods. This could have been avoided by following the precedent in *Thistlewood's case*; the prosecutors fell into this mistake in avoiding the evil pointed at

in the note to Mr. Cox's edition of this act. The case of *Dennison v. Richardson* (14 East. 296), shews in civil cases how strong the court will lean against the objection of repugnancy. The 5th and 6th counts are open to the same objection; in both, the overt acts of compassing are laid on the 3rd of June and on several days after. This count is also bad for misdescription of the offence. These writings should be set out as publications, and not as overt acts. There may be publications which are not overt acts, and the statute includes such, as is shewn by the words of the 4th section—"no one shall be indicted for any compassing, so far as same may be expressed by open and advised speaking only," *Rex v. Douglas* (1 Camp. 212); *Rex v. Howell* (6 Car. & P. 148, S. C.; 1 Mood, C. C. 405; 1 Arch. C. P. 99, ed. 1846).

Dec. 29.—The Attorney-General in reply.—The indictment follows the precise words of the third section, "That the prisoner feloniously did compass, &c., and the same feloniously did express, &c.," by publishing a certain printing, containing among other things according to the tenor and effect following, setting out the portion of article relied upon. First, it is alleged that this count is not sufficiently certain, there being no sufficient expression of the compassing. Secondly, that there are no explanatory averments or innuendos; and lastly, that it is bad for duplicity. The first and third counts being similar, with this exception, that the first states the intention to be to depose the Queen, the latter to levy war against her, must abide the same rule. I will consider these objections in their order in the indictment. It cannot be denied but that if this were an indictment for libel, forgery, or sending a threatening letter, it would be necessary to set out the portions of the libel alleged to be injurious, and several cases were cited for that position. The strongest was *Clement v. Fisher*, (7 B. & C. 461). With the doctrine of that case I agree, but it is to be observed that those decisions were nearly all after verdict. The *Queen v. Martin* is an express authority. These counts are similar to those used there, except that the record contained the whole of the articles, which was not necessary. This count sets out portions of the articles only, as evidence of the compassing charged in the first part of the indictment, and follows literally the precedents in libel. *Lord George Gordon's case*, (22 St. Tr. 177). (*Perrin, J.*—Lord George Gordon had no counsel). *Paine's case*, (22 St. Tr. 360); *Holt's case*, (ib. 1200); *Williams' case*, (26 St. Tr. 646); in each of these cases portions of the articles relied upon are set out, introduced by the averment, "containing among other matter." In *Tabart v. Tipper*, (1 Camp. 350), Lord Ellenborough, p. 353, says—"The more correct way would have been to have said, 'in a certain part of which said libel there was and is contained, &c., and in a certain other part of which said libel there was and is contained, &c.'" As to the objection of the grand jury finding bills on the portions not set out, it does not apply. The prosecutor sets out the matter he relies on, and they are to judge whether the articles are sustained in the manner they are set out. The sole question for the court is whether the writings

bear the meaning we allege they do; that is, the compassing charged in the first part of the indictment. It is clear from the articles themselves that they bear the meaning attributed to them by the crown. An innuendo is only necessary when the document relied on does not palpably bear the meaning attributed to it. If any portion of the indictment be good, the demurrer must be overruled. *Queen v. Rhodes*, (1 Ld. Raym. 886); *Queen v. O'Connell*, (11 Cl. & Fi. 379), per Denman, C. J. As to the objection of duplicity, if several distinct publications, within the meaning of the act, be alleged, they are admissible. The statute of Ed. 3, states treason to be a compassing the death of the king. From the earliest periods the practice has been that the prosecutor should be at liberty to prove as many overt acts of treason as he pleased. The fifth section of the 11 & 12 Vic. c. 12, enacts that any number of the acts or deeds by which such compassings shall have been expressed, may be set forth; the object of which was, that having assimilated the law to treason, and, as in treason any number of overt acts might be alleged, to assimilate the course of pleading also; and it is only in this way the prosecutor can avail himself of the power given him by the statute. In cases of embezzlement the offence is single—the taking of the property—therefore the facts constituting it need not be set out. Here you may, exactly as in treason, set out as many of the means of compassing as may be necessary. The language of the 36 Geo. 3, is a strong authority for my position. That statute introduced a new treason not in existence under the statute of Ed. 3, viz. compassing to levy war or to depose the king, evidenced by publishing any writing, or by any overt act or deed, being in every respect identical with the 11 & 12 Vic. c. 12, except as to the commission of the offence by open and advised speaking. In *Thistlewood's case*, and in *Watson's case*, there were two counts under the 36 Geo. 3, and one under the statute of Ed. 3; the count under the former, as in this case, contained several overt acts. *Fitzharris's case*, (8 St. Tr. 337-8). The second and fourth counts are similar, both charging the publications as overt acts of compassing, one to depose, the other to levy war, and are objected to for setting out the publications as overt acts; an overt act at common law, and under the statute of Edward was anything done in furtherance of the object, to fulfil the purpose or bring into effect the treasonable purpose. In an indictment for levying war, the levying war was of itself an overt act. In treason for compassing, before the passing of the 36 Geo. 3, publishing might be an overt act, *Fitzharris's case* (8 State Trials, 337); and so have written documents been considered, *Cole's case* (7 State Trials, 7). The 36 Geo. 3 took the distinction between publications and overt acts. In *Thistlewood's case* publications were relied upon, and may be so still, if in furtherance of the particular object. It is quite possible there may be a publication not an overt act. Any printing is an overt act, if in furtherance of the criminal object; and when the documents—as in this case—themselves shew the intent, and we know that the publication

of them was in a public newspaper, it is impossible not to hold them to be overt acts. The letter to Mr. W. S. O'Brien, and several other passages, are clearly overt acts done in furtherance of the criminal object, and in which the intention is clearly expressed. The second objection is, that the whole of the publications are not set out. There is no case which professes to set out the documents or any part of them in terms. (*Perrin, J.*—That is not an universal proposition.) *Francia's case* (15 State Trials, 898-938) best illustrates this proposition; the letter was the overt act, the contents only the evidence of that act. This case is also distinguishable from the cases referred to on other grounds. In cases of libel the document must be set out that the Judges may see whether the publication be libellous or not. So in the case of a threatening notice, whether it be such is matter of law; and in the case of forgery, whether the documents be of that particular description, the forging of which will constitute that crime, it not being a general charge to be evidenced by writing. The next objection is, that this count is repugnant and inconsistent as to time, and this objection is also applied to the fourth, fifth, and sixth counts. There is but one compassing evidenced by several overt acts, and the time is not material; the compassing is correctly alleged as on the 3rd of June, and that felonious compassing is charged to be expressed by several publications hereinafter mentioned. It is argued that the "then and there" means on the 3rd of June, and that the expression on that day by divers acts on subsequent days, is repugnant. The demurrer does not apply to that portion of the count which sets forth the documents constituting the overt acts of the 3rd of June, and being to the whole count, is too large and must therefore fail, *Queen v. Rhodes* (2 Lord Ray. 886) *Webb v. Baker* (7 Ad. & El. 841); *Boyce v. Williams* (2 Jones, 214). This objection is ill founded. The count charges that the prisoner "did then and there feloniously express by divers overt acts hereinafter mentioned." "Divers acts" mean others than those on the 3rd of June. This is not an averment of two distinct things; it is, that on the 3rd of June the prisoner did a certain act, and on another day, another act as evidence of the same compassing, *King v. Shepherd and Agnew* (5 East. 244). The time not being material, the objection is unfounded. *Townley's case* (Foster, C. C. 7), and *Deacon's case* (ib. 9), shew the true meaning of the rule; and all the publications being laid on the 3rd of June, it is clear from these cases we may give in evidence publications on different days. (*Perrin, J.*—It is clear if you laid the acts "on the day, &c. as aforesaid," you might give them in evidence. The question is whether, their being laid in the indictment on two different days, it is not a repugnancy.) In *Thistlewood's case* the indictment was upon the 36 Geo. 3, which is in the same terms with this act (2 Hawk. P. C. c. 25, s. 82). The act of publishing may be done on several days; it is otherwise as to the compassing. As to the fifth and sixth counts, they are general. It is first objected that the articles are not fully set forth; and, secondly, that they are repugnant as to time. These counts would be good under the 36 Geo. 3,

Thistlewood's case and *Francia's case*. The objection as to repugnancy of time is equally inapplicable to these counts, as to the second and fourth.

Jan. 4.—*PERRIN, J.*—The prisoner is charged under the 11 Vic. c. 12, with feloniously compassing to depose the Queen, and to levy war against her majesty. There was another indictment for the same offence pending in the county of Dublin, this, the Court is of opinion, should be quashed. This indictment contains six counts, the first four charging several distinct matters, publications, and overt acts, as the expression of the compassing. The fifth and sixth charge the same matters more generally, and to each there was a several demurrer and joinder therein. The first count charges "that the prisoner on the 3d of June, in the eleventh of the Queen, did compass, imagine, and intend to depose the Queen, and that compassing did express, utter, and declare, by feloniously publishing a certain printing or writing, which said printing contains, among other passages," the several following ones, and to which it is material to advert:—"When the French revolution raised the hopes of Ireland in a speedy deliverance, I asked to have done what seemed to me to be the manifest duty of the hour, I proposed that the two existing Repeal associations should be forthwith dissolved, and a new one, kindled with the new spirit of the times, set in their place; that it should be open to all repealers without pledge or qualification; that its government should be committed to a legislative counsel of three hundred repealers, the foremost in Ireland for capacity and devotion, and its direction to an executive committee of five, competent to act as the cabinet of the movement. That commissioners should be sent forth to organize the entire country into local clubs. That permanent agents should be established in England to organize the Irish, and the friends of Ireland, in every city in that island. It was my conviction that nothing ought to be left to chance, which forethought could prepare. That every foot of Irish soil ought to be made vital with the passion for daring changes, and for results that glowed in the heart of the capital. That the hot blood engendered there ought to be sent burning and thrilling to the coldest extremities. That organization ought to be extended and systematized, till literally every hamlet and parish had its club, every town and city its brigade of clubs. Had this been done, Ireland, instead of pleading a shameful want of forethought, would at this hour possess a popular cabinet, treasury, and legislative counsel, trusted by the whole country, and a national guard of disciplined clubs." "Give Ireland a native power which she can love and obey, and you give all she requires for strength or victory. A popular executive set up by the Irish nation would overtop the officials of Dublin castle in a week, and if they are worthy of their office, would centre round themselves the love and reverence of the whole nation." These passages are set out as expressive of the compassing charged, and with the intent to depose the Queen. In the second publication we find the following extracts—"Frankly we go into this league to establish clubs universally, to regain for Ireland the generous aid of our foreign friends,

to compass a national council of three hundred elected representatives, fit to confront the majesty of England, or the sterner majesty of death." "The ministers of Ireland prefer a civil war to an Irish legislature—the base aristocracy of Ireland have declared for the minister, and against the soil on which they live—the Irish government now becomes simply a question of force, force of will, and force of organization. It has ceased to be a debatable question, a propagandism, or a demonstration. With petitions, motions, resolutions, and all oratory of the remonstrative order, it is done for ever. Does Ireland really will national institutions? If so, Ireland must prepare herself to assert them by union and by action. Every town, village, and barony must have its club, every club its committee, every committee its plan of operations, adhering with the general policy. When this is done, and Ireland, from end to end, is bound together by a spirit of sympathy, and cords of combination, it will be a feasible work to emancipate her from the British yoke, and give her whatever form of government the national will decrees." That expressly shews an intention to depose. The charge in the first count against the prisoner was, that he had compassed the deposition of the Queen, and expressed that compassing or intention by the articles therein set forth. I am of opinion that the passages I have read do not only contain evidence of the existence of that design, but also an advice to others to effect that purpose. To seek to change the government shews an intention to depose the Queen, and is an overt act evidencing that intention. The count charges an intention of compassing to depose the Queen, and of creating a popular revolution, which was treason under the 36 Geo. 3; it is clear that it was not the intention of the legislature to deprive the crown of the protection it was theretofore entitled to, and the fifth section expressly provides that "it shall be lawful, in any indictment for felony, to charge against the offender any number of the matters, acts, or deeds by which such compassings, or any of them, shall have been expressed, &c." It is argued for the prisoner, that the word indictment is not equivalent to count, but that it might mean that the acts or deeds should be charged in several counts; no authority has been shewn me that the word indictment there means one, and not several counts; and, if that were so, there would have been no necessity for any legislative enactment, as the different offences might, previously to the passing of the act, have been set out in several counts. In 1 Hale, P. C. 122-3, it is said "that more overt acts than one may be laid in an indictment, and then the proof of any of them so laid—being in law sufficient overt acts—maintains the indictment." Indictment there means count, and must be taken so under this act. It has been argued that there is a distinction between the offences created under the 36 Geo. 3, and the 11 & 12 Vic. c. 12. That under the first act the compassing alone was the offence, but that under the latter there was the compassing, and the expression of it. No authority has been cited to establish that distinction, and is in my mind untenable. The explanation, construction, and import of the same word

in this act must receive the same construction as in the 36 Geo. 3. It cannot mean different things, and, to sustain this argument, we must go further, and hold that it means different things in the same act, that is, in the section extending the 36 Geo. 3 to this country, it should have one meaning, and in the fifth section another. That what would be a great count in treason should be bad when changed into treason to felony; the crime, the offence under the 36 Geo. 3, is the same as that under the 11 & 12 Vic. c. 12. The thing prohibited was the same, viz. the compassing, and the expression of it by publication, or by any matters, acts, or deeds. It is equally erroneous to hold that the publication was not included in the word "matter." An indictment under the 36 Geo. 3, would be erroneous if the charge was of compassing alone, and would be insufficient if the overt act were not expressed. The same rule must also be necessary under the 11 & 12 Vic. c. 12; under either act it is necessary to express the things or matters expressive of the offence. If, therefore, the compassing alone is the crime, it is erroneous, and over-refined, to say that there are three felonies—publishing, open and advised speaking, or any other act or deed. There is nothing to shew that the expression should be laid in more than one count, or that the overt acts were to be laid otherwise in felony than in treason. The proper mode is to set out the overt acts in the count charging the felony of which they are the expression. Authorities were referred to, but they do not support the position they were cited for; and this count is conformable with the practice and precedents in cases of perjury and conspiracy. No possible inconvenience or disadvantage can possibly arise to the prisoner, and so far the case of the *Queen v. Martin* is in point, therefore I think there is nothing in this objection. The second objection is, that the count is too general in not specifying fully the words charged, and that there is no *colloquium* or *innuendo* expressive of the intent charged. I think that the passages themselves plainly express the intention charged, therefore no innuendo is necessary. In *Clement v. Fisher*, (7 B. & C. 459,) though the count was held to be bad for not setting out the meaning, yet the court says that "such an allegation would not have been necessary if there had been in the libel set out anything which clearly applied to the plaintiff, or any distinct innuendo so applying to the libellous matter, or if, upon the perusal of the matter set out, it had manifestly appeared that it related to the libel in respect of which the plaintiff had recovered damages." In the present case it is quite impossible to read the passages I have referred to without seeing that they do directly refer to the object of compassing, and that they suggest the means of carrying it into effect. "The problem that lies before us is to seize the whole force of the country—now scattered and chaotic—to reduce it promptly to order, and discipline it to system, that it may be wielded like a sword against England. We are playing for the life of Ireland, and anything short of this is flinging away the last hope of the Celtic race." The court is to read these words as they would be read elsewhere, according to their literal meaning. Could it be suggested:

that the intent was not to depose the Queen? What averment could make the intent clearer than that passage itself has expressed it. "A popular executive set up by the Irish nation would overtop the officials of Dublin castle in a week, and, if they are worthy of their office, would centre round themselves the love and reverence of the whole nation." That expresses an intention in the prisoner, and an advice to others to seek to change the government. That could not be done without levying war and deposing the Queen. It was suggested, but it was not shewn, that some other meaning might be attributed to them. The case of the *Queen v. Martin* is an authority on this point also. This case is even stronger, for there the passages were not, as here, either specified or selected. I cannot conceive the necessity for expressing the intent, there is no ambiguity. In the *King v. Agnew*, (5 East. 258,) the rule is thus stated. There is no rule that other words shall be employed than those in ordinary use, or that in indictments or other pleadings a different sense is to be put on them than they bear in ordinary acceptation. "And if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied with anything to explain or define them." In the case of *Rex v. Horne*, (Cowper. 672,) referred to in the argument. De Grey, C. J., at page 683, says, "To apply these principles to cases of libel, it may happen that a writing may be so expressed, and in such clear and unambiguous words as may amount of itself to a libel. In such a case the court wants no circumstances to make it clearer than it is of itself, and therefore all foreign circumstances introduced upon the record would be only matter of supererogation." In the present case the passages are not merely capable of being connected with the offences charged, but directly relate to the compassing and effectuation of it, and I approve of the rule cited by Sir C. O'Loughlin from Foster Treas. c. 1, s. 7, p. 198, that "the words must be published, and that they import such compassing;" and, applying it to the present case, it appears to me that these passages denote, and are expressive of the design charged, and are in furtherance and contemplation of it. This objection is repeated in another form, viz., that the whole of the writings should be set forth, and that nothing should be left to intendment. If the whole were set out it would be most injurious to the prisoner to have voluminous and long continuances set out upon the record, and, as expressed by Lord Denman, "a grievance and an oppression." The doctrine is also correctly stated in *Sacheverell's case*, (15 St. Tr. 1,) and this indictment follows that course, and gives the prisoner an advantage by selecting the passages relied upon, and I do not think the Attorney-General could rely on other portions of the publications, than those set out, to support his case. Several cases were cited in which it was necessary to set out the whole matter of the publication, as in indictments for

administering false oaths, &c., they do not apply to the present case. I agree with the doctrine of Lord Hale, (1 Pl. Cr. 109,) that the words must shew not only a purpose, but a settled intention in the mind. I will test the count by this rule; it charges the prisoner with compassing to depose the Queen, &c., by publishing certain writings; and I find by the passages I have referred to, which appear to me plainly to import the intention imputed to them, that the intention of all these is so clearly set out as to denote the settled purpose necessary to constitute the charge; but if the words do not of themselves express the guilty purpose, then it should be shewn. I think the count does express the compassing, and that the prisoner evidenced the intention of perfecting that compassing by the passages I have referred to. In *Thistlewood's case* (83 State Trials, 684), Abbott, C. J., in his charge to the grand jury, speaking of the 36 Geo. 3, says, "that the intention shall constitute the crime, which shall be manifested by some act tending towards the accomplishment of the criminal object." I adopt that view; it is not merely necessary that a vague intention should be expressed in the count, but a settled purpose. What was there set out was, in the object of law, an overt act, and evinced a settled purpose to effect the intention charged, *Despard's case* (28 State Trials, 345). In *Sacheverell's case* (15 State Trials, 1), two passages were referred to as not being set forth; he was impeached for preaching a sermon against the then recent revolution in England. The question was referred to the Judges, and from the resolution arrived at, it will distinctly appear, that the objection was, not that the passages were not fully set out, but that none were specified; in fact, the very thing done in the present case was that, the want of which was complained of there, *R. v. Mason*, (1 Leach, 487,) was relied on to shew that the passages should be set out, that the court may see if the offence is that contemplated by the statute creating it; and *Clements v. Fisher* (7 B. & C. 459) was cited to the same effect. It was also said that the whole publication should be set out in order that the court might be in a position to measure the punishment to be inflicted. It is in the power of the court to have the whole document before it, and to use it for that purpose. Another argument was urged that the whole publication should be set out, that the true meaning might be arrived at. I think the passages of themselves shew that. It was further argued, that the grand jury may not have found the bills upon the passages alleged to be expressive of the offence. It is not to be presumed that the grand jury did so; and, in my judgment, it is more likely that both the grand and petty jury would be more embarrassed by long statements than those confined to particular charges, and that justice would be better administered, and the prisoner have a better opportunity of defence, than if he were distracted by passages not bearing on the case, or under the consideration of the prosecutor; and, in addition to this, the authorities and precedents appear to shew plainly that this course of pleading is proper; and in *Sacheverell's case*, to which I have already referred, the objection was that no

entire passage of the sermon had been set out. The objection was not allowed, and this count appears to be entirely in accordance with that authority; and precedents to the same effect will be found in *Stockdale's case* (22 State Trials, 237), *Finerty's case* (26 ib. 901), *Williams' case* (26 ib. 653), and particularly in *Francia's case* (15 ib. 897), where the same words, "containing, among other things," are used. And in *Thistlewood's case* (33 State Trials, 681), a part of the proclamation only was set out. For these reasons, it appears to me that this count does set forth an offence within the statute; that there is no necessity for any innuendoes to support it; and therefore there must be judgment for the crown on the first count. The second count was objected to as being repugnant and inconsistent as to time, in stating that the prisoner did compass on the 3rd of June, and the same compassing did further express, on the 17th of June, and so on several subsequent days; and, secondly, it is objected that the publications are set out as overt acts of felony. It is not necessary to give any opinion on this objection, as I am of opinion the first is well founded. The expression on the 17th, of a compassing on the 3rd, is repugnant and insensible, and this is clearly established by authority; in 2 Hawk. P. C. 324, it is said, "if an indictment lay the offence on an uncertain or impossible day, or where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day as makes the indictment repugnant to itself, it is void." The reading of that passage is, that if any portion of the count be repugnant to itself, it is bad; and the case of *King v. Agnew* (5 East. 257), and the authorities there cited, support this view. I do not think this defect can be successfully obviated; but on the authorities, I think that all the charges subsequent to the first overt act must be rejected, but that the count may be sustained with respect to the overt acts laid on the 3rd of June, and prior to that day. During the course of the argument, I thought that this course of pleading was that objected to in *Thistlewood's case*. I find I was in error. The statement of the compassing is on a particular day, and on several days before and after; that was not repugnant. On these authorities, I think the second and subsequent overt acts are repugnant and inconsistent, and must be rejected; but, according to the authority of Lord Holt, the first is not consequently to be rejected. The second objection is not well founded. The publications are well laid as overt acts. It will appear on reading the averments charging the publications, that it is charged that they were published in order to carry out the alleged compassing—that they were charged to have been used as an encouragement or incentive to others, and to create revolution. I think, on the authority of Hale, P. C., 118, Foster, 119, of Lord Ellenborough in *Thistlewood's case*, and of Bayley, J. in *Watson's case*, these publications are properly laid as overt acts. So far as this count is bad, the demurrer should be allowed; and perhaps the proper course would be to say that so much be allowed and so much quashed. The cases cited to shew that where a demurrer is too large it should be overruled, are applicable to civil cases only.

I cannot hold the same rule in criminal cases. I think the demurrer is to be allowed to that portion which is bad. The rule to be pronounced on the first count governs the third, and that on the second governs the fourth. The next objection is to the fifth and sixth counts. First, that they are repugnant and inconsistent in point of time; and, secondly, that the contents of the overt acts should be clearly shewn. The rule I have made on the second count applies to this; therefore, all the charges subsequent to that on the 3rd of June must be rejected. The other objection I do not think to be well founded. The count charges that the prisoner "did feloniously publish divers other printings, and contains, amongst other things, incitements, encouragements, advices, and exhortations to the liege subjects of the Queen to rise and rebel treasonably, &c. It appears to me that this count does charge divers overt acts on the 3rd of June, the tendency of which is plainly the accomplishment of the deposition of the Queen; and I think such overt acts might be given in evidence. And as to the objection that the overt acts should be fully set out, I think that would be unnecessary, and that it is quite sufficient to charge the intent and purpose. There are no authorities cited to the contrary, with the exception of the alleged opinion of the Lord Chief Baron and Baron Pennefather. They had expressed no such opinion; they felt some difficulty, not as to whether it was evidence, but whether it could be used to support another count, as to use it so would be a surprise upon the prisoner, by using evidence not charged; but they offered to receive the evidence if the verdict were taken on the count in question; and a count of this nature will be found in *Francia's case* (15 State Trials, 903), decided shortly after *Sack-neverell's case*. And also in *Laver's case* (16 State Trials, 95-6), *Watson's case* (32 State Trials, 1), and *Thistlewood's case* (33 State Trials, 697), the indictment is in the same way. I cannot, therefore, hold it necessary to specify the particular words. The demurrer must, therefore, be overruled on this ground, as to the first overt act; and the same rule will apply to the sixth count.

RICHARDS, B.—After the judgment that has been pronounced by my brother Perrin, it is not my intention to go at any length into the minute and technical points of pleading that have been raised upon the demurrer in this case. But there are some new and important questions involved in the arguments that have been addressed to us, and upon those questions I propose to offer a few observations. It is insisted by the counsel for the prisoner that all the publications relied on, and stated in the indictment as expressive of the alleged guilty compassings of the defendant, should be set forth with the same certainty that it is necessary written or printed matter should be stated in an indictment or action for a libel, for it is said that under the provisions of the 11th Vic. c. 3, the published matter is made part and parcel of the crime itself—part of the corpus delicti—and it has been insisted that several of the learned judges in this country, before whom prosecutions have been had under this recent statute, have expressed themselves in language involving that consequence.

and we have been referred to the several cases as reported by Mr. Hodges, of the *Queen v. Martin*, and the *Queen v. O'Doherty*, and to the expressions of the several learned judges before whom those cases were respectively tried, and it must be admitted that the language attributed to the learned judges who presided on those several occasions, does give colour to the position insisted on by counsel for the prisoner. If the expressing of the compassing, by matter published or written, is to form, in the sense contended for, a part of the crime, it is difficult to understand upon what principle of law the prosecutor can be excused from setting out in terms in his indictment that writing or printing. The cases to which we have been referred, from Sacheverell's case downwards, establish the position that where the written or printed matter forms part of the corpus delicti, it should be set out distinctly, and in terms so that the offence charged may appear upon the record, and be judged of accordingly. But writings relied on, in cases of treason, for the purpose of establishing the guilty intent, have never been considered—at least never that I am aware of—to come within the principle established by the class of cases to which I have last adverted, but the contrary, as will appear by reference to various very eminent writers on the law of treason, and to adjudged cases. And first, with respect to the course of pleading adopted in prosecutions founded on the statute of Edward 3, I would refer to Foster, c. 1, s. 1, p. 194, where, speaking of the crime of compassing or imagining the death of the king, or of his queen, or eldest son, he writes thus:—"The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason; it must charge that the defendant did traitorously compass and imagine, &c., and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart." Undoubtedly by the common law, as well as by the express provisions of 7 W. 3, no evidence was admissible of any overt act that was not laid in the indictment, that is to say, no overt act of a distinct nature from the act alleged, though falling under the same head or class, was allowed to be given in evidence where not laid. But facts, and circumstances, evidence falling within, and going to support, the general overt act alleged in the indictment, were receivable, though not expressly laid. *Rockwood's case*, (13 St. Tr. 139); *Lowick's case*, (ib. 267); and *Francias' case*, (15 St. Tr. 938); where the Chief Baron of that day expresses himself very fully and distinctly on the subject. I would also refer to *Sayer's case* (16 St. Tr. 93), also *Deacon's case* (Foster's Cases, 9), all those were cases founded on the statute of Edward 3, and were decided before the 36 Geo. 3; and many other cases of a similar kind could also be referred to for this purpose, if necessary. But subsequently to the 36 Geo. 3, cases involving the same principle have also occurred, and a like doctrine appears to have been held and laid down by the

Judges in regard to the manner of stating the overt acts and publications expressive of the guilty compassings of the party charged, as that which prevailed before the passing of the act of 1795; accordingly, on looking into the charge of Mr. Justice Bailey to the grand jury before whom the bills of indictment in *Watson's case* were to be laid (32 St. Tr. 5), I find that he, in the most express terms, draws the distinction between treason and the means by which the treason is expressed and by which it is to be established. His words are these:—"In order to support those different acts, the law expects that what are called the overt acts shall, with reference to most of these treasons, be stated in the body of the bill of indictment to be preferred. These overt acts do not constitute the treason; that is comprised in the compassing the King's death, in the compassing the deposal of the King, in the conspiring to levy war, or in the actual levying of war; but these which are called overt acts are necessarily introduced into the indictment, and are the evidence by which the charge is afterwards to be supported; and they are introduced into the indictment, that each person against whom the charge is made may have the opportunity of knowing, before hand, what is the evidence by which he is affected, in order that he may prepare himself to meet that evidence." And it is to be recollected that these observations are made generally, and as well with regard to treasons under the act of 1795, as under the act of Edward. Again, Chief Justice Abbott, in charging the grand jury, in the year 1820, before whom the bills of indictment were sent in *Thistlewood's case* (33 St. Tr. 684), goes into a very full disquisition on the law of treason, under both the statute of Edward and of 36 Geo. 3, and proceeds thus:—"You will have observed that, in the several descriptions of offence which I have enumerated here (except the levying war mentioned in the ancient statute) the crime is made to consist in the compassing, imagination, or intention, (which are all words of the same import) to perpetrate the acts, and not in the actual perpetration of them." And the indictment in that case (the form of which is given in pages 701-2 of the same book) is in conformity with the rule of pleading so laid down by both these learned Judges. Since the passing of the 11 Vic. the cases that have occurred are, perhaps, too few to be regarded as establishing any law or course of pleading under that statute, except so far as the judgment of the Court of Queen's Bench in the *Queen v. Martin*, to which we have been referred on the part of the crown, may be considered as having done so. But let us look to the two corresponding sections in the acts of 36 Geo. 3 and 11 Vic., and collate them together; and on doing so, they will be found in principle the same, and, indeed, alike in all respects, save that in the statute of 36 Geo. 3, the crime which is the subject of the present indictment is declared to be treason, and in the act of Vic. it is declared to be felony; and save that the words "open and advised speaking" are introduced into the later statute, and are not in the former; but that portion of the recent act upon which any question as to pleading could be supposed to turn, is, with the exception that I

have mentioned, *totidem verbis* with the former statute. And it certainly does not appear to me (though a good deal of argument has been expended on the subject), that the introduction of open and advised speaking, as one of the modes of expressing a guilty intention to depose the Queen, &c., can or ought to make any difference in the construction which the other words in the same member of the section would and ought to receive in case the words "open and advised speaking" had not been introduced into it, and for this reason, amongst others, that open and advised speaking might at all times, under circumstances, have been relied on as an overt act in treason. Let me not, however, be misunderstood in this. I do not say that open and advised speaking, or any speaking, could formerly, nor can now, be relied on for that purpose unless the words used have relation to some determined purpose of a treasonable, or, we may now say with reference to this Act of Parliament, of a felonious character, in hand or about to be undertaken, or words of advice or persuasion to commit such offence; and I should hope those words in the recent statute will not at any time receive a more extended construction than has already, upon the fullest consideration, been given in law to the terms "open and advised speaking," by the different learned Judges in England who have had to consider and expound their import and meaning. It therefore does strike me, that the introduction of those into the 3rd section of the act was nothing more than was implied in the former statute, and in support of that view of the case. I would refer, first, to Sir Michael Foster's Discourse (ch. 1, sec. 7, p. 200), where he says, "As to mere words supposed to be treasonable, they differ widely from writings in point of real malignity and proper evidence. They are often the effect of mere heat of blood, which, in some natures otherwise well disposed, carrieth the man beyond the bounds of decency and prudence. They are always liable to great misconstruction, from the ignorance or inattention of the hearers, and too often for a motive truly criminal." And therefore I choose to adhere to the rule which hath been laid down, on more occasions than one, since the revolution, that *loose words not relative to any act or design*, are not overt acts of treason;" but words of advice or persuasion, and all consultations for the traitorous purposes treated of in this chapter are certainly so—they are uttered in contemplation of some traitorous purpose actually on foot or intended, and in prosecution of it. And next to the language of Chief Justice Holt, on the trial of *Charnock and others* (12 St. Tr.), and quoted in *Despard's case* (28 St. Tr.) I would also refer to Lord Ellenborough's judgment in *Despard's case* (p. 497 of the same book), when, in speaking on this subject, he expresses himself thus:—"It has been urged that the crime consists only in words, and that words are not of themselves overt acts of high treason. If it be said that loose words referable to no particular design, words merely calumnious, or seditious words expressive of an irritable and angry mind, and of sentiments highly indecent and criminal in a subject towards his sovereign, but words neither indicating or conducing

to the execution of any definite purpose of a treasonable kind on his own part, nor persuading or exciting others to concur in the execution thereof on theirs, I readily admit that loose words of this description are not to be considered as constituting overt acts of high treason, and that it would be too much to infer from the random and careless, though highly blameable, use of expressions of this kind, so mischievous and abominable a purpose as the destruction of the king. But if words of this kind are used at meetings held for the purpose of forwarding designs of a treasonable nature, and if they are addressed to persons with an intent to excite, and to confirm them in the prosecution of measures which have for their declared object the assassinating or deposing of the king by force and arms. And where words are the immediate vehicle by which treasons such as these are communicated, and by which they are sought to be carried into full completion and effect, it never was, since the promulgation of law in this land, by any one lawyer, ever doubted that words of this nature, uttered for such a purpose, at such meetings and consultations, and being themselves the very instruments and means of exciting other persons to take part in measures which had for their end and object the personal destruction of the king, were in their very nature and essence the clearest and most absolute overt acts of high treason that can be stated. This point never yet admitted of a doubt; it never was questioned, it never can be so." Now I take it, we must assume that the legislature was aware of the state of the law, and of the established course of pleading under the 36 Geo. 3, at the time of framing and passing this act, 11th Vic. and was aware that the words used in the 36 Geo. 3, did not make the expressing of the guilty compassing in law part of the crime in the sense contended for, and, if it were intended to make such an important change in the law as that insisted on, I apprehend the legislature would not have followed so exactly the words of the previous statute, upon which an opposite construction to that now contended for had been put. The word "other" does not precede the words "overt act," in the 36 Geo. 3, no more than in the 11 Vic., and yet the publishing of any printing or writing was in all respects placed upon the same footing as any other overt act under that statute. Under those circumstances, I feel myself bound, upon the question now under consideration, by what has been laid down by former judges, and by the decisions in the cases of treason to which I have already referred, and I therefore am of opinion that although the printing or writing relied on, as well as every other overt act, should all be stated in the indictment in this case with convenient certainty as they should in treason, yet that publications such as those referred to in this indictment need not be set out verbatim, or with that strictness that would be necessary in the case of libel. But it has been said, and truly, that a party tried for felony under the 11th Vic. is, by the express terms of the seventh section, protected from a prosecution for treason upon the same facts upon which he had been tried for felony; and it has been

argued, that unless the writings and matter relied on are set out in the indictment, as strictly as would be necessary in the case of libel, it will be impossible for a defendant to avail himself of a plea of *autre fois acquit*. With respect to that argument, I would say, in the first place, that if the indictment be as certain and precise, in regard to the matters charged to make out the felony, as would, before the recent act, have been sufficient in a prosecution for treason upon the same facts, it is plain that the party is as well protected now from a double prosecution for felony and treason as he was before from two prosecutions for the same alleged treason; and as we never heard of a man's having been (even in the worst of times) indicted twice for the same alleged treason, I must confess I do not see the reason nor necessity for the legislature putting him in a different situation in that respect than he would have been in before the recent statute. But, inasmuch as all the overt acts must, as I have already said, be stated in the indictment with sufficient certainty to inform the party charged of that which is to be relied on against him; and as that is necessary, both in an indictment for treason as well as in an indictment for felony, I see no real difficulty in a party availing himself, by plea, with proper averments of the provision to which we have been referred in the 7th section, if at any time, so outrageous an attempt should be made as to prosecute a party, first for felony, and afterwards for treason upon the same facts. The next objection which I think it material to notice is that of alleged duplicity in the indictment, by reason that several different publications have been relied on in the same count, in order to make out the compassing and guilty intention of the prisoner. But what I have already said, as to the nature and essence of the crime, goes far, if I am right in that, to dispose of this objection also. A man may declare the same guilty intention by several distinct publications. Nay, he may declare or express his intention, partly by writing or by printing and publishing, and partly by open and advised speaking, and partly by some other overt act or deed, and all those several matters may be necessary to make out the case against him, or at least all may be relied on for that purpose. It requires no great ingenuity of mind to imagine a case in which those several matters may be so linked and connected together, and may all converge so completely to one point, that the statement of each may be in a manner necessary to shew the bearing of, and to explain the whole. And I think it very plain, that the legislature contemplated that it might be necessary, as no doubt it might, to resort to means as compound as I have suggested, to make out the offence. On turning to the fourth section, a provision of a peculiar description is made, with respect to cases where the guilty intention is expressed by words "only." The word "only," as used in that section, shews that it was considered by the framers of that act that the felony may be established partly by open and advised speaking, and partly by other means. But it may be said, that in the case I have put, I have supposed a necessary connection between all the matter sug-

ested, all converging to the one point, and each link in the chain depending on the other, and that here that does not appear to be the case; and perhaps it does not. But the argument that each separate expression of the same guilty intention, by a different and distinct publication, makes a new crime, is put out of the way at once, if I am right in likening this offence, in its essential nature, to that of treason under the 36 Geo. 3, though mitigated in character. Indeed, the proposition that a new crime could be eked out by each fresh expression of the same compassing, is so extravagant, and so difficult to be reconciled with any principle of law or justice that I am aware of, that I think the announcement of such a doctrine carries its own refutation with it, and indeed goes far to prove that felony, under this act, can and ought no more to be considered, in point of law, as compounded of the guilty compassing and the means adopted for expressing the same, than treason could be compounded of the same two things under the 36 Geo. 3. To construe the act in the way contended for on the part of the prisoner, and to hold that each and every publication of written or printed matter, expressive of the same compassing, would be a new crime, would multiply offences greatly under this act, and would, in my mind, be a most cruel and mischievous construction, and a construction that could not fail to operate most oppressively and unjustly upon the subject, as must be obvious to every one. But the fifth section removes all doubt upon this part of the case. It is manifest that the meaning of the fifth section is, that any number of "matters, acts, and deeds, by which such compassings," &c., "or any of them, shall have been expressed, uttered, or declared," may be charged in the same count in the indictment. The section would be useless if it was introduced to allow different matters of the description mentioned to be introduced into different counts in an indictment. The case to which we have been referred on the Embezzlement Act, has no bearing on the subject. In that case no one act of embezzlement could be aided, or in any way worked out, by proving any other act of embezzlement. Each act charged was perfectly independent of the other, and the *corpus* of the crime in each case was the particular act of embezzlement charged, and not a general intention or design to embezzle. I therefore think it right that the different acts of embezzlement, neither having any legal connexion with the crime involved in the other, should be stated in different counts. If, indeed, it had been enacted that a party guilty of three several acts of embezzlement within a certain limit of time, should be subject to a greater punishment than if only guilty of one; it might be necessary in that case, to charge the three several acts in the one count, as is the case with regard to some other offences. But that is not the end or object of the act. The punishment is the same whether the party be guilty of one or three of those acts of embezzlement; but, for the sake of convenience, the prosecutor is allowed to charge three different acts of embezzlement, if committed within a certain time, in the one indictment, and the usual, and I think proper course, is to do it in different counts.

The cases referred to on this statute do not, in my opinion, apply to any of the questions that have been raised before us. As to the objection to certain of the counts in the indictment, on account of the introduction of the words "amongst other things," in setting out the articles and published matter, if I am right in the view which I have taken of the act generally, and that no more certainly is necessary in this case than would be necessary in an indictment for treason, the introduction of the words "amongst other things" cannot be relied upon as making the count bad. But, in any case, I should think the introduction of the words would not vitiate the count, if sufficient appeared on the record to support *prima facie* the charge contained in the counts; and I find those words "amongst other things," or words of similar import, adopted in setting out matter in cases where the matter professed to be set out must be stated exactly and precisely,—in libel cases, for instance, *Paine's case* (22 St. Tr. 360), *Holt's case* (same book, 1200), both for seditious libels; also *William's case* for publishing a blasphemous libel, viz., *Payne's Age of Reason* (26 St. Tr. 606); and in the several other cases to which my brother Perrin has referred, and which I think it unnecessary again to mention. Then as to the objection on account of the omissions of a proper colloquium, and of averments and innuendoes, I admit all these are necessary where the sense of the matter is doubtful; but, in my opinion, in this case the sense and meaning of the matter introduced into this indictment may be fairly enough collected from the passages themselves without the aid of a colloquium, averment, or innuendo, beyond what have been introduced into the indictment. With respect to the objection, that several of the articles relied on in the indictment, being part of the published matter charged and assigned as overt acts, are inconsistent with the time at which the alleged felony has been laid, my opinion is that there is an inconsistency in that respect, in certain of the counts in the indictment. But in each count there is one overt act well laid; and with regard to the publication so well and sufficiently laid, this objection does not hold. And, that being the case, my opinion further is, that the other subsequent assignment of inconsistent or repugnant matter laid in the indictment may be rejected, and ought to be rejected; but I do not think such repugnant matter can vitiate the whole count, the statement of the offence being well laid, and there being one overt act or expression of guilty intention well and sufficiently laid in each count. Some of the cases to which I have already referred, and especially the charge of Mr. Justice Bailey and of Chief Justice Abbott, supports this view of the case. And, in addition, I would refer to 2 Hawk. Pl. of Cr. (Book 2, ch. 25, sec. 82), and to the *Queen v. O'Connell* (11 Clark & Fin.) where Lord Denman's interpretation and reading of Lord Holt's judgment in the case of the *Queen v. Rhodes* will be found. It is, however, another question, whether we should not guard the prisoner against being prejudiced by pleading over (in case he shall now be allowed to plead, upon which question something still remains to be considered) by reason of those ill-

assigned overt acts. Mr. Justice Bailey's charge to the grand jury in *Watson's case*, shews very clearly that the overt acts which are not supported in an indictment for treason may be rejected by the grand jury in finding their bill, and that they ought to do so, and find their bill on the overt acts that have been sustained before them in proof. Now, I should say that where the court finds some of the overt acts insufficiently laid in the indictment, that such ill-laid overt acts ought to be expunged from the indictment, or, in technical language, quashed, and the indictment treated and considered in all respects as if no such ill-laid overt acts had been introduced into it.

ROLLS COURT.

OGLEBY v. CAMPBELL—Nov. 20.

Fee-farm Rent.—Receiver.

A bill having been filed to recover a fee-farm rent, a Receiver was granted, the bill containing a statement that there was a loss of title-deeds and confusion of boundaries.

The bill in this case was filed to raise the arrears of a fee-farm grant, and the cause came on to be heard *pro confesso*.

Henderson now moved for a Receiver. The bill in this case contains statements of confusion of boundaries and loss of title-deeds, which is sufficient to give this court jurisdiction, *Sterdy v. Murphy*, (2 I. E. R. 448); *Holder v. Chambray*, (3 P. W. 256); *Benson v. Baldwin*, (1 Atkyns 598); the cases of *Roberts v. Hughes*, (Beatty, 417), and *Cremen v. Hawkes*, (8 I. E. R. 153), do not apply, as here there is a statement of the loss of title-deeds and confusion of boundaries, which must be considered as true—the cause being heard *pro confesso*, sufficiently distinguishes the present case. In the case of *Brady v. Fitzgerald*,* there was not any statement of confusion of boundaries; it cannot therefore be considered an authority against this application; also, in that case a Receiver was appointed over the estate of the defendant, John Westropp, who allowed the bill to be taken *pro confesso* against him.

MASTER OF THE ROLLS.—I do not think the case of *Cremen v. Hawkes* is opposed to the decision of Sir Michael O'Loughlin in *Sterdy v. Murphy*. Mr. Butler, in his note to Coke Littleton, states that a fee-farm rent can be recovered as rent charge. In this case I will grant a Receiver, taking down on the order that the bill contained a statement that there was a confusion of boundaries.

M'DERMOTT v. O'CONNELL, MAHONY v. O'CONNELL—Dec. 14.

Accounts.—Reference to Ascertain Priorities.

Upon an application before hearing for a reference to ascertain priorities and take accounts, the motion was refused, it appearing that there was another suit, for a sale of the same lands, set down for hearing in the Lord Chancellor's list, in which the same accounts must be taken.

This was an application on behalf of the plaintiff.

* Rolls, July, 1848, not reported.

in the first cause, that it might be referred to the Master to inquire and report what was due to the several parties and creditors in these causes, on foot of the charges and incumbrances affecting the lands in the pleadings mentioned, and the nature, priority, and amount thereof, and arrears for interest due on same, and the parties entitled thereto respectively; and that the Receiver might be at liberty to apply the rents in payment of same. In this case it appeared that on the 27th March, 1848, the bill in the cause of *McDermott v. O'Connell*, was filed to raise the amount of a mortgage granted by the defendants, J. O'Connell and M. J. O'Connell, to the plaintiff, but no answer had been filed, nor had the bill been taken *pro confesso* against any of the defendants. The bill in the second cause had been filed in July, 1847, for the purpose of obtaining a sale of the same lands, and the cause was then set down for hearing in the Chancellor's list.

Leahy for the motion.

Green, Q.C. and *Berkeley*, contra.

MASTER OF THE ROLLS.—Under the circumstances, I do not think there is any precedent for this application. The late Master of the Rolls made orders to ascertain the amount of incumbrances before hearing, but there was no other suit pending for the same purpose; and there is no instance of such an order being made when there was another cause in the lists, in which a decree would be obtained probably in the course of the next Term. The accounts could not be taken for three or four months, and in the meantime there would be a decree to take the very same accounts probably before a different Master, in the suit now in the Chancellor's list. I am called on to direct the reference which will be directed by the Lord Chancellor. It appears to me the object of this motion is, that next Term the proceedings in the first cause may not be stayed, in consequence of my order; for if I make the order now sought, the parties will treat it as a decree. I must refuse this motion with costs.

EX PARTE HUTTON.—Jan. 14.

IN THE MATTER OF THE ACT TO FACILITATE THE SALE OF INCUMBERED ESTATES IN IRELAND.

Incumbered Estates Act—Suit—Pleading.

A bill having been filed for redemption of a mortgage and a sale of the lands, a decree was pronounced, directing that the plaintiff should pay to H., a prior mortgagee, the sum found due by the Master's report, within six months from the date thereof, or, in default, that the bill should stand dismissed with costs, as against H., after the expiration of the six months. H., being the first incumbrancer, and in possession of the title deeds, and not having been paid, presented a petition, under the Incumbered Estates Act, for a sale. The court directed proceedings in the suit to be stayed, and made an order of reference upon the petition. The plaintiff was given her costs in the cause, with the exception of those which she was liable to pay H., whom she should have been prepared to redeem, according to the terms of the decree.

The facts of this case are stated, *ante*, page 34.

MASTER OF THE ROLLS.—A petition has been brought before the court in this matter, which raises a question as to the course of proceeding in the Court of Chancery, in a suit for redemption and sale. The facts are these:—Mr. Robert Hutton presented a petition for the sale of certain lands which were mortgaged to him on the 1st of Nov., 1833, by a Mr. Robert Young and others. Mr. Hutton states that he is the first incumbrancer, and also that he has the title deeds, and in either character he is entitled to present a petition under the second section of the Incumbered Estates Act, unless prevented by the provisions of the 67th section. That section provides that the act shall not authorize the presenting any petition for sale in any case where, at the time of presenting such petition, any suit for foreclosure, redemption, or sale of the encumbered land, which shall have been commenced before the 1st of July, 1848, shall be pending, unless with the consent of the parties competent to consent to the dismissal or staying of the suit, and certain powers are given to the court as to staying such suit. The first question which arises is, whether there is a suit pending within the meaning of the 67th section of the act. The facts as to the alleged pending suit are as follow:—A Mrs. Leslie, being a puisne incumbrancer, filed a bill in the Court of Chancery, and on the 19th of January, 1848, a final decree was pronounced by the Commissioners for hearing causes. The substance of that decree, so far as it is material to state it, directs that the plaintiff, Mrs. Leslie, should pay to the defendant, Mr. Robert Hutton, within six calendar months from the 19th of November, 1847, (being the date of the Master's report) the sum of £31,346 0s. 1½d., the sum found due to Mr. Hutton by the said report, and that thereupon Mr. Hutton should convey to the said Mrs. Leslie; and that in default of payment by Mrs. Leslie of said sum, with interest and costs, within said time, it was further ordered that Mrs. Leslie's bill should stand dismissed with costs "as against the defendant, Robert Hutton." The decree then orders that the defendants, or such of them as ought to do so, do, within six calendar months from the date of the decree (i. e. from the 19th of January, 1848), pay to the plaintiff, Mrs. Leslie, £5,856 2s. 2d., found due to the said Mrs. Leslie, with interest and the costs of the suit; and do also, within the time aforesaid, pay to the said Mrs. Leslie the sum directed to be paid by her to Mr. Robert Hutton, "provided the said plaintiff shall have then paid the same," and in default thereof, the Master is directed to sell the lands, and that out of the produce of the sale, &c., the plaintiff and the other persons whose demands are found due to them by the said report, be paid the same in the priority reported, and that the plaintiff be paid, in like manner, the sum which she shall pay to the said defendant, Robert Hutton. The decree then directs the payment of the plaintiff's costs, in the same priority with her demand, and also the costs which she would pay to Hutton in the same priority with his demand. Then follow some further directions as to costs, not material to the question which arises; and it was further

ordered that the Receiver should be continued until the sale. The money reported due to Mr. Hutton was not paid to him by Mrs. Leslie, and the six calendar months expired on the 19th of May, 1848. Mr. Hutton's counsel insist that the bill now stands dismissed with costs, as against him; and such is the case; as the English practice of obtaining a final order to dismiss, as laid down in *Faulkner v. Bolton* (7 Simons, 319), and by *Stuart v. Worall* (1 Brown's Chancery Cases, 581), and in Daniel's Chancery Practice, second edition, 989, has not been adopted in Ireland. The form of the final order to dismiss in a redemption suit in England will be found in Seton on Decrees, 147. Mrs. Leslie, the plaintiff, has signed a consent that her proceedings in said suit should be stayed. The defendants, however, who are entitled to the equity of redemption, have declined to sign the consent. The question then arises, whether in a suit for redemption and sale, where the bill stands dismissed with costs, as against the mortgagee, in consequence of the sum reported due to him not having been paid within the six calendar months, the suit can in general be proceeded with, and is to be considered a pending suit. I have communicated with Mr. Long, the Registrar of the Court of Chancery, on this subject, and there is much doubt on the question. He has furnished me with the papers in two cases—one in this court, and another in the Court of Exchequer. In the case of *Joly v. Rumley*, a consent order was made in this court on the 8th of November, 1844—after a bill for redemption and sale had been dismissed, with costs, as against the mortgagee—that the proceedings should be carried on and a sale had, the said mortgagee undertaking to execute the necessary deed of conveyance. In the case of *Holden v. Baillie*, in the Court of Exchequer, (which Mr. Tench has been so good as to furnish me with a very full note of) the Court of Exchequer granted the carriage of the proceedings in the cause to the mortgagee, after the suit had been dismissed with costs as to him, in consequence of his not having been redeemed within six calendar months after the date of the Remembrancer's report, and in that case the mortgagee had taxed his costs as upon a dismissed suit, and had been paid those costs by the plaintiff in the suit at the time when the court made the order giving him the carriage of the proceedings. The Court of Exchequer must have considered the suit as a pending suit, or the carriage of the proceedings could not have been given to the mortgagee. Mr. Long having, as I understand, communicated with Master Henn on the subject, he appears to consider that if the title deeds were under the control of the court, and lodged in the Master's office, that he might proceed to sell the lands, but not the equity of redemption. If the produce of the sale was more than sufficient to pay the amount reported due to the mortgagee, and his costs, and that an allocation order was made by the court on the consent of the purchaser to pay the sum reported to the mortgagee, and his costs, and that he should decline to receive the amount, or execute the deed of conveyance, a question would arise,—whether a supplemental bill might not be filed

against him to compel the execution of the deed, and to charge him with the costs of such supplemental suit. If any case should arise where the title deeds shall be under the control of the court, and in other respects similar to the present, I shall request the Masters to state to me the course adopted in their offices, where a decree for a sale has been made in a suit for redemption and sale, and where the bill stands dismissed with costs as against the mortgagee, in consequence of his not having been redeemed within the six calendar months. However, under the particular circumstances of the case, I think I may make an order without deciding what the course of proceeding should be in ordinary cases of decrees in such suits. The petitioner is not only the first incumbrancer, but he has the title deeds. Under the 138th general order of the court, no lands can be set up for sale by any Master of this court until the title deeds and other documents necessary to make out title shall have been deposited with the Master. I do not think that I have any jurisdiction in the cause of *Leslie v. Young*, to order Mr. Hutton, against whom the suit has been dismissed with costs, to bring in the deeds. I do not therefore see how there can be a sale in said suit, unless Mr. Hutton should consent to such an order as was made in the case of *Joly v. Rumley*, or apply for the carriage of the proceedings, as in the case in the Court of Exchequer. I am of opinion, therefore, upon the whole, that as the suit of *Leslie v. Young* cannot be proceeded with, and as no sale can take place thereunder, by reason of the petitioner being in possession of all the title deeds, I have authority under the 67th section of the Incumbered Estates Act to direct that the proceedings in said suit shall be stayed. Mrs. Leslie, on the terms of being entitled to her costs in said suit, consents to such order. I shall make the usual order of reference under the 10th section of the act; and I shall order, under the 68th section of the act, that all proofs of debts and other proceedings, and such evidence as shall have been taken in the said cause of *Leslie v. Young* and others, may be adopted and used in the proceedings under this petition in the same manner as if the same had been originally taken under this petition. I shall entitle the order in the petition matter and in the cause, and therefore the report of the Master should not repeat over again what has been already found in the cause of *Leslie v. Young*. It should only refer to what has been already found. As the several proceedings already had in the cause of *Leslie v. Young* are to be adopted in this matter, I think the plaintiff in that suit will be entitled to her costs. I shall not, however, give her any costs of appearing on this petition. I must add that I disapprove of the course pursued by the petitioner of presenting to the court so voluminous and prolix a petition. I wish it to be understood that I shall not sanction or permit the abuse which has grown up as to equity pleadings, to be applied to cases under the Incumbered Estates Act. Every deed set out in such a petition must be abstracted with as much conciseness as is consistent with clearness, and as I shall have to read over every petition, I shall either

adopt the course of dismissing prolix petitions without prejudice to presenting petitions in proper form, or I shall make such order as to the costs as shall prevent such a document as the petition in this matter, from being again presented. The petitioner must take care in carrying on the proceedings before the Master that no unnecessary expense shall be incurred. The Master under the proposed general orders will have to state the number and dates of the meetings before him, and I shall be able to form a judgment when the case comes back whether the case has been fairly conducted in the office, or whether it has been carried on with the view of accumulating costs. Mrs. Leslie is not entitled to the costs she is liable to pay to Mr. Hutton, as she ought to have redeemed him, for she was not justified in filing a bill unless she was prepared to redeem the prior incumbrancers.

The petitioner, R. Hutton, undertaking to submit to such order as the court may think proper to make, in the event of its appearing on the inquiries hereafter directed that the petitioner is not a person authorized by the statute to present the petition in this matter, and the petitioner stating to the court, by his solicitors, that there is not, to their knowledge or belief, any person having any estate or interest in the lands and premises in the said petition mentioned, or having any incumbrance or charge thereon, or whose consent is necessary to a sale thereof, other than the persons severally named as such in the said petition; and the petitioner further stating to the court, by his said solicitors, that there is not, to their knowledge or belief, any suit now pending, either in this court or the Court of Exchequer, for the foreclosure, redemption, or sale of the lands and premises in the petition mentioned, or of any part thereof, unless the suit of Leslie v. Young and others, he considered a pending suit within the meaning of the said act. It is ordered, &c., that it be referred to the Master to inquire and report what estate or interest, if any, the petitioner has in the lands, &c., in the petition mentioned, and the uses, &c., to which said lands, &c., stand limited or settled; and further, to inquire and report the incumbrances and other charges affecting the same, including, as well, such as are claimed by the petitioner and the parties to whom sums have been reported in the said cause of Leslie v. Young and others, and by the persons who shall come in under this order, as all such others as shall appear from the title deeds, or on search, or otherwise, as far as the same can be ascertained, and including, also, debts, &c., due or belonging to her Majesty, her heirs and successors; and the Master is further to inquire and report the persons entitled under such uses, &c., and the persons in whom same are vested, in the order and priority of such incumbrances and charges, and the amount due thereon respectively, distinguishing principal names from interest, and making all just allowances, and let all further proceedings in the said suit of Leslie v. Young and others be stayed; and, in pursuance of the provisions of the 68th section of said act, let all such proofs, and debts, and other proceedings, and such evidence as shall have been taken in such suit, be adopted and used in the proceedings under this petition, in the same manner as if the same had been originally taken under the present order of reference, so that no duplicate costs shall be incurred or reported to any incumbrancer whose incumbrance is already reported in the said cause of Leslie v. Young and others, and declare the several parties to whom costs are decreed in said cause entitled to same in the proceedings under this order of reference, save and except the costs of the petitioner, Robert Hutton, as defendant in said suit, and declare that the said Robert Hutton is not entitled to such costs under this order, and that Mrs. Leslie

shall not be entitled to said costs when she shall have paid same; and let the Master further inquire and report the value of the said lands, tenements, and premises, and the annual head rents, quit rents, or crown rents, if any, payable out of same respectively, or out of any part thereof, and whether a good title can be made to the said lands, tenements, and premises, or to any and what part thereof, and whether it is expedient that said lands, tenements, and premises, or any and what part thereof, should be sold; and, in case it should appear that the petitioner is not the first incumbrancer on said tenements and premises, the Master is to report whether the said petitioner is in possession of the title deeds and writings relating to the said lands and premises; and, the better to enable the said Master to take the said accounts and make the said inquiries, the petitioner and all other persons to whom any sum is reported in said cause of Leslie v. Young and others, and all other persons coming in under this order, or bound thereby, are to produce before the Master all deeds, &c., as the Master shall direct, save in such cases as are excepted by the 10th section of the said act, and the petitioner and such other persons are to be examined on interrogations as the Master shall direct, who, in taking the said accounts, is to make unto such persons all just allowances; and the Master is to cause the advertisements, as by the said act is directed, and let the said C. P. Leslie and W. P. Young, &c., who have appeared on the hearing of the said petition, abide their own costs; and let the Receiver appointed in the said cause of Leslie v. Young and others, be extended to this matter, and reserve further directions until the return of the Master's report.

Rolls Petition Book, No. 26, fo. 419.

COMMON PLEAS.—HILARY TERM.

EVANS v. FIGGIS.—Jan. 18.

Practice—Allowing Demurrer—Amendment—Venue.

A change of venue is not such an amendment as can be made under a general liberty to amend upon allowing a demurrer with costs, and will not be permitted in such a case without special grounds being assigned.

Declaration in assumpsit—count on a bill of exchange and the common counts—special demurrer to the first count, and a plea of the general issue to the residue of the declaration.

Johns now moved to change the venue and to amend the declaration in the points demurred to, upon allowing the demurrer taken to the first count with costs, and cited *Brown v. Lambert* (4 Law Rec. O. S. 266); *Anonymous* (3 Ir. L. R. 216); *Nesbitt v. Barrett* (Batty's Reports, 493), in support of the first part of his application.

Mockler, contra.—There is no affidavit of special grounds for changing the venue. The case of *Aungier v. English* (7 Ir. L. R. 226) overrules *Brown v. Lambert*; as does also *Administrators of King v. Sherry*, cited in the note to the former case, [*Fife v. Bowstead* (7 Jurist, 491).]

DOUGARTY, C. J.—The plaintiff is seeking two things entirely distinct. He is entitled to amend his declaration generally on allowing the demurrer with costs; but he goes farther, and asks for liberty to change the venue, which is not, strictly speaking, an amendment, and which is never permitted after plea pleaded without shewing special grounds. The defendant was entitled to come in and oppose that part of your application, and we must, therefore, refuse it, and give the defendant the costs of this motion.

EXCHEQUER OF PLEAS.

CIVIL BILL APPEALS BEFORE THE LORD CHIEF BARON.—Dec. 11, 18.

FITZGERALD, Appellant, and LACY, Respondent.

Loan Office—Usury—Promissory Note—2nd and 3rd Vict. ch. 37, 8 & 9 Vict. c. 102.

A. applied to B., the proprietor of a loan office, for a loan of £5, which B. agreed to advance upon A.'s giving his joint and several promissory note with two sureties, payable to B.'s order twenty-one days after date, B. to deduct from loan 1s. per £1 as discount, and 1s. for expenses of inquiring after the solvency of the sureties, the £5 to be repaid by weekly instalments of 5s. each; the first payment to be made in seven days from the giving of the note; but in the event of A. allowing three weeks to be in arrear, the twenty-one days specified in the note having expired, then the note was to be put in suit. Held that the note was within the protection of the Statute, 2 & 3 Vict. c. 37.

Appeal from the Recorder's Court. The respondent had obtained a civil bill decree on a promissory note for £5, made by the appellant and two sureties, in favour of the respondent or his order, at twenty-one days after date; and the appellant now appealed on the ground that the transaction was usurious. It was agreed that the appeal should be argued on the following statement of facts.

Respondent, being the proprietor of a loan office, was applied to by appellant for an advance or loan of £5, which respondent agreed to advance upon appellant passing his joint and several promissory note with two solvent sureties, payable to respondent's order at twenty-one days after date, respondent to charge therefor, as discount, 1s. in the £1, and 1s. for card, and expenses of inquiry after sureties, the £5 to be repaid at 5s. per week, the first payment to be made in seven days from the passing of the note; but in the event of appellant allowing three weeks to be in arrear (and twenty-one days specified in note having expired), then the sureties to be sued. Appellant thereupon filled the annexed application paper, and respondent having approved of the sureties therein, appellant, together with said sureties, perfected and delivered to respondent the following form of promissory note:

"£5 Dublin, 27th July, 1847.

"Twenty-one days after date, we jointly and severally promise to pay Mr. Wm. Lacy, or order, at No. 6, Fleet Street, five pounds sterling, value received in cash.

"John Fitzgerald, John Smith, Terence Byrne."

Upon the perfection and delivery to respondent of this note, £4 14s. was advanced by him to appellant, thereby retaining 6s., being the discount at 1s. per £1, and 1s. retained for the expenses attendant on inquiry after the sureties, as previously agreed on; and the annexed form of card was, at the same time, handed by respondent to appellant, in order to have the repayments entered thereon according as they were made by appellant. Appellant, not having made any repayment at all, was proceeded against by civil bill and decreed against, and against that decree the present appeal has been brought. It was solely upon the security of the

promissory note respondent advanced the money to appellant. He would not advance the money until it was first perfected and delivered to him.

The application paper and card referred to in the foregoing statement, not being material to the question before the court, are omitted.

Macdonagh, Q.C., for the appellant.—This is a loan under £10, and as to such the statute of Ann, sess. 2. c. 16, is not repealed, the promissory note is a mere contrivance to evade the statute, and does not render the illegal contract valid. In *Berrington v. Colles* (7 Scott, 302) it was decided that a loan upon usurious interest, secured by the deposit of a lease and a warrant of attorney, was not brought within the protection of the 1 Vic. c. 80, by the addition of a promissory note as a further security. In *Doe v. Houghton and King* (11 M. & W. 333), the same principle is recognised. The clear object and policy of the statute 2 & 3 Vic. ch. 37, was to protect the poor by leaving loans under £10 to the operation of the usury laws, and was passed with a particular view to pawnbrokers and loan offices. The 3rd section plainly shews the true construction of this statute is, that any loan of money under £10, whether secured by a note or not, at usurious interest, is prohibited. The 39 & 40 Geo. 3, c. 99, relating to pawnbrokers, fixes the maximum sum which they can lend at £10. In *Pennell v. Attenborough* (4 Q. B. 868), a loan by a pawnbroker of more than £10, at usurious interest, was upheld, but solely on the ground that it was above £10, and therefore within the protection of the 2 & 3 Vic. c. 37. The policy of the legislature respecting pawnbrokers has been extended to loan societies by 6 & 7 Vic. c. 91. The 1 Vic. c. 80 applies only to cases where the bill or note is the primary transaction. The 2 & 3 Vic. c. 37, extended the provisions of that act to loans of money exceeding £10 if there were no real securities; and the third section continues the protection of the pawnbroking acts to loans under that sum, clearly shewing that the policy of the legislature was to preserve such loans from the operation of these statutes, whether advanced on the security of bills or of goods and other securities, as in the case of loan and pawn offices, and to avoid which this transaction is a mere device, *Floyer v. Edwards* (1 Cowp. 112). [*Ex parte Terwest* (Mon. & Ch. 146, 351.)]

Napier, Q.C.—If a note have not more than twelve months to run, and the money be lent on the security of the note, the loan is good. In this case it is admitted the money was advanced solely upon the security of the note. The 2 & 3 Vic. c. 37, limits the time which notes, to be within the act, have to run to twelve months, but prescribes no limit of amount, and provides that no party to any such bill of exchange shall be affected by reason of any statute or law in force for the prevention of usury. *Holt v. Myers* (5 Mee. & W. 168), and *King v. Braddon* (10 Ad. & El. 675, S. C., 2 Per. and D. 546), clearly shew that if the bill be the security, however usurious the contract may be, the statute will uphold it. *Ex parte Terwest** appears to be overruled by *Holt v. Myers*. In

* Overruled on appeal (3 Jur. 994, Chan.)

Turquand v. Mosson, (7 M. & W. 504), Alderson, B. says, "the proviso at the end of the first section that nothing herein contained shall extend to the loan of any money upon the security of any lands, &c., applies to mortgages, clearly not to bills of exchange or promissory notes." *Pennell v. Attenborough* (4 Q. B. 868) bears out that decision. Then with regard to the subordinate arrangements as to the payment of the money; if the note is good the parties may make any arrangement they like. There is no difference between discounting a bill and giving a bill for an antecedent debt. *Holt v. Myers* and *King v. Braddon* decide that, and the general policy of the Acts of Parliament contemplate and warrant this construction. The subsequent act did not intend to repeal the previous acts, as to bills of exchange, which the construction on the other side would make it do. The law stands thus: if bills of exchange or promissory notes are the security, and if they have not more than twelve months to run, they are not usurious; and in other contracts, all loans above £10 are exempted from the usury laws, unless they are secured on land.

Macdonagh, Q. C., in reply, referred to *Scott v. Gilmore* (3 Taun. 226).

Cur. adv. vult.

Dec. 13.—*PIGOT, C.B.*—Upon the facts appearing upon the statement agreed upon by both parties, the defence to the civil bill was rested on two grounds; first, it was contended, that the words "above the sum of £10 sterling," in the first section of the 2 & 3 Vic. c. 37, applied not only to the next antecedent words in the sentence, "any contract for the loan or forbearance of money," but also to the previous part of the sentence relating to Bills of exchange and promissory notes. The effect of that construction would be, to exempt any bill of exchange or promissory note for a sum not exceeding £10 from the operation of the statute. Such a construction would be inconsistent, not only with the course of previous legislation upon this subject, but with the express intention of the legislature declared in the preamble of this Act of Parliament. The previous statutes (3 & 4 Wm. 4, ch. 98, sec. 7) exempted from the laws for the prevention of usury all bills of exchange and promissory notes made payable at or within three months from their date, or not having more than three months to run. The 7 Wm. 4, and 1 Vict. ch. 80, extended that provision to bills and notes made payable at or within twelve months from their date, or not having more than twelve months to run. The act of 2 & 3 Vic. ch. 37, on which the present question arises, recites that the 7 Wm. 4 and 1 Vic. ch. 80, was limited to the 1st of January, 1840, and that it was expedient that its provisions should be extended; and then proceeds to enact, "that from and after the passing of this act, no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, *nor any contract for the loan or forbearance of money, above the sum of £10 sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring any such bill*

of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury." The act received the royal assent on the 29th of July, 1839, when the 7 Wm. 4, and 1 Vic. ch. 80 had still several months to run, and, by the fourth section, the act was to remain in force till the 1st of January, 1842. It has been since continued by the 3 & 4 Vic. ch. 83; 4 & 5 Vic. ch. 54; and 6 & 9 Vic. ch. 102. The preamble of this statute plainly indicates two purposes; first, to prevent the expiration, on the 1st of January, 1840, of the protection which the then existing law gave to ALL bills and promissory notes payable within twelve months from their dates or negotiation; secondly, to extend the provisions of the statute then in force. The first of these purposes is effected by enacting the continuance of the protection for two years longer. The second is effected by extending the protection to contracts not connected with bills or notes, for sums not exceeding £10. But if the limitation to sums exceeding £10 were applied, not to general contracts for loans only, with which in the context that limitation is coupled, but also to bills and notes, this would be a most material restriction of the previous Act of Parliament, which it was the declared object of the legislature, as stated in the preamble to extend. Unless the context clearly expressed the intention thus to narrow the then subsisting law, it ought not to be construed as so doing. The words used in reference to bills of exchange, in the 2 & 3 Vic. ch. 37, are precisely the same as those used in the preceding statute, save that the word "such" is introduced, for greater clearness, before the words "bill of exchange or promissory note," in the clause providing that the liability of any party to any such bill or note shall not be affected by reason of any law in force for the prevention of usury. The context is plainly susceptible of the other construction by which the restrictive words shall be confined to the next preceding clause of the sentence, in immediate connection with which we find them used by the legislature. I am clearly of opinion that such, upon the language used by the legislature, must be taken to be the true import of this enactment; and that bills of exchange and promissory notes, whether for sums exceeding or not exceeding £10, are within the protection of this Act of Parliament, if they are payable at or within twelve months, or have not more than twelve months to run. It was argued, that the intention of the legislature to protect borrowers of sums not exceeding £10, being shewn by the clause relating to contracts for loans, and shewn also in the third section relating to pawnbrokers, whose advances must not, by law, exceed that amount, ought to govern the construction of the provision relating to bills and notes, and that in order to execute that intention, the restriction to sums exceeding £10, ought to be applied to the protection given by the first section to bills and notes, as well as to the protection given to loans of money. Possibly that may have been designed by the framers of this

statute; but I do not feel myself at liberty to speculate upon the intention of the legislature by inference drawn from other enactments. I must infer their intention from the words which they have used in the enactment itself, and in the preamble which expounds it. Secondly, it was contended on the part of the defendant, the appellant in the appeal, that the enactment of the statute did not apply to the present case, because there was, in the first instance, a loan upon a contract for usurious interest, which, as a loan, the statute did not protect, because it was for a sum not exceeding £10, and that the note being given to secure the unlawful loan, was a device to evade that provision of the statute, and was void for that cause; and the principle of some decided cases was referred to, *Foster v. Edwards* (1 Cowper, 114), *Berrington v. Colles* (7 Scott, 303, S. C. 5 Bing. N. C. 332), *Doe v. King* (7 M. & W. 303), in support of the proposition that if the primary object was the loan, and the promissory note was given as a cover to the transaction, the note derived no protection from the statute. What may be the effect of a promissory note given after the completion of an unlawful loan, in a distinct and by-gone transaction, I am not called upon to decide in the case now before me. In the present case, the loan and the note were parts of one and the same transaction. The loan would not have been made, if the note were not given as a security. In the statement of the case agreed on between the parties, it is expressed that the money was advanced solely on that security. The act, in terms, provides "that no such bill or note" as it specifies (that is, payable within twelve months, &c.), "shall be void," "by reason of any interest taken thereon, or secured thereby, or any agreement to pay or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note." It was argued, that if the agreement for the loan preceded, by any interval of time, the making of the note, the principle of *Berrington v. Colles* and *Doe v. King* applied; and the loan being void, the note was void also. It is, in my opinion, impossible so to hold. The agreement for a loan on the security of a bill or note may, and often must, precede the actual making of the instrument; because it is useless to make the note, or to draw the bill, until the lender has agreed to advance the money on its security; nor, until he shall have so agreed, can, in many instances, the parties to the bill or note, and their position as makers, or as drawers or acceptors, or indorsers, be determined. But when the agreement is completed, and the bill or note is given, the interest which it secures is the interest, which, by the contract for the giving the instrument, the bill or note itself is framed for the purpose of securing, and is within the very terms of the protective enactment, as well as within the plain purpose of the statute. The statute is not confined to transactions in which the usurious interest is the subject of agreement upon the discounting or negotiating of bills or notes previously made. It confers its protection in alternative words, which include, plainly, bills and notes otherwise dealt with. Its terms are, that no such bill or note shall be void "by reason of any interest taken

thereon, or secured thereby, or any agreement to pay or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note." In the present case, the note secures interest upon the sum advanced upon its security, the sum actually advanced being £4 14s, and the amount of the note being £5. I should, therefore, be of opinion that this note is within the protection of the 2 & 3 Vic. ch. 37, if there were no previous decision to guide me to that conclusion. But the case of *Holt v. Myers* (5 M. & W. 168) appears to me to be a direct authority. It was decided, as Mr. Macdonagh has observed, upon the 7 Wm. 4, and 1 Vic. ch. 80, which left the usury laws, in reference to contracts for loans not connected with bills of exchange and promissory notes, as they stood before the statute, and as they now stand, where, as here, the loan is for a sum not exceeding £10. In *Holt v. Myers* the contract was for advances of money, to be secured by promissory notes successively renewed until the advance should be repaid, each note to be payable one month after date, and to secure interest at the rate of 1s. in the £1, the interest thus secured being at the rate of £60 per cent. per annum. It was argued there, as here, that the contract for the loan being unlawful, and the note being given to secure it, the note was a contrivance to evade the usury laws and to cover the unlawful contract, and was therefore void. But the court held the note was within the very terms of the protective words of the statute, the interest on the loan being "the interest secured thereby." Baron Parke says (p. 173), in reference to the statute 3 & 4 W. 4, ch. 98, "the words are, 'no bill of exchange or promissory note made payable within three months'—here is a promissory note made payable within three months—'shall, by reason of any interest taken thereon or secured thereby, be void'; and here is a case where one of the objects of the promissory note was to secure the payment of the interest, although it was also intended thereby to secure payment of the principal too." Baron Parke, indeed, adds, that any doubt respecting this part of the statute was removed by the general words which follow, "that the liability of any party to any bill of exchange or promissory note shall not be affected by the usury laws. In the subsequent statutes the word "such" was introduced before the words "bill of exchange or promissory note;" and that is the form of the enactment in the 2 & 3 Vic. ch. 37, with which I have now to deal. But this does not affect Baron Parke's view (which I think is the correct one) of the previous part of the section: nor does it at all affect the construction of the entire clause, when once it is decided—as I feel bound to decide here—that the statute applies to every bill of exchange and note, whatever be the amount of the sum secured by it, which is made payable within twelve months from its date, or has not more than twelve months to run. On the whole, I am of opinion that this note is within the protection of the statute. The decree must, therefore, be affirmed, with costs.

ROLLS COURT.

CROFTS v. ALLMAN.—Nov. 16.—Jan. 12.

Pleading—Demurrer—Multifariousness.

A bill by A. B. and C. to foreclose a mortgage against X, tenant for life, and Y, tenant in tail in remainder. Y. files a bill against A. B. and C., and D., solicitor for the plaintiffs in the original cause, praying that the bill might be taken as a cross bill against A. B. and C., and that the mortgage and other deeds executed to give effect to the same, might be declared fraudulent and void, and that A. B. and C. might be directed to account as mortgagees in possession, and that an account might be taken of the sum due on foot of a judgment obtained by D. subsequent to the mortgage, and that certain bills of costs, which formed part of the sum secured by the said judgment, might be taxed.

Demurrer for multifariousness by A. B. and C., another by D., both demurrers allowed.

The original bill in this cause was filed on the 27th September, 1847, by Geo. J. Allman, Richard Lane, and Elizabeth Lane, against George Crofts and others, praying a foreclosure and sale in respect of a mortgage of the 28th February, 1844. A cross bill was filed by Christopher Crofts against George James Allman, Richard Lane, and others. It stated the marriage settlement of George Crofts, the father of the plaintiff, under which the plaintiff was entitled, as tenant in tail in remainder, to the lands and premises mortgaged, subject to a power of appointment to the said George Crofts in favour of any one or more younger son—that in the year 1842, George Crofts, the father of plaintiff, borrowed from the defendants, George J. Allman, Richard Lane, and Elizabeth Lane, and from one N. D. Lane, deceased, the sum of £300, and that said sum was secured to them by the bond and warrant of the said George Crofts, and also further secured by a policy of assurance effected on the life of George Crofts, in the Asylum Office, in Cork; and by an indenture of mortgage, of 13th September, 1842, whereby George Crofts conveyed the lands of Ballyellis (which were not included in his marriage settlement) for a term of 200 years, subject to redemption, to N. D. Lane and George J. Allman, their executors, administrators, and assigns, to secure the said sum with interest—that in all those transactions the defendant, James Lane, acted as the solicitor of all the parties, and was also agent of the Asylum Office—that George Crofts, about the end of the year 1842, when the plaintiff was still a minor, having had occasion to borrow some money to meet his own personal demands, made an agreement with the said James Lane, who was his solicitor, that James Lane should draw on him bills of exchange, that several bills were drawn, the first on the 12th of January, 1843, and the last on the 29th of January, 1844, the amount of which were applied to the personal demands of George Crofts, and part of which was repaid to James Lane out of the rents of the lands of George Crofts, which he had permitted James Lane to receive—that James Lane, at the time of the above agreement, also entered into an arrangement with

George Crofts, whose solicitor he then was, that the moneys so to be procured should be charged on the inheritance of the plaintiff, and not only so, but should be exclusively charged upon the inheritance, without any information being given to him, or any person being employed on his behalf—that James Lane, being the solicitor of the plaintiffs in the original bill, applied to them to advance him certain sums of money for the purposes before mentioned, stating that he would procure the execution of deeds by the plaintiff, Christopher, having the aforesaid effect. The bill charged that whatever sums were so advanced by them were advanced with their full knowledge of James Lane's agreement and intentions, and that if they did advance any sums of money as in their bill stated, they had actually, and through their solicitor, notice of all the dealings of the parties, and the transactions relative to the three deeds of the 28th of February, 1844, aftermentioned—that the plaintiff had not attained the age of 21 years until three months previously to the execution by him of the deed of mortgage of the 28th of February, 1844, and that he was not aware of his rights under his father's marriage settlement, farther than that he believed he was tenant in tail; nor did he know with what debts his estate was chargeable, and that James Lane, being his solicitor as well as the solicitor of his father, should have informed him of his rights, and should not have sought such a security from him without having him first properly advised relative thereto—that previously to the execution of the deeds of the 28th of February, 1844, James Lane had furnished several accounts to George Crofts relative to the bills of exchange, and by the last account, dated the 23rd of February, it appeared that the mortgage money, being the consideration of the deed of the 28th of February, 1844, was applied in the payment of the balance due to James Lane on account of the bills of exchange—that James Lane, being the solicitor of the plaintiffs in the original bill, and of George Crofts and the plaintiff Christopher, prepared for the execution of plaintiff Christopher and of George Crofts three deeds; the first, a disentailing deed; the second, the mortgage to the mortgagees in the original bill; and the third appointing Lane receiver over the mortgage lands, and directing him to pay out of the rents thereof the premiums on certain policies of insurance to be effected on the life of George Crofts, as a further security for the mortgage moneys, and for the £300 secured by the said bond and warrant of George Crofts. It charged that while J. Lane applied the rents to pay his own personal demands (as appeared by the said accounts) and also untaxed costs, he had allowed, while in possession of the said lands as agent of the mortgagees, the head rents of some of them to be in arrear, and that in the bill filed by the mortgagees it sought to have those arrears raised out of the inheritance of the plaintiff—that it appears, by other accounts, J. Lane had paid several personal debts of the said George Crofts as well as untaxed costs to himself, and that he had not used due diligence in the receipt of the rents, whereby a large amount thereof was lost—that James Lane, claiming a balance of £600 on an

account current between him and the said George Crofts, and having the entire control of all the property of the said George Crofts, upon which all his family were dependent, including plaintiff himself, called upon George Crofts and plaintiff to execute a bond and warrant for the penal sum of £1,300, which they had done, and on which he had entered two separate judgments. The bill prayed that the mortgage deed of the 28th of February, 1844, should be set aside as fraudulent and void, so far as the same purported to charge the estate in remainder of the said plaintiff, he being willing to forego any advantage which he might derive under the disentailing deed, and prayed that any provision in the said third deed which purported to create any charge or liability against the plaintiff or his estate, might be set aside as fraudulent and void against him; or, that in case the mortgage deed should not be set aside, then that the policies should be directed to be kept up for the benefit of plaintiff out of the rents of the said estate, to indemnify him against the charge created by the said mortgage of the 28th of February, 1844, and that it might be declared that Richard Lane, George James Allman, and Elizabeth Lane, being in receipt of the rents of the said estate were bound to pay the head rents and other charges affecting the inheritance, before they paid any portion of the rents to the said George Crofts, and that they should account for all rent which they might have received, without wilful default, to the extent of such head rent and charges, and that such of the defendants, as to the court should seem fit, should be decreed to pay such arrears. And that an account should be taken of the amount *bonâ fide* due to the said James Lane, on foot of the accounts for which the judgment of the 23d of November, 1846, was obtained, and that the bills of costs in said accounts mentioned should be duly taxed. And that the bill should be taken as a cross bill so far as the same related to George J. Allman, Richard Lane, and Elizabeth Lane. Allman and the other mortgagees demurred to this bill. The grounds of the demurrer by the mortgagees was, first, that several and distinct matters are joined in the bill, in some of which those defendants are in no way interested; that it appears by the bill James Lane is a necessary party to the bill, and that it does not appear he is interested in so much of the bill as relates to the subject matter of the original bill, and that he appears to be a material witness, and that the bill is not a cross bill as to those defendants, nor is the matter thereof proper for a cross bill. Secondly, that it prays inconsistent relief, and relates to matters not referred to in the original bill, and forming no answer thereto, and in which those defendants are not interested. The demurrer of James Lane was for the grounds following, first, want of interest in the original bill mentioned, and that the bill is exhibited against this defendant and several other defendants for several and distinct matters which have no relation to each other, and wherein, or in the greater part whereof, this defendant, or the said complainant, is no way interested, and it appears that in relation to them this defendant ought to be a witness, and that there is no privity

between this defendant and complainant. Secondly, that it appears part of the relief sought against him is in respect to matters in which he acted as the agent and solicitor of others, and other parts in which he acted for himself.

Chatterton, for the demurrer of the mortgagees, submitted that the bill was demurrable on two grounds, firstly, for multifariousness, secondly, for praying inconsistent relief. The question always is, whether the plaintiffs have a general right against all the defendants? Here, the first part of the relief prayed is to set aside the right of the mortgagees, and the second part is the relief prayed against James Lane, who has no interest in the mortgage, and no costs are prayed against him. James Lane is not a necessary party as to the relief prayed in the event of the mortgage deed not being set aside, for he is in any case bound to keep the policies up. The third part of the relief prayed is, that the plaintiffs in the original bill should be charged as mortgagees in possession, and they alone are chargeable, and no relief is here prayed against Lane, and it was improper to join him as the agent of the mortgagees. The fourth part of the relief is the account prayed of sums paid to Lane on foot of the accounts for which a security had been given to him, and the mortgagees are in no way interested in those accounts. *Steel v. Smith*, (3 L.R.N.S. 51); *Salvidge v. Hyde*, (5 Mad. 138); gives a criterion of multifariousness. Now, in this case is the object of the suit single? *Attorney-General v. Goldsmiths' Company*, (5 Sim. 670). He distinguished this case from the following cases, *Campbell v. Mackey*, (1 M. & Cr. 603); *Manners v. Rowley*, (10 Sim. 470); *Parr v. Attorney-General*, (8 C. & F. 409); shews that the case must be an entire case. As a cross bill it is more objectionable, charging the mortgagees as in possession, for this might be done much better by answer in the original bill. He admitted that in some cases the relief is so mixed up that it does not render a bill multifarious to pray various relief, from the inseparable nature of the relief, but it is not so in this case. Second objection, the relief here prayed is inconsistent; the bill first prays that the mortgage should be set aside as fraudulent, and then it prays that if the court should not think so, that it should carry out the arrangement made by the deed. *Edwards v. Edwards*, (1 Jacob, 335); *Attorney-General v. Brereton*, (2 Ves. S. 425); *Lindsay v. Lynch*, (2 S. & Lef. 1).

Robert Warren for the demurrer of James Lane. There is no relation between the relief which is prayed against the mortgagees in respect to the mortgage, and against Lane in respect to the judgment. *Attorney-General v. Moses*, (2 Mad. 305); *Attorney-General v. Cradock*, (3 M. & Cr. 95); *Salvidge v. Hyde*, (1 Jacob, 151).

Henry Leslie, for the bill, relied on two propositions to shew that the bill was not multifarious, first, that the parties were so mixed up in the transactions sought to be impeached, that they ought to be joined, and secondly, that Lane was connected with all the relief, and that the mortgagees were connected with nine-tenths of it. He referred to the statements in the bill to establish those two propositions. The mortgagees are charged in the

bill to have had notice of all the dealings between Crofts and Lane, and the clause in the deed, appointing a receiver, extends to all incumbrances; this shews that Lane has an interest in the mortgage deed, and the bill also charges that the three deeds were obtained for the purpose of having Lane paid his claims. It is unnecessary to cite authorities in support of the first proposition. The second proposition is supported by (Story, Eq. P. 271.) (Mitford, 211, note,) *Campbell v. Mackey*, (1 M. & Cr. 614); *Attorney-General v. Cradock*, (3 M. & Cr. 95); *Attorney-General v. Parr*, (8 C. & F. 433); *Lund v. Blanchard*, (4 Hare, 9); *Lewis v. Morgan*, (5 Price, 42). It is the object of this court to prevent multiplicity of suits. As to the objection of the relief prayed being inconsistent, the bill does not pray that the mortgage should be set aside altogether, but only so far as the plaintiff is concerned, and merely is alternative in the relief it seeks.

Green, Q.C., same side.—The prayer of the bill is not the only criterion of multifariousness, you must also look to the statements in the bill, and see whether they make a consistent case against all the parties, and give a unity of case against all. The pleader is often involved in a dilemma between multiplicity and defectiveness. [He cited *Brown v. Douglas*, (11 Sim. 283); *Addison v. Walker*, (4 Y. & C. 442).] The accounts between Lane and Crofts are charged by the bill to have been mixed up with the mortgage accounts, and he contended that those accounts were so mixed up, that, under the authorities, the case was inseparable.

Lane, Q.C. in reply.—There is no relief prayed against Lane in respect of the case made against the mortgage, and it is necessary to pray relief against a party who is brought before the court, and even costs are not prayed against Lane. *Le Tesier v. Margravine of Anspach*, (15 Ves. 164); *Beadle v. Burch*, (10 Sim. 338); *Roddy v. Williams* (3 Jones & La. 1); *Fenwick v. Read*, (1 Merivale, 114). There is no case of cestui que trust made against Lane, he is called agent and solicitor through the whole bill. The case as to the mortgagees is somewhat different, the bill is objectionable as to them, in seeking to keep them before the court while accounts are being taken between Lane and Crofts as to their dealings relative to transactions in which the mortgagees are in no way interested. *Benson v. Hadfield*, (5 Bev. 554); *Pearse v. Hewitt*, (7 Sim. 471. As to its not being a proper subject for a cross bill, (Story, E. P. s. 401). As to inconsistent relief, *Mole v. Smith*, (1 Jacob, 490); *Hove v. Best*, (5 Mad. 19). Suppose Lane were to join the mortgagees in a bill to raise the amount of the mortgage, could there be a doubt that the bill would be demurrable?

Jan. 12th 1847, MASTER OF THE ROLLS.—The original bill was filed on the 27th of September, 1847, by George James Allman and others, against Christopher Crofts, George Crofts, and others, and prays for a foreclosure and sale of certain lands contained in a mortgage of the year 1844. The second bill was in chief part a cross bill filed by Christopher Crofts; its prayer may be divided into four parts—the first prays that the deed of mortgage of the

28th of February, 1844, may be declared fraudulent and void, and set aside, so far as it seeks to charge the sum of £2,550 on the estate in remainder of the plaintiff; the plaintiff foregoing any advantage which he might derive under the disentailing deed. The second part prays that if the court should not think fit to set aside the deed of mortgage, that the three policies of insurance for £1,000, £1,200, and £350, might be kept up for the benefit of the plaintiff, out of the rents and profits of the real estates, to indemnify him against the said charge of £2,550. The third part prays that it might be declared that the said Richard Lane, George James Allman, and Elizabeth Lane, being in receipt of the rents, were bound to keep down the head rents and interest of charges affecting the inheritance, and were bound to pay same before payment of any part thereof to the said George Crofts, and that they are bound to account for all rents received by them, and may be decreed to pay all arrears of head rent and interest upon the charges. The fourth part prays that an account might be taken of the sum due to James Lane, as a collateral security for which the judgment of the 23rd November, 1846, was obtained, and that the bills of costs of said James Lane, mentioned in the accounts, might be taxed. It is to be observed that no direct relief is prayed against James Lane, unless what is stated in the fourth part. To this bill a demurrer has been taken by the defendant, James Lane—first, that it does not appear that he is interested in the matters contained in the original bill, and is not a necessary party to any cross bill filed thereto; secondly, for multifariousness; thirdly, want of priority. A demurrer has also been taken by the other defendants—first, for multifariousness; secondly, that J. Lane appears to be a material witness; thirdly, that the present bill is not a proper subject for a cross bill. I shall, with respect to J. Lane, in the first place, consider the demurrer on the ground of multifariousness. From the statements in the bill, it appears that upon the marriage of George Crofts a settlement was executed, bearing date the 1st of April, 1815, by which the estate was limited in tail, or *quasi* tail, upon the first and other sons of the marriage, subject to certain charges, and a power was given to George Crofts to appoint the estates to any one or more younger sons. The plaintiff was the eldest son. That in the year 1842 James Lane, who was solicitor for George Crofts, entered into an agreement that certain moneys which were to be procured by James Lane were to be charged upon the estate in remainder of the plaintiff—that J. Lane applied to G. J. Allman, R. Lane, and E. Lane for the money—that any sums advanced by these parties was with full notice of this agreement—that the plaintiff was under age when this agreement was entered into, and attained age only three months before the deed of mortgage was executed—that he was unacquainted with his rights—that J. Lane furnished accounts to G. Crofts, shewing sums due to himself—that J. Lane was solicitor for Allman in all these matters—that there was no other solicitor—that the deeds were not read by plaintiff—and that the sums raised were charged exclusively on

the estate of plaintiff, which was not in any way liable thereto. The bill then sets out the disentailing deed, and the deed of mortgage of 1844, which contained a covenant that J. Lane was to be receiver over the lands, and was to have £5 per cent. poundage fees; it also provides for the appointment of a new receiver, in case of necessity, and the rents were to be applied in payment of head rents, interest on the mortgage money, and the residue of the payment of fees and expenses was to be paid to George Crofts for life, and after his death to the plaintiff; it also provided that the costs of all necessary proceedings were to be paid out of the rents, and that George Crofts should be liable to pay the interest only of the sum advanced. The third deed is then set out, which related to the policies of insurance. The bill then charges that the three deeds were procured by the said J. Lane for the purpose of securing payment of £2,550—that they were never read to plaintiff, and that he was unaware the disentailing deed contained a clause releasing the power of appointment in favour of younger children, and contains a statement that the rents were mismanaged by J. Lane. It was contended by the plaintiff that the plaintiffs in the original cause are, in fact, trustees for James Lane, and that the money advanced was his altogether, or chiefly so. But I consider there is no foundation for this argument. By the third account, J. Lane debited himself with the entire amount of the mortgage, and it does not appear that he advanced any part of the consideration for the mortgage; it is not once positively so stated in the whole cross bill. It is contended, further, that the entire transaction is fraudulent, but no relief, not even to make him liable to costs, is prayed against J. Lane, *Beadles v. Burch* (10 Sim. 332); *Roddy v. Williams* (3 Jon. & Lat.; Mitford Pleading, 4th ed. 189); and there is no provision in the deeds entitling him to any provision out of the inheritance. Therefore, in this bill, which relates to the inheritance, he is not properly made a defendant, nor is his interest as agent sufficient to render him a necessary party, *Finder v. Stephens* (2 Phil. 147). I am of opinion, therefore, that the bill is multifarious, J. Lane being brought as defendant upon a record, with a great part of which he is not connected. *Campbell v. Mackay* is decided on the principle that there is a common interest in all the plaintiffs, and all the defendants were interested in all the questions raised, and were accounting parties. It is not necessary for me to give any opinion upon the other grounds of demurrer, but a serious question arises, whether the bill is not objectionable on the ground of misjoinder, but it is not necessary to decide that question. As to the other demurrer, I am of opinion that it also should be allowed. The defendants, the mortgagees, had no concern with a great part of the bill; *Attorney-General v. Poole*. I shall allow the demurrer with costs.

Allow the demurrer with costs, and let the bill stand dismissed as against the defendants, James Lane, George James Allman, Richard Lane, and Elizabeth Lane, with costs.—Lib. 20, fol. 59.

BRABAZON v. LORD LUCAN.

Ecclesiastical Lease—Perpetuity—Purchase—Renewal Leases—Interest.

The immediate lessee of an ecclesiastical lease purchasing the perpetuity under the 3 & 4 Wm. 4, c. 37, is entitled to interest on the renewal fines payable by the sub-tenant.

In this case—the facts of which will be found fully reported in 9 I. E. R. 441—Lord Lucan, being possessed of certain lands under a lease from the see of Tuam, demised same to Sir Wm. Brabazon, with a *toties quoties* covenant for renewal; on the 28th of September, 1837, Lord Lucan having obtained a conveyance of the fee under the Church Temporalities Acts, by order, bearing date the 30th day of June, 1846, it was referred to the Master to inquire and report what sum was due, by the representatives of Sir Wm. Brabazon, for interest, upon their proportion of the purchase money; and, also, what was due for rent and arrears, and fines and fees for renewal, and if interest was customarily paid and payable on such fines for renewal, and also what was due and payable for such interest and such fines, and to settle a proper deed of conveyance. Upon appeal before the Lord Chancellor, on the 23rd of December, 1846, this order was varied, so far as it directed a reference to ascertain the interest due upon the purchase money. On the 24th of June, 1848, the Master made his report, and thereby found that there was due, for rent and arrears of rent, by the petitioners to the respondent, £793 16s. 10d. for fines for renewal, £2,269 11s. 10½d. The report then proceeded as follows:—“And having regard to that part of said order of reference by which I am directed to inquire and report whether interest had been customarily paid upon such renewal fines, no evidence has been offered to me by either party; but, being under the impression that in all similar cases it has been the habit of Courts of Equity in Ireland to allow such interest, I have made my calculation on the supposition that, in the absence of express evidence of any local custom, interest ought to be paid upon fines for renewal of leases of the lands and premises.” To this report the petitioner excepted that the Master ought not to have found that there was due to the respondent the sum of £770 10s. 4d. for interest on the renewal fines, because interest was not payable upon same, nor was the Master authorised by the order of reference to compute or allow interest thereon, unless he should find that interest had been customarily paid on such fines; and it appeared by the report there was not any evidence laid before the said Master to shew or prove that interest had been customarily paid on such fines.

Sergeant O'Brien for the exceptions.—There was no evidence given before the Master that it was customary to pay interest on the renewal fines, and he ought not to have so found. Also the covenant to renew is silent upon that point, and there is no specific time limited within which the renewals must be taken out. This is not the case where the tenant is obliged to come into a Court of Equity for relief, but the statute 6 & 7 Wm. 4, c. 90, sec. 1, enables him to obtain a renewal upon terms

which do not include payment of interest on the fines.

Nov. 29.—Attorney-General and S. B. Millar for the report.—Independently of the act, Sir W. Brabazon, the tenant, upon the renewal of his lease, is bound to pay the renewal fines and interest; and if a bill was filed in a Court of Equity, a renewal would not be decreed unless upon payment of fines and interest. In the case reported in 9 I. E. Rep. 540, the Lord Chancellor was coerced by the Act of Parliament, and did not give interest on the purchase money, which was a new thing created by statute; but by the 141 sec. of the 3 & 4 Wm. 4, cap. 37, before obtaining a conveyance of the perpetuity, a tenant must renew his lease, and all rent and arrears of rent must be paid.

Maley, in reply, cited *Swanton v. Biggs* (Beatty, 240); *Revell v. Hussey* (2 Ball & B. 280).

Jan. 14.—MASTER OF THE ROLLS.—On the 30th of June, 1846, an order was made in this case, that it be referred to the Master to inquire and report what sum was due by the representatives of Sir W. Brabazon for interest upon the purchase money and rent, and whether interest was customarily paid on the renewal fines contained in the lease of the 13th day of June, 1832, and on the 23rd December, 1846, that order was varied so far as it directed the Master to ascertain the amount of interest payable on the purchase money. The Master, having made his report, finds that there is due, for rent and arrears, £793 16s. 10d.; he then proceeds, that no evidence was brought before him of interest being customarily paid upon renewal fines, but that his impression is, that interest has been allowed in all similar cases by Courts of Equity, and finds accordingly. To this report, exceptions have been taken by James O'Dowd, the surviving trustee of Sir W. Brabazon's representatives, because the Master found that interest was payable on fines, while the Master was not authorised to do so. The renewal of 1832 recites a payment made by Sir W. Brabazon of renewal fines and interest previously to its execution by the Earl of Lucan, and therefore supplies some evidence, at least, that interest was customarily paid upon the renewal fines. There is no covenant to pay interest upon the renewal fines; for, from the nature of the *toties quoties* covenant, the renewal was to take place as soon as the lease was obtained, and it became the duty of the inferior tenant to pay his proportion immediately; also, upon looking to the statute 3 & 4 Wm. 4, c. 37, sec. 141, I find it is there directed that "no tenant or lessee, as aforesaid, shall be entitled to have any such conveyance of the fee simple and inheritance, &c., of whose lease if holding by lease for the term of 21 years, 20 years shall not be then unexpired; or for the term of 40 years, 39 years shall not be unexpired; or if holding for 21 years or three lives, or for three lives, and all the lives shall not then be in being, unless he or she shall, previous to the execution of such deed of conveyance, pay all the renewal fines payable for the renewal of such lease, &c., or unless all rent and arrears of rent shall have been fully paid and satisfied." The 30th section of the 4 & 5 Wm. 4, cap. 90, does not contain this provision, but the 6 & 7 Wm. 4, c. 99, sec. 35, enacts

that these statutes are to be considered as one act; and by the first section of the latter statute, an inferior tenant may apply to his immediate landlord for a conveyance of the perpetuity, "provided that such tenant shall previously have paid or tendered to such landlord, &c., such sum as shall be payable for contribution for the purchase money, &c., together with all rent, and fines, and fees for renewal, and all arrears thereof, then due and payable by such tenant, by virtue of such lease or contract." All these statutes are to be considered as one act, and no person is to be entitled to a conveyance unless all fines and arrears of rent are paid. On the part of Sir W. Brabazon, it is contended that in the case reported in 9 I. E. Rep. the Lord Chancellor decided that interest was not payable on the purchase money, however long payment was delayed. I am of opinion that Sir Wm. Brabazon ought to pay the entire fines with interest, and the statute ought to be construed with reference to what was the practice of Courts of Equity previous to the passing of it; for nothing could be more unjust than that a tenant should, after a considerable time, be at liberty to pay up the fines without any interest. I would not have any difficulty in the present case, were it not for the Lord Chancellor's opinion expressed upon the former case. However, without acting against that decision, I think that interest upon these renewal fines was customarily payable.

Overrule the exceptions with costs, and declare Lord Lucan entitled to the costs of the reference under the order dated the 30th day of June, 1846, and the costs of this hearing against the surviving petitioner James O'Dowd, and let the deposit be paid over to Lord Lucan, in part payment of said costs, and refer it to one of the Taxing Masters of this court to tax same.

Lib. 20, fo. 52.

HORNEBROKE v. WARE.—*Dec 18.*

Practice—Amendment.

After a demurrer allowed as to one defendant by the operation of the 64th General Order. The plaintiff having paid the costs of the suit to that defendant, amended the bill and issued subpoena against that defendant, who appeared. Held that the plaintiff could take the bill pro confesso against him.

This was a bill filed by judgment creditors. The defendant Ware demurred for want of parties, and the plaintiff not having set down the demurrer for argument, it was allowed under the 64th General Order. On the 10th of January, 1848, the plaintiff served notice of motion for liberty to amend the bill by adding parties, and on the 20th of January that motion was refused. The plaintiff afterwards amended the bill on the 9th of May, and served subpoena on the defendant Ware, having first paid him the costs of the demurrer. Ware appeared, but served a notice on the plaintiff that his appearance should not waive the irregularity of the amendment of the bill.

Lawson now moved to take the bill *pro confesso* against Ware.

R. Longfield, contra.—Under the 64th General Order, the amendment of the bill is irregular, *Lautour v. Holcombe* (11 Sim. 71; 10 Bea. 256); *Assignee Cornwall v. Speering*, decided in this court, 7th May, 1842.

Lawson, in reply.—In this case the costs of the suit have been paid, and that distinguishes it from *Lautour v. Holcombe*. The amendment makes a new record; it is a new bill *quoad* this defendant; even if the amendment had been irregular, the irregularity has been waived by appearing; for *Denny v. O'Connell* (1 S. & Sc. 111) shews that it was not necessary to appear, and the notice served by the defendant does not alter the effect of appearing.

MASTER OF THE ROLLS.—In this case the defendant, T. Ware, having demurred to the bill, the demurrer, not being set down for argument, was allowed. In January, 1848, the plaintiff moved for liberty to amend the bill, upon payment of costs. That motion was refused. On the 20th of May, the plaintiff, notwithstanding, having amended his bill, served a subpoena upon the defendant Ware, who, upon the 2nd of September, 1848, entered an appearance, and no notice has been served of any application to set aside the subpoena. The defendant served notice of the irregularity, but that was not the proper course; he should have moved to set aside the service of subpoena. The time for answering having expired, the plaintiff now moves to take the bill *pro confesso*. According to the argument of Mr. Ware's counsel, if there were a great number of defendants, and one demurred, if the demurrer be not set down for argument, the plaintiff would be obliged to dismiss the bill as against the rest, although they had all answered. In the case of *Cornwall v. Speering*,* (which is not reported) decided by Sir. M. O'Lough-

* In this case Mr. Sergeant Warren moved that the parliamentary appearance entered by the plaintiffs on the 19th day of March, might be set aside, and that all costs incurred by Andrew Speering, Charles Sugrue, and Robert Delacour, since the order of the 10th of February, (by which the bill has been dismissed for want of prosecution) might be paid to the plaintiffs, and it was ordered that the parliamentary appearance entered by the plaintiffs be set aside. "The said defendants not having been made parties to this suit by any proceeding subsequent to the pronouncing of the order of the 10th of February last, by which the bill in this case was dismissed as against them, and it being admitted on the part of the said defendants, that the costs awarded to them by the said order hath been paid, and counsel for the plaintiffs' informing the court that said defendants are decreed to be necessary parties to this suit, it is further ordered that the said plaintiffs be at liberty at any time within 10 days from the date of this order to amend the bill in this cause, by again introducing the names of the said A. Speering, C. Sugrue, and R. Delacour, as defendants, and the said A. Speering, C. Sugrue, and R. Delacour, having appeared on this motion, by J. H. Garde, as their solicitor, it is further ordered that they do, within eight days after service on the said J. H. Garde, their solicitor, of a notice stating that such amendment has been made, and of copies of subpoena to answer said bill, cause appearances to be entered to such subpoena, and that in default of their so doing, the plaintiffs be at liberty to enter appearances for them pursuant to the statute." The order then directed payment by the plaintiff of the costs incurred by defendants subsequent to the order of the 10th February.—*Lib.* 330, fo. 343.

len, in May, 1842, there was an application that a parliamentary appearance should be set aside, and it was ordered that the appearance entered on the 19th of March should be set aside, the defendants not being parties to the suit subsequent to an order of February previous by which the plaintiff's bill had been dismissed for want of prosecution, but the plaintiffs were allowed to amend the bill by bringing these parties on the record. So that where a bill was dismissed for want of prosecution—which is not distinguishable from the case of a demurrer allowed—the parties were afterwards permitted to amend the bill, and enter a parliamentary appearance, and Sir M. O'Loughlin considered the amendment regular. The effect of this decision is, that a bill being dismissed against any defendant for want of prosecution, you may bring him again on the record by amendment, and may subpoena against him. I concur with the rule that order made. There is no difference in principle between that and the present case, and I will make the order that the bill be taken *pro confesso*.

"Declare that plaintiff is entitled to take said bill *pro confesso* as against defendant, Thomas Ware, and counsel for said defendant, Thomas Ware, having applied for time to answer, let the said defendant have three weeks' time to answer; and let him pay plaintiff £5 costs of this motion, and in default of his answer being filed within said period, let the bill be taken *pro confesso* against him without further order."

QUEEN'S BENCH.—HILARY TERM.

HOLT v. KELLY.—*Jan. 15.*

In an issue under the Interpleader Act (9 & 10 Vic. c. 64), to try whether a certain deed of assignment was fraudulent or not, the simple question as to whether it was intended to defeat or delay particular creditors is not a sufficient test of its bona fides. Semble, that it is enough for the party impeaching the deed to shew that it is within section 10 of Car. 1, sess. 2, c. 3, Irish, so as to enable him to make out a prima facie case; and that it then rests with the other party to prove that he is exempted from the operation thereof, and protected by the 14th section of the same statute.

This was an issue under the Interpleader Act (9 & 10 Vic. c. 64), to try the validity of a certain deed of assignment of stock in trade and other property, and bearing date the 18th of December, 1847, and purporting to be made between Michael Creagh Mangan of the first part, the plaintiff Holt of the second part, and the other creditors of Mangan of the third part. The assignment purported to be for the behoof of such creditors as should execute the deed, or otherwise assent thereto, on or before the 1st of February, 1848. The defendant Kelly was a creditor of Mangan, but never executed or assented to the deed in question. An agent, named Lees, was sent by Holt to Lime- rick, ostensibly on behalf of some English creditors, to take possession of the goods, which he accordingly did, employing Mangan in the winding up of

the business. The shop was closed on the 24th of December; subsequently, but prior to the 1st of February, 1848, the goods in question were seized by the Sheriff of the city of Limerick, by virtue of a *fi. fa.* issued at the suit of the defendant, and on the 27th of January the order to interplead was obtained. The cause was tried at the Limerick Spring Assizes, 1848, before Ball, J., and on that occasion the learned Judge told the jury that "if they believed that the deed was executed to hinder, delay, or defeat creditors, they should find for the defendant." Counsel, at the trial, objected to this charge, and called upon his lordship merely to leave with the jury the question whether the deed was executed *bona fide*, and for valuable consideration. The jury having found for the defendant, a conditional order was obtained in last Easter Term to set aside the verdict, on the ground of misdirection of the learned Judge; and this day

Copinger moved, that the said order be made absolute. The charge was wrong, as the only matters for the jury to consider were those relating to the valuable consideration and *bona fides* of the transfer; and it is quite beside the question to inquire whether the deed was executed in fraud of certain creditors. The case rests on the construction of the statutes 13 Eliz. c. 5, English, and 10 Car. 1, sess. 2, c. 3, Irish, *Pickstock v. Lyster*, (3 Manle & Sel. 371); *Holbird v. Anderson* (5 T. R. 235); *Wood v. Dixie* (7 Q. B. 892, per Lord Denman, C. J.)

J. D. Fitzgerald, Q. C., and *Sir C. O'Loghlen*, contra.—The deed in question belongs to the class adverted to by Dampier, J., in his judgment in *Pickstock v. Lyster*, who there says, that if it could have been shewn "that the whole transaction was fallacious, that the trustee was, in effect, only a trustee for some particular creditors, and not, as he is stated, for all, the case would have been different; that might have given it a fraudulent complexion." It is also laid down that no creditor can take advantage of a deed if they be not parties to it, and have not executed it, *Garrard v. Lauderdale* (3 Sim. 1); *Simmonds v. Pallas* (2 Jones & Lat. 494). Here no creditor had executed the deed before the 1st of February; no notice of the execution of the deed was published in the Gazette, as is usual in such cases. Judging of the intentions of parties by their acts, it is quite evident that Holt got up the deed for his own purposes, and not *bona fide* for the benefit of the creditors in general. By the terms of the deed, Holt was not bound to give notice to a single creditor. There were only the representatives of three creditors present when the arrangement was agreed on. (*Moore, J.*—If any creditor had assented to this deed, would it not suffice?) It does not appear from the evidence that there was any express assent thereto from any party but the plaintiff. It is contended that although the deed was ostensibly for the general body of the creditors, it was in reality but for a few. (*Perrin, J.*—Is a deed fraudulent where some creditors are excluded?) A creditor at common law may prefer particular creditors, but here the deed is exclusively for the benefit of one. How could a deed intending to defeat a class of creditors be *bona fide*? The case of *Owen v.*

Body (5 Ad. & El. 28) also bears on the present case, as appears by the trusts of the deed. (*Moore, J.*—The 10th section of the 10 Car. 1 appears to render void deeds executed under certain circumstances, and the 14th section to qualify the general words of the former. Thus he who desires to have the protection of section 14, ought to shew his case to be within it.) (*Crampton, J.*—The charge in this case seems to rest on section 10, and the objections to be founded on section 14.) It was impossible to bring the deed in question within section 14. In any event, the direction which was called for was wrong in part, being based on the 14th section alone, exclusive of the 10th, which the former was only intended to qualify; and the court ought to allow the verdict to stand, unless satisfied that the charge which the plaintiff called upon the Judge to give was the correct one.

Thomas Graydon, in reply.—The 14th section of the statute does not warrant the position that the mere circumstance of an assignment, having for its object the defeating of a particular creditor, would avoid it, *Wood v. Dixie* (7 Q. B. 892). Here the goods were seized by the defendant but a few days after the deed was executed. The case of *Owen v. Body*, relied on by the other side, has no application whatever to the present one. Five creditors intimated their intention to accept a benefit under the present deed.

BLACKBURN, C.J. (after briefly stating the case).—The question depends upon the effect of a certain deed, by which Mangan assigned all his property to the plaintiff Holt, in trust, for the benefit of his creditors. The transaction may possibly have been a fraudulent one, but nevertheless we think that the jury may have been misled by having had their attention so pointedly directed to the question, whether the deed was executed for the purpose of delaying or defeating creditors, on the assumption that such was the proper test of its validity. On the other hand, we think that the direction called for by the plaintiff was too large. The verdict in this case, therefore, is not satisfactory, and there must be a new trial, on payment by plaintiff of costs of former trial.

Order absolute.

COMMON PLEAS.

ALLINGHAM v. WALKER.—Jan. 17, 20, 24.

Pleading—Special Demurrer—False Plea—Plea in Discharge of Action—Replication de injuriâ.

Where the plea denies the cause of action instead of being in confession and avoidance, the replication de injuriâ is bad, and a demurrer must be allowed, although the plea is itself specially demurrable as amounting to the general issue. A demurrer to a replication putting in issue a false plea, will be set down for immediate argument. Signing the name on a blank bill of exchange stamp, with an express agreement to draw it for a specified amount, is not a contract to pay any sum which may afterwards be inserted in the bill as between parties having notice of the agreement.

This was an action in *assumpsit* by the indorsees against the acceptor of a bill of exchange for £74 11s., drawn by Messrs. Hamilton and Ruskell. The declaration contained a count upon the bill of exchange and the indebitatus counts. The defendant pleaded as to the indebitatus counts the general issue, and as to the first count, the following plea:—"That heretofore, to wit, &c., he, the said defendant, delivered to the said certain persons using the name, style, and firm of Hamilton and Ruskell, a bill of exchange stamp of the amount of 4s. 6d., accepted in writing and in blank by the said defendant, and it was then and there agreed by and between the said defendant and the said Hamilton and Ruskell, that they should draw on the said stamp their bill of exchange, and thereby require the said defendant to pay to their order the sum of £65 1s. 2d. three months after the date thereof, to wit, the 19th of December, 1846; and the said defendant says, that the said Hamilton and Ruskell, without the knowledge or assent of the said defendant, then and there drew on the said stamp their bill of exchange, and thereby required the said defendant to pay to their order £74 11s., three months after the date thereof, to wit, &c., and afterwards, to wit, then and there indorsed the same to the said plaintiffs, who then and there had due notice of the aforesaid matter in this plea set forth, and this the said defendant is ready to verify," &c.

Replication—"That the said plaintiff's, by reason, &c., because they say that the said defendant of his own wrong, and without the cause by him in his said second plea alleged, broke his said promise in the said first count of the declaration mentioned in manner and form," &c.

Demurrer to the replication, assigning as special cause, "that the defendant's said second plea is in discharge of said plaintiff's cause of action, and that it denies the said plaintiff's said cause of action, and that it is not by way of confession and avoidance."

R. Johnson, with whom was *Brooks, Q.C.* now (17th January) moved that the demurrer should be set aside as frivolous, or that it should be set down for immediate argument.

Codd, contra.—It is certified that this demurrer is tenable.

DOHERTY, C. J.—Where counsel appears at the bar in support of his demurrer, we cannot set it aside as frivolous. We shall hear it argued on Saturday.

Jan. 20.—The case having been now called on,

Cuffe (with whom was *Codd*) in support of the demurrer.—It is clearly laid down in all the books that the replication *de injuriâ* is applicable only where the plea confesses the cause of action and avoids it, *Crogate's case* (8 Rep. 66, b. 2; Saunders, 295); *Edwards v. Greenwood* (5 Bing. N. C. 476). *Fisher v. Wood* (1 Dowl. N. 54) is an express authority in favour of this demurrer. Here the plea is in denial of the contract stated in the declaration, and not in excuse.

Johnson, R. (with *Brooks, Q.C.*), contra.—*Fisher v. Wood* is overruled by *Cowper v. Garbett* (13 Mees. & W. 33). Pollock, C. B., there says, "Though these circumstances render the contract

not binding, and so amount to a denial that there was a binding contract, they admit a contract in fact and excuse its performance, *Lansdale v. Clarke* (1 Ex. Rep. 78). (*Ball, J.*—If you can establish that the defendant's putting his name upon a blank stamp is a contract in fact for whatever sum is afterwards inserted, notwithstanding an express agreement for a particular amount, you overthrow this demurrer.) It is impossible to contend that this is not a contract in fact, as to the whole world; and a contract in law, as to all persons not having notice of the fraud, *Isaac v. Farrier* (1 Mees. & W. 65); *Rowland v. Evans* (4 Jur. 460; 2 Arch. N. P. 40); *Shultz v. Astley* (2 Bing. N. C. 544); *Watson v. Wilks* (5 Ad. & El. 237); *Emanuel v. Rendal* (8 Dowl. P. C. 238); *Reynolds v. Blackburn* (2 Nev. & P. 136); *Tolhurst v. Nolley* (17 Law. l. 97); *Noel v. Rich* (4 Dowl. P. C. 228). (5 Tyr. 692, S. C.) is exactly in point. If this were not an acceptance in fact he ought to have pleaded *non assumpsit*, *Grant v. Enthoven* (1 Ex. Rep. 382).

Codd, in reply.—We admit that this plea is open to special demurrer, as amounting to the general issue. But the plaintiffs have not taken that course; they have put a bad replication upon the record, and this demurrer must therefore be allowed, *Whittaker v. Mason* (2 Bing. N. C. 359).

JACKSON, J.—*Noel v. Rich* is not the same as this case.

PER CURIAM.—This demurrer must be allowed. It is said that *Fisher v. Wood* has been overruled, but that does not appear to be so. We decide this case on the authority of *Fisher v. Wood*.

Demurrer allowed with costs.

Codd applied for the costs of the former motion.

Johnston, contra.—Before the court makes such an order, it will hear the affidavit of the Messrs. Hamilton and Ruskell as to the falsehood of the plea.

DOHERTY, C. J.—This is a branch of the case much too important to be disposed of lightly. Let the defendant apply for these costs on Wednesday next.

Jan. 24.—*Codd* for the defendant, in pursuance of the leave given, applied this day for the costs of the motion to have the demurrer set down for immediate argument.

Johnston, contra.—We have the affidavit of one of the firm of Hamilton and Ruskell, the drawers of the bill, stating the matters contained in the plea to be false, and that the figures £74 11s., written in the margin of the bill, are in the handwriting of the defendant himself, *Horner v. Keppel* (10 Ad. & El. 17); *Haworth v. White* (1 Arnold, 278). The answering affidavit of the attorney for the defendant does not even allege that he had any authority from his client for putting such a plea upon the record.

DOHERTY, C. J.—This case was a very proper one to be set down for immediate decision. The replication is one fairly putting in issue matters alleged in the plea, and now admitted to be false. We refuse to give the defendant any costs, and we regret that we cannot give them against him.

COURT OF CHANCERY.

DUNDAS v. BLAKE.—Oct. 26, 27, 1848, Jan. 16, 1849.

Statute of Limitations—Effect of a general charge in a will for payment of debts. Held that where a testator devises lands, subject to the payment of his just debts, directly to the devisee, and without the intervention of trustees, that there was no trust created, so as to save a debt from the operation of the statute.

The bill in this case was filed to raise a sum of £1,000 and a sum of £400 claimed to be charged upon certain lands called Crumlin and Cloncum. The case relied on was as follows:—

That by indenture of mortgage, bearing date the 25th day of May, 1796, and made between Stephen Blake of the one part, and Joseph Callinan of the other part, the said Stephen Blake, in consideration of the sum of £1,000, conveyed to the said Joseph the said lands of Crumlin and Cloncum, together with certain other lands, not the subject matter of the suit, by way of mortgage, to secure payment of the said sum of £1,000.

That the said Stephen Blake and Robert Blake, his brother, jointly executed their bond and warrant for confessing judgment thereon, in the penal sum of £2,000, with interest thereon.

That the said indenture of mortgage was duly registered on the 18th day of June, 1796.

That in Trinity Term, 1796, separate judgments were obtained against the said Stephen and Robert Blake, and that the judgment obtained against Robert was redocketed in Michaelmas Term, 1833.

That the said Stephen Blake died some time in the year 1813, unmarried and intestate, leaving his brother Robert his heir-at-law, him surviving, who, immediately after the death of Stephen, entered into possession of all his real property, inclusive of Crumlin and Cloncum, and continued in possession thereof to the time of his death.

That Joseph Callinan died on the 8th day of February, 1812, having first duly made his will, dated the 6th day of September, 1807, and, after certain specific bequests, devised the residue of his property to his son John, and appointed his brother, John Callinan, and Francis Farrell executors thereof, by whom same was duly proved.

That John Callinan attained his full age some time in the year 1817, and became entitled to the moneys secured by said indenture of mortgage.

That Robert Blake was liable to pay said debt, not only as joint obligor in the said bond, but because, as heir-at-law of Stephen, he applied to his own use the rents and profits of Stephen's real estate, from the time of his death in 1813, till the year 1819, when the said Robert died.

That on the 26th day of November, 1817, the said Robert Blake wrote to C. J. Moore, the solicitor for the said John Callinan, the following letter:—

"Sir,—I am this day favoured with your letter of yesterday's date. I wrote to Mr. John Callinan on the 2nd instant, that I had about 220 acres of good land out of lease, which I would agree to sell him to discharge his mortgage, and take his security for the balance; and that the business might be settled without the expense of fore-

closing, and that the value might be left to two gentlemen of understanding. This I am ready to do at any time. I am, Sir, your obedient servant,

ROBERT BLAKE."

That the purchase or sale proposed by said letter never took effect, and the mortgage debt remaining unpaid on the 2nd day of June, 1818, John Callinan, the devisee, and Francis Farrell, the surviving executor of the will of Joseph Callinan, filed their bill of foreclosure against the said Robert Blake, who, having neglected to appear and answer, process to a sergeant-at-arms was entered against him; and, by order of the 16th of December, 1818, it was referred to one of the Masters to appoint a receiver.

That process to a sequestration was carried on against the said Robert Blake, and said cause was about to be heard when the said Robert Blake died, about the 6th day of February, 1819, whereby said suit became abated.

That the said Robert Blake made his will, duly executed for passing real estates, and after reciting that he was seized of the lands of Crumlin, he specifically devised same, and the will proceeded in the words following:—"I give, devise, and bequeath my said estates of Cloncum and Grange, with all rights, &c., unto my sister-in-law, Mrs. Jane Blake, for and during the term of her natural life, subject to all my just debts, legacies, and funeral expenses, and after her death, to such of her children, in such proportion as she, by any deed or will by her duly executed, shall limit, direct, or appoint, and for want of such appointment, I order that the issues and profits arising therefrom may be divided, share and share alike, among all her children, male and female, save only Mrs. Mills, who has been already provided for; and whereas George M'Entaggart holds my security for £300, for which I never received any value, I think it but right to declare that it was my intention to resist the payment thereof, and consequently I do not conceive it to be a demand that comes under the term of my just debts." And, after certain specific bequests, the testator bequeathed all his personal property, of every nature and kind whatsoever, unto his sister-in-law, the said Mrs. Jane Blake, the better to enable her to pay all his debts, legacies, and funeral expenses; and he appointed the said Mrs. Jane Blake, the Rev. Robt. Marsh, and Paul Dolphin executors of his will. That the said Robert Blake died without having altered or revoked his will, which was, on the 8th of February, 1820, proved by Mrs. Jane Blake alone, the other executors having renounced probate. That the said Jane Blake and her second son, Stephen, having notice of said mortgage debt, by indenture dated the 28th day of October, 1819, appointed to the said Stephen the said lands of Cloncum and Grange, after her death; and by the said indenture, Stephen covenanted to indemnify her from all charges affecting said lands, and particularly from said mortgage debt, and that said deed was not registered till July, 1842.

That in the year 1819, Stephen Blake intermarried with Jane Creighton, and by indenture of marriage settlement, dated the 4th day of December, 1819, the said lands of Cloncum, amongst others,

were, subject to the debts scheduled in said deed, and to the life interest of the said Jane Blake, and to a jointure for the said Jane Creighton, conveyed to the use of the said Stephen for life, remainder to the children as Stephen should appoint, and in default, to the children equally.

That Peter Blake, a defendant, was the eldest son and heir-at-law of G. E. Blake, who died in 1842, and who was the heir-at-law of Robert Blake, the testator, and of Stephen, the mortgagor.

That by deed, dated the 5th of May, 1819, a judgment of Trinity Term, 1808, obtained by John Montgomery against the said Stephen Blake, for the penal sum of £400, was assigned to the said John Callinan. That in the year 1773, one Clare Civile obtained a judgment against Patrick Blake, the father of Stephen, the mortgagor, and Robert Blake, the testator; and that same became vested in Edward Callinan, who, in the year 1818, issued an *elegit* on foot thereof, and having obtained a finding, brought an ejectment against the said lands of Cloncum; and, having obtained judgment in the year 1819, an *habere* was executed, putting him in possession of one moiety thereof, and that he continued in possession of same and received the rents thereof till the time of his decease, and that Celia Callinan, his administratrix, continued in possession thereof for several years, till her demand was paid off. That in the year 1820 a bill of revivor was filed in the cause of Callinan v. Blake, that same having become abated by the death of Edward Callinan, the *elegit* creditor, a bill of revivor was filed in 1825, to which Giles E. Blake appeared—that on the 21st of December, same year, G. E. Blake became an insolvent, and the suit again abated. This was the last proceeding in that cause. That in the year 1825, Thomas Seymour, a judgment creditor of the said Robert Blake, and Giles E. Blake, filed his bill to recover the amount of his claim, and a receiver was appointed in the suit of Seymour v. Blake, who continued in possession for several years. That Joseph Burke, a creditor of the said Robert Blake, in respect of a judgment of 1810, in the year 1838 obtained an order for the extension of said receiver. That in the year 1832 John Callinan died, and in 1835 his widow, one of the plaintiffs in the present suit, obtained administration to him, and also in the year 1838 she obtained administration *de bonis non* to Joseph, the mortgagee. That on the 20th day of November, 1843, an application was made to the Master of the Rolls for liberty to proceed in the cause of Callinan v. Blake,* notwithstanding the 81st General Order of 1843, and same having been refused, and upon appeal to the Lord Chancellor this decision was confirmed. The bill prayed that the will of Robert Blake might be established against the defendant, Peter Blake, and the trusts thereof carried into effect—that an account might be taken of the sum due on foot of the mortgage and judgment, and an account of the real assets of Stephen received by Robert, the testator, and of the amount to which he was, at the time of his death, a debtor to the real assets of Stephen, and as such, bound to discharge the judg-

ment of 1808, and a sale. The bill was taken *pro confesso* against the defendant, Jane Blake, and on her death was revived against her executor. The bill was resisted by the heir-at-law, on the ground that his father, on the death of Robert, took possession of the said lands, adverse to all the world, the entry was proved in the cause; and he also relied on the Statute of Limitations. He relied, further, that Robert was tenant for life, and had no power to make a will; but this point was not pressed in argument, nor proved. Stephen Blake and his wife admitted notice of the will, and of the mortgage for £1,000 and judgments collateral, and also of the judgments of 1808, at the time of the appointment and marriage settlement; and in a schedule to the latter, those debts were scheduled, subject to which the lands were conveyed to the trustees of the settlement. They insisted, further, that the trust in the will, if created at all, was only for the life of Jane Blake.

R. W. Green, Q. C., Christian, Q. C., Mr. Hickey, and Mr. Dundas, for the plaintiff, relied on the trust in the will as taking the demand out of the Statute of Limitations, and cited *Dillon v. Cruiss* (3 I. E. Rep. 70); *Jones v. Scott* (1 Ross and M. 255); *Hunt v. Bateman* (10 I. E. Rep. 360); *Commissioners of Charitable Donations v. Wybrants* (2 Jur. & Lat. 182; Sc. 7 I. E. R. 580); *Bailey v. Ekins* (7 Ves. 323); *Shaw v. Borrer* (1 Keen. 577); *Young v. Lord Waterpark* (13 Sim. 202); *Hargreaves v. Mitchell* (6 Mad. 326); *Fergus v. Gore* (2 Sch. & Lef. 107); *Burke v. Jones* (2 Ves. & B. 286); *Morse v. Langham* (stated in judgment of *Burke v. Jones*, 2 V. & Bea.); *Crallan v. Oulton* (3 Beav. 1), as to the fact, that the possession by the receiver was inconsistent with the adverse claim of Peter Blake, *Gressley v. Adderley* (1 Swa. 571); *Kellett v. Kelly* (5 I. E. R. 34); *Adair v. Shaw* (1 Sch. & Lef. 243-262); *Elliot v. Merryman* (2 Barnard, 78); *Walker v. Smallwood* (Amb. 676); *Shephard v. Lutwiche* (8 Ves. 26).

Attorney-General, F. Fitzgerald, Q. C., and F. Meagher for the defendant—Peter Blake—relied upon the adverse entry of G. E. Blake and the statute of Limitations, and contended that there was not such a trust created by the will as would take the case out of the statute, and relied upon the cases of *Knox v. Kelly* (6 I. E. Rep. 279); *Harrison v. Duignan* (2 Dr. & W. 295); *Hughes v. Kelly* (3 Dr. & W. 48); *Francis v. Grover* (5 Hare, 19); *Hunt v. Bateman* (10 I. E. R. 366).

Brewster, Q. C., and Mr. David Boyle, for the children of Stephen Blake, contended that the trust in the will was only implied, and did not come within the exceptions contained in the statute, *Hunt v. Bateman* (judgment of Lefroy, B.); *Young v. Wilton* (10 I. E. R. 10); *Lawson v. Lawson* (3 Bro. P. Cas. 424); *Hamilton v. Worley* (2 Ves. Jun. 62); *Bassett v. Percival* (1 Cox 268); *Evelyn v. Evelyn* (2 P. W. 664); *Barry v. Harding* (1 Jones and Lat. 475).

Mr. Blackham and Mr. P. Blake appeared for other parties.

LORD CHANCELLOR.—In this case, Lorenzo and Ellen Dundas seek relief as creditors of a person named Robert Blake, and their bill is filed to establish the trusts of his will against his heir-at-

* See case reported 6 I. E. R. p. 100, and 353.

law, Peter Blake, and others, and prays an account in respect of a mortgage and two judgments vested in the plaintiffs. The mortgage bears date the 25th day of May, 1796, with which one of the judgments is collateral; and the second judgment is of Trinity Term, 1808. It appears that in the year 1796, Stephen Blake, the brother of Robert, being seized in fee of the lands of Cloncum, mortgaged same to Joseph Callinan for the sum of £1,000; and on that occasion two bonds were passed—one by Stephen, the mortgagor, and the other by Robert, whose will this suit seeks to establish—on which judgments were entered in Trinity Term, 1796. In the year 1833, the judgment against Robert was redocketed; with respect to the judgment against Stephen, and the mortgage; no claim is now made on them, and the Statute of Limitations is conceded to be a bar to both. The judgment against Robert was given as collateral security to the mortgage, and that is the first security upon which the plaintiff's claim is rested. The second judgment is of Trinity Term, 1808, not against Robert, but against Stephen; and that claim is rested on the ground, that Robert having succeeded to the real estates of Stephen, which were real assets, Robert is liable to the extent of those real assets. That, I think, is the position of the parties. The defendants are of two classes—those persons deriving under the will of Robert Blake and those claiming by a title adverse to that will. As I before said, it is admitted that the mortgage of 1796 is barred by the 40th section of the 3 & 4 Wm. 4, c. 27; and by the effect of the Redocketing Act the judgment against Stephen is also barred; and the case upon the judgment which was redocketed, in 1833, against Robert, is not rested upon that, but the plaintiffs claim relief solely under the trusts of his will, when that will was made, and at the time of his death, it being a subsisting demand. And as to the judgment of 1808, no relief *ex directo* is claimed; but it is alleged that Robert was a debtor to the real estate of Stephen. The defendants are the persons claiming the estate under the devise in the will. Mrs. Jane Blake, the tenant for life, is now dead, and so is her son, Stephen—his children are entitled in remainder, and form one class of defendants. The other principal defendant, Peter Blake, is in a peculiar position: he is the heir-at-law of G. E. Blake, who was heir-at-law of Stephen and Robert, and claims by the title of adverse possession. He has shewn an actual entry by his father, G. E. Blake, upon the death of Robert, nearly thirty years ago; and if his rights be well founded, they will exclude the plaintiffs' claim. An important question also arises between Peter Blake and the other defendants. The plaintiffs have relied on certain proceedings by creditors of Robert as taking the possession from G. E. Blake, and thus preventing the effect of the statute. Without expressing any opinion upon that, the important question now is, whether, upon a bill filed in 1846, the plaintiffs can sustain their claim, even supposing the devisees under the will to have remained in possession since 1819. [His lordship here read the will.] It is argued that by this will the debts of Robert Blake are charged upon his real estate, and no doubt

they are so. It is also argued, that a trust is cast upon the devisees, and that they have become trustees for the payment of the debts—that such trusts do not come within the 40th section of the Statute of Limitations, or, the case being that of trustee and *cestui que trust*, are within the saving contained in the 25th section of the same statute. Although not many cases have been decided upon the effect of a trust in a will since the passing of the act, the decisions have given rise to some difficulty. *Prima facie* the case comes within the simple words of the 40th section, which applies to all sums of money charged on lands where a present right to receive same accrued more than twenty years before to a person capable of giving a discharge; and *prima facie* this demand is not within the 25th section; this not being a demand for land or rent, or what can be regarded as land or rent. It would thus seem to come within the plain words of the 40th section, if no case had been decided on the point. The plaintiffs, however, insist that they are entitled to recover on this ground, that the charge in the will creates a trust, and therefore the claim is not within the operation of the 40th section, or is within the saving of the 25th—that by the established operation of the doctrine of trusts, this demand is to be considered as one which no lapse of time can affect, and which cannot be barred by the statute. In considering this question, I think the decisions which would seem to shew that such a demand as the present would not be barred by the old Statute of Limitations, have little or no application to the question which now arises. The 40th section of the late statute contains no exception in favour of such a claim; on the contrary, it would seem to be framed for the purpose of discouraging stale demands, and to relieve the possessors of land from them. I see nothing in the words of the act, nor in its policy, which excepts this claim from its operation. It remains, therefore, to be considered how far, upon the authority of the decided cases, this demand can be sustained; and upon this part of the case, I am relieved from a great deal of embarrassment by the recent judgment of the Court of Exchequer in the case of *Hunt v. Bateman*; and I think, from the expressions used by the learned judges, I am warranted in saying that if the present case was before them, they would have considered the plaintiffs' demand to have been barred. In that case, there was a trust for payment of the debts of the testator, who devised to trustees for the purpose of their payment, and the court held that the trustees took the estate for that purpose, and stood between the estate and the creditors. The Chief Baron says in his judgment, in page 366, "the question involves two considerations; first, whether when money is secured upon land by means of an express trust for its payment, the Statute of Limitations bars the claim to the money so long as the trust is subsisting; secondly, whether in this case such a trust was created by the will, &c., in favour of the creditors, and if so, whether that trust was subsisting at the time of the sale by which this fund was realized." The Chief Baron then proceeds to consider whether the trust for raising money was, or not, within the 25th sec-

tion; but he considers that question closed by authority, and that the statute did not apply where the relation of trustee, and *cestui que trust*, existed between the owner of the estate and the owner of the charge. He then says the next question is, whether, between the person entitled to the debt and the person representing the estate devised, the relation of trustee and *cestui que trust* subsisted; and, after considering the whole context of the will, he says, "I think it is quite clear the trustees took the legal estate in the lands," and that the case was not affected by the decisions in *Hughes v. Kelly*, *Harrison v. Duigenan*, and *Francis v. Grover*; and, in the conclusion of his judgment, he says, "it may be well to add, that we concur in the decisions of *Harrison v. Duigenan*, *Hughes v. Kelly*, and *Francis v. Grover*, ruling that a charge and a devise to a person for his own benefit, subject to that charge, is not enough, without more, to create a trust which prevents the bar of the Statute of Limitations; and our judgment in this case involves no assent to the proposition, that if the right of the trustee to the estate devised to him, in trust, were barred by the Statute of Limitations, the *cestui que trust* of the charge could successfully rely upon the trust for the purpose of recovering it out of the lands." Baron Pennefather, in his judgment, (page 380) says, "The principle which appears to me to be extracted from the cases seems to be this, that charges upon lands in the hands of the beneficial owner of the estate, are not within the meaning of the exception in that statute." And in another part of his judgment he says, "It is quite a different case if the legal estate is not vested in a trustee." These two judgments are express declarations on the point in question, that a mere charge on an estate in the hands of the beneficial owner, would not constitute a trust. In all the cases in England, and before Sir E. Sugden, in which it was held that the demand was not barred, there were trustees appointed, and the estate of the trustees was not barred, as in *Young v. Lord Waterpark*, *Blair v. Nugent*, and *Commissioners of Charitable Donations v. Wybrants*. It may be said of the case of *Hunt v. Bateman*, that the opinions expressed by the judges were upon the words of the will, and should not be considered as an authority, unless in similar cases. I shall now, therefore, consider the other authorities upon the point. The opinion thrown out by the Vice-Chancellor in the case of *Lord St. John v. Boughton* (9 Sim. p. 223), would have been a strong authority against the plaintiffs, but that it was decided on other grounds. There was an acknowledgment to take the case out of the statute. The first case in Ireland after the statute was *Kelly v. Kelly* (6 L. Rec. N. S.), in which there was also an acknowledgment, but there, no doubt, Sir M. O'Loughlen seems to be of a different opinion from the Vice-Chancellor in *Lord St. John v. Boughton*, and states as the grounds of his decision that the trust took the case out of the operation of the statute, and rests his judgment upon the decisions in *Scott v. Scott*, and *Phillippo v. Munnings*; the former of which was afterwards reversed by the House of Lords. The case of *Dillon v. Cruise* (3 I. E. R. 70) was also much relied on by the

plaintiffs, and the general proposition as stated in the marginal note, would seem to sustain their view. But, on examining that case, it should be borne in mind, that the devise of the property was subject to the payment of the testator's debts, which he directed to be paid in the first instance, and the devisees were not, therefore, to take anything till that direction was performed; and Lord Plunket (in page 79) rests his judgment on that circumstance. There, also, the property was under the jurisdiction of the court; a receiver had been appointed, and the question arose as to a surplus which was then in court. In the case of *Kear v. Kelly* (6 I. E. Rep.), which was that of a legacy charged on land, the Master of the Rolls (the present Lord Chief Justice) entertained no little doubt of the authority of the decisions in *Kelly v. Kelly* and *Dillon v. Cruise*, and certainly did not consider the question settled by the opinions expressed in those cases. It is impossible to read his able and convincing judgment without arriving at the conclusion that it was impossible, against the strong words of the statute, to hold that the demand was not barred. After a review of all the cases, I do not consider that a devise, subject to the payment of debts will constitute the devisee a trustee. In *Harrison v. Duigenan*, it was held that it would not; also in *Hughes v. Kelly*, and in *Francis v. Grover*. In *Harrison v. Duigenan* (2 Dr. & W.) Sir E. Sugden says, "On the part of the plaintiffs, it is argued, that the effect of the deed of conveyance of 1831 was to create a trust in favour of Bryan Kyne. I am clearly of opinion there was no trust created; there was an obligation imposed on the purchaser which this court would enforce." In *Hughes v. Kelly* (3 Dr. & War. 489), he says, "there was an obligation imposed, but no trust created." There was no relation of trustee and *cestui que trust* to take the case out of the operation of the statute; and in *Francis v. Grover* (5 Hare, 39), where the question arose on a will which charged the annuity expressly on land, and not, as here, by implication, it was held that the devisee was not a trustee within the 25th section, or otherwise; and in page 49 the Vice-Chancellor says, "I have no doubt as to the construction of the 42nd section of the act. The present case is one of land devised to a person, not upon trust, but subject to, and chargeable with, an annuity; and the question is, whether the beneficial owner of an estate charged with payment of an annuity, under a will, is a direct trustee"—"but this is a devise of land to a person beneficially, subject to a charge;" and he concludes by saying, "neither upon principle nor authority can this be considered an express trust within the act." Unless there is some distinction between a general charge of debts and a charge of a specific sum, the case of *Francis v. Grover* would rule the present case. So in the case of *Gough v. Andrews* (1 Coll. C. C. p. 69), where there was a pre-existing charge on certain lands, and a subsequent devise of those lands and other real estate, "subject to the payment of the testator's just debts, funeral and testamentary expenses," it was held that the words of the will were only a recognition of the debt, but did not create a charge on the other lands in favour of it; and is

those cases where Courts of Equity have given effect to charges for payment of debts, as in *Ball and Harris* (4 My. & Cr. 267), and *Bailey v. Ekins* (7 Ves. 322), they constitute themselves trustees to carry out the intention of the testator. What is done, is done in aid, not in consequence of the will—the court carries out the object of the testator—but does not create the charge; and entirely in accordance with this view, are the observations of Baron Leffroy in *Hunt v. Bateman* (p. 383)—“In my opinion, the fact of charging a sum of money upon land, neither creates an express trust within the meaning of this act, nor, if it did, would a bill to raise it come within the provisions of the 25th section, respecting express trusts;” and he cites the opinion of Lord Eldon in *Bailey v. Ekins*, where he says, “I am confident that Lord Thurlow’s opinion was, that a charge is a devise of the estate in substance and effect, *pro tanto*, upon trust to pay the debts,”—and, “a mere charge is no legal interest,”—“it is that declaration of intention on which a Court of Equity will fasten.” And Sir E. Sugden, in 3 Vend. & P. 160, says, “In the case of a charge, the trust arises by construction of Equity, whereas in the case of a conveyance or devise, it is produced by the express declaration of the party.” In the *Commissioners of Charitable Donations v. Wybrants* (2 Ion. & L. 191), he observes, “in the case of the *Attorney-General v. Peress*, I did not decide that if an estate be devised to A., subject to an annuity to B., A. is a trustee for B.,” and, in the latter part of his judgment, he says, “It is not a case in which the annuities were given to trustees for the charities, and the estate itself, subject to the annuities, was given to others beneficially. If that case should arise, it would be more difficult to relieve.” I cannot find any satisfactory authority to shew that a devise to a party beneficially, subject to the payment of debts, creates the relation of trustee and *cestui que trust* between the parties, so as to take the case out of the operation of the statute; even in the case where there is a trust under the 25th section, it may be found that the Court of Exchequer may have considered that more settled than it in reality is. The argument that the statute does not apply where there is a trust, goes too far; for thus, in no case of trust can a debt be barred. Being of opinion that this debt is barred by the operation of the statute, it is unnecessary for me to give any opinion as to the admissibility of the evidence tendered to prove the debt as subsisting in 1811, or on the case of adverse possession made by the heir-at-law, against whom I dismiss the bill with costs, but, in consequence of the conflict of authorities, without costs as against the devisees.

TANGNEY v. HOLMES, GOOD v. HOLMES, HACKETT v. HOLMES, O’KEEFE v. HOLMES—Jan. 27.

Several Suits—Staying Proceedings—Costs of Defendants—Liability of Plaintiff to.

Where there are several creditors’ suits, and proceedings in that which was first instituted are stayed, liberty being given to the plaintiff to go in under the decree obtained in a subsequent one and prove his demand, including his costs properly

and necessarily incurred, and the costs of the defendants properly and necessarily made parties in his suit, and to which he would be liable, the plaintiff is personally liable, under this order, to pay the costs of such defendants, who are not obliged to wait until funds are realized in the cause that continues.

This was an appeal from an order of the Master of the Rolls (*ante*, p. 78). Four different creditors’ suits having been instituted in the order in which they appear above, and a decree having been made in the fourth cause, by order of the 23rd of June, 1848, it was ordered, that all further proceedings in the other three causes should be stayed, upon the terms of the plaintiffs in those causes respectively, being at liberty to come in and prove, under the decree in the cause retained, for the amount of their respective demands, together with their costs properly and necessarily incurred, and the costs of the several defendants in the three other causes respectively, properly and necessarily made parties in those causes respectively, and to which the plaintiffs in those causes respectively would be liable. Menus O’Keefe, a defendant in the cause of *Tangney v. Holmes*, afterwards applied to the plaintiff, Tangney, for the payment of his taxed costs in that suit, who refused to pay them, contending that he was not personally liable for them under the order of the 23rd of June, and that the defendant must wait until a fund was realised under the decree in the cause that proceeded. O’Keefe thereupon applied to the Master of the Rolls for an order for payment of these costs, and on the 12th December, 1848, the Master of the Rolls made an order for their payment within a week, deciding that the plaintiff was personally liable.

Francis Fitzgerald, Q.C., for the plaintiff.—The order appealed from is founded on two decisions, *Croker v. Copley* (2 Moll. 469), and *Loftie v. Forbes* (2 Ir. Eq. 443), decided on the authority of the first case. But there was this important difference between that case and the present; there, one cause was in the Exchequer and the other in Chancery—here they are both in Chancery; and the Master of the Rolls, in *Croker v. Copley*, gave his judgment on the ground that the defendant had no remedy for his costs in the Court of Exchequer, where the suit was retained, and that consequently, unless the plaintiff paid them, they would be lost; and the whole of the judgment shews how much he felt the stringency of the rule he was pronouncing. There is also this other difference, that there the suit stayed was the second suit, here it is the first. In *Croker v. Copley* the suit stayed was also the second one. The Master of the Rolls, in that case, says, “Every suitor who comes here for relief, necessarily makes himself liable to the rules and practices of the court. One of the rules is, that where two suits are instituted, and a decree has been pronounced in one of them, under which the plaintiff in the other can have effectual relief, the court will stay the proceedings in the second cause, and oblige the plaintiff to prove his demand under the decree in the first.” Until *Croker v. Copley*, no case decided that the plaintiff in a stayed suit should be liable, personally, to pay the

costs of defendants. Is it possible to sustain the proposition, that though a suit is stayed without the default of the plaintiff, whatever may be the priority of a defendant, and whether the fund be deficient or not, you should give him the first payment out of the fund. There is no authority in the Court of Exchequer here, or in England, for this order. In *Crofts v. Poe* (3 Ir. Eq. 151), the decree ordered a defendant to have his costs against the plaintiff, and the plaintiff to have them over against the fund; and it was held that the costs were given against the plaintiff only as an ultimate security, and that they were not to be enforced against him, unless it appeared that there were no funds in the cause applicable to their payment, or that the plaintiff was guilty of laches in prosecuting his suit. Suppose the order of the 23rd of June had been in the form of that in *Crofts v. Poe*, the effect would have been that the relief against the plaintiff would have been secondary, and not primary. If the practice of the Court was to make the plaintiff liable in the first instance, why was not the order of June in that form, and what was the necessity of having a second motion involving additional costs? Where is the jurisdiction of this court to award costs before the final hearing and disposal of the case? I admit it may be done by way of punishment, where there has been any misconduct on the part of the plaintiff; but here the plaintiff is in no default: the suit was stayed against his will, and it is sufficiently plain that in the ordinary course the defendant, to get his costs, must have waited for a decree in the stayed suit, and if *Crofts v. Poe* be an authority, he must have waited further till the fund was realised. *Hall v. Hill* (5 Ir. Eq. R.) is an authority to the same effect. (Lord Chancellor.—I am informed the practice is, that in the ordinary decree where the plaintiff is ordered to pay a defendant's costs, and to have them over against the fund, the plaintiff pays them at once. Has the court jurisdiction to dispose of the costs of a suit in this manner on summary motion?)

Gibbon and Chatterton for the defendant, O'Keefe, who obtained the order.—Where a plaintiff files his bill before he is entitled to do so, he must take the consequences. Here the bill was filed immediately after the death of the debtor, before probate was taken out, and while there was no personal representative; and the consequence of his precipitation is, that his suit was properly stayed by another person who had obtained a prior decree. It is admitted on the other side that all the authorities are in our favour, and the only difference between *Croker v. Copley*, and *Loftis v. Forbes*, and the present is, that in our case the suit stayed is the first cause, in these cases they were subsequent. But that is disposed of by the case of *Hill v. Averell*, (6 L. R. N. S. 21.) On principle, independently of authority, this order should be sustained. The defendant looks for his costs of suit to his own plaintiff, who is liable to pay them, if the defendant has been improperly made a party. And, if the plaintiff fails to go on, the defendant has a right to dismiss the bill for want of prosecution; but, when a suit is stayed, he cannot do

so, if the costs are paid by the plaintiff. In *Croker v. Copley* the bill was not stayed for the plaintiff's own benefit. As to the question of hardship, the balance is in favour of the defendant. The plaintiff comes in voluntarily, the defendant involuntarily. The order is to pay these costs, which the plaintiff is properly liable to pay. If the defendant is improperly made a party, and he was obliged to wait till the plaintiff files his charge, if there is no fund to pay it, the defendant would lose his costs. (Lord Chancellor.—How does the order provide for the costs of incumbrances which are not properly payable by the plaintiff.) They are not provided for by the order. Another hardship is, that the defendant cannot file a charge except through the medium of the plaintiff in the stayed suit. (Lord Chancellor.—The next question is, in what right the defendant is entitled.) He is either a mere party on account of title, and the plaintiff must in that case pay him his costs, and have them over, or he is the heir at law of a prior mortgagee, whose costs must be paid by the plaintiff, as he will be obliged to redeem him. Unless the plaintiff is personally liable, the defendant may never get these costs, although they may be all paid to the plaintiff. In a creditor's suit, the plaintiff does not get his costs unless the fund reaches his demand. *Gray v. Crawford*, (1 Ir. Eq. 274).

McO'Boy replied.

LORD CHANCELLOR.—I am of opinion that this order should be affirmed. I think the proper way to consider this petition is to look at what is the position of the defendant here, whose costs are in question, and what would have been his rights as to these costs, if the cause that was stayed came to a hearing. It is plain that the order would have been that these costs should be paid by the plaintiff, who would have them over against the fund; or the plaintiff, being entitled to redeem the defendant, and failing to do so, he would have been bound to pay these costs without having them over. That is the position of the parties if the cause had come to a hearing. Then the staying order in this case is the same in effect as if both causes had come to a hearing, and as if an order had been made in one cause staying the proceedings, in the other giving the parties in the stayed suit all the advantages which they would have had if the stayed cause had gone on. The order gives the plaintiff a right to prove his demand in the cause that proceeds. It also gives him the power to add to his demand the costs of all defendants properly made parties, and to which he is liable. It stops short of an actual order on the plaintiff to pay these costs; but the manifest intent of the order is, that the plaintiff is to pay them, and to have them over. There is no mode of giving this defendant a right to costs out of the estate. I do not look upon that order simply as a staying order, but as substantially a decree in the stayed suit. The plaintiff then gains a decree precisely on the same terms as if his own cause went to a hearing. He is, in fact, in a better position than if that suit went on, for he gains an earlier decree, and is saved from the payment of the defendant's subsequent costs; and if he is at all injured, he has

himself to blame for not prosecuting his own suit with diligence. On examination, it is not difficult to come to a proper conclusion in this case. It is only seeking, on motion, the same decree that would eventually be made; and I think this order is right in point of form, and according to practice. I think it is a just order, and one that confers no hardship on the plaintiff.

Order affirmed.

ROLLS COURT.

SHERLOCK v. DISNEY.—Dec. 22, 1848.

Demurrer—Amendment—Costs.

A demurrer not having been set down for argument within the time limited, was allowed, pursuant to the 64th General Order; plaintiff moved for liberty to amend and serve new subpoenas against the demurring defendants. This motion was refused, the costs of the demurrer not having been paid.

The bill in this case was filed on the 21st of April, 1847, and on the 20th of July was amended on the file, by stating new matter, and by making J. D. Oliver, T. Disney, jun., R. C. D. Oliver, and R. A. Disney parties thereto. Notice of this amendment was served on R. A. Disney, as solicitor for the new parties, who appeared for them, and was furnished by plaintiff's solicitor with a copy of the bill which purported to contain the amendment, but, by some mistake, was incorrect. To this bill the new defendants demurred, for want of equity, and the same not having been set down for argument within the usual time, the bill was dismissed with costs as against them, under the 64th General Order. These costs were duly taxed, but were not paid when the present motion came on to be heard.

F. Fitzgerald, Q.C., on the part of the plaintiff, now moved that the bill, as then standing upon the file, might be considered as an amended bill, so far as same related to a statement of a certain deed of mortgage of the 15th of January, 1842, between P. Disney, sen., J. D. Oliver, R. C. D. Oliver, T. Disney, jun., and R. A. Disney, and that J. D. Oliver, R. C. D. Oliver, T. Disney, jun., and R. A. Disney might be considered as parties to the suit, and might answer said bill within the usual time, and that subpoenas to appear and answer might issue against them; and relied on *Matthews v. Chichester* (11 Jur. 49); *Coningsby v. Jekyll* (2 P. W. 300); *Lloyd v. Loaring* (6 Ves. 773); *Baker v. Mellish* (11 Ves. 72; 1 Danl. C. P. 552); *Watkins v. Bush* (2 Dick. 701); *Jackson v. Pownall* (16 Ves. 204); *Hannam v. S. L. Waterworks Co.* (2 Mer. 63).

Hughes, Q.C., contra, cited *Mathews v. Chichester* (11 Jur. 49); *Davies v. Davies*, (10 L. E. R. 614); *Knight v. Majoribank* (14 Sim. 198).

Mr. R. Warren, same side.—Mitford, 14, 315; *Barry and Keogh*, 204; *Smith v. Barnes* (1 Dick 67); *Watkins v. Bush* (2 Dick 701); *Attorney-General v. Poole* (2 Keene, 209); *Lataur v. Holcombe* (11 Sim. 71).

Fitzgerald, Q.C., in reply.

Jan. 15.—MASTER OF THE ROLLS.—This case is somewhat similar to that of *Hornebrooke v. Ware*.* A demurrer, not having been set down for argument within the time prescribed, was allowed by the 64th General Order. The plaintiff applies for liberty to amend and serve new subpoenas against the demurring defendants. I understand that costs have not been incurred by the other defendants; but, without entering on this, I will refuse this motion, for this reason—the costs of the demurrer were not paid when the motion was moved, and I consider it was an attempt to evade the payment of them. I wish it to be understood, that it is not to be considered as a general rule, or a matter of course, that after a bill is dismissed for want of prosecution, or a demurrer is not set down for argument in time, I will allow the bill to be amended. Before I make an order of this nature, I must be satisfied of the justice of the case. However, I do not consider this such an order as will prevent the plaintiff, after payment of these costs, from again applying to the court.

Refuse the motion with £5 costs.

QUEEN'S BENCH.—HILARY TERM, 1849.

LESSEE READE v. KENNEDY.—Jan 13.

Ejectment—Notice to Quit—Infant—Guardian next Friend.

A notice to quit was given by the mother of the lessor of the plaintiff, who was an infant, describing herself as his guardian and next friend. She was neither a guardian appointed by the Court of Chancery, nor a testamentary one. Held, that the infant could not give authority to her to act on his behalf, and therefore that the notice was insufficient to determine the tenancy.

Ejectment on the title for the lands of Rosduffe, in the county of Waterford. Plea—Not guilty. At the trial before Richards, B., at the Summer Assizes for the county of Waterford, 1848, it appeared that the lessor of the plaintiff was an infant, and resided with his mother, who received his rents and managed his estates. A notice to quit was then given in evidence, which was signed by the mother of the infant, and in which she described herself as his guardian and next friend. The learned judge thought this notice was insufficient, and non-suited the plaintiff, the defendant consenting that a verdict should be entered for the plaintiff if the court above should be of opinion that the notice to quit was properly signed.

A conditional order having been obtained in Michaelmas Term, 1848, to enter a verdict for the plaintiff,

Harris (with him *Lynch*) now shewed cause.—The mother of the plaintiff was neither a testamentary guardian nor appointed by the Court of Chancery, she can therefore only be considered as his natural guardian; and it never has been held that a person filling that situation had authority to determine tenancies.

George and Wall, contra.—The proceedings in this case having been taken by the mother, for the

* Reported ante p. 117.

benefit of the infant and on his behalf, the court will support her acts, *Long v. Myles* (Fox & Sm. 1); *Duncan v. Couch* (1 Ir. Cir. Rep. 573). (*Blackburne, C. J.*—I do not think it is for the benefit of the minor that any one should act for him without legal authority.) There was a demise in the name of the lessor of the plaintiff, and another in the name of his mother, as his guardian and next friend. A notice to quit may be given by the Receiver appointed by the Court of Chancery, *Doe v. Reade* (12 East. 57); also by the steward of a corporation, *Roe v. Pierce* (2 Campb. 96). There was evidence in this case from which the jury might have inferred that the mother had an implied authority from her son to act on his behalf, and that question ought to have been submitted to them, *Doe and Maine v. Walters* (10 B. & C. 626). (*Moore, J.*—An authority may be implied to have been given by a person who had power to give authority, but a minor cannot authorize another to serve a notice for him.) (*Blackburne, C. J.*—It is the province of the Judge to see that there is some specific evidence which would enable the jury to form an opinion upon the subject.) The defendant has adopted the acts of the mother, by having paid rent to the agent appointed by her.

Lynch, in reply, was not called on.

BLACKBURNE, C. J.—We think there was no evidence in this case to go to the jury of any authority in the mother to act on behalf of the minor. She was neither a guardian appointed by the Court of Chancery nor a testamentary one. We must, therefore, regard her as a mere stranger; and I cannot conceive anything more injurious to the tenantry, and to the proprietor of an estate, than that a person should undertake the management of it without being legally authorized.

MOORE, J., concurred.*

Cause allowed.

O'DONNELL v. WATERFORD AND LIMERICK RAILWAY COMPANY.—Jan. 29.

Mandamus—Railway Company—Costs.

Where plaintiff obtained a mandamus to compel a railway company to issue their warrant to a sheriff, to summon a jury, to assess the amount of compensation to which he was entitled; and the jury afterwards awarded him a less sum than the company had previously offered. Held that he was not entitled to the costs of the mandamus.

This was an application on the part of the plaintiff, that the defendants might be directed to pay the costs of a mandamus which had issued to compel them to summon a jury to assess the amount of compensation to which the plaintiff was entitled for a portion of his land which was purchased by the company.

Meagher for the motion.

Lawson, contra.—The plaintiff demanded £1,000 for his interest; the company offered him £650, and the jury assessed the value at only £500. The result of the proceedings, therefore, being unfavourable to the plaintiff, he is not entitled to have the costs of the mandamus.

Meagher, in reply.—The company were called

on by notice to issue their warrant, and, having refused to do so, it became necessary to apply for the mandamus to compel them.

PER CURIAM.—The merits are entirely with the company; the plaintiff asked for more than he was entitled to, and ought not now to get the costs of the mandamus.

Motion refused.

EXCHEQUER OF PLEAS.—HILARY TERM.

KINNEARS v. EVANS.—Jan. 31.

Plaintiff allowed to amend his bill of particulars after an abortive trial, on terms.

Sir C. O'Loughlin moved, in this cause, that the plaintiff be allowed to amend his bill of particulars, by the insertion of an additional item of £22, which had been omitted by the mistake of the Dublin agent of the attorney for the plaintiff. The declaration had been filed in Trinity Term, and a bill of particulars, containing one item, had been furnished. Plea—the general issue. The cause went down for trial to the last Cork Summer Assizes, when the jury disagreed.

Joseph H. Reeves, for the defendant, resisted the motion, on the ground that costs already incurred by the abortive trial would be costs in the cause—that they ought to abide the result of the plaintiff's succeeding on the original item only, but that if the new item were introduced, the plaintiff might possibly recover that, and be defeated upon the original one, in which case he would obtain those costs, although he was defeated on what was the subject matter of the former trial.

PER CURIAM.—Let the plaintiff be at liberty to amend his bill of particulars as desired, upon the terms of said defendant's being at liberty to plead anew, if so advised, filing his plea within ten days from the date hereof, and being at liberty to lodge money in court, as of the day subsequent to the filing of the declaration in this cause, and if the said plaintiff shall, upon the trial of the issue in this cause, obtain a verdict only for the cause of action hereby introduced into the said bill of particulars, that he shall not have any costs of the former trial; but, in that case, the said defendant shall be taxed and allowed his costs of said former trial without further motion, and said plaintiff to pay the costs of this motion to defendant.

DOE v. O'BRIEN.

Practice—Service of Ejectment on Married Women.

If a party treats a married woman as a feme sole, by serving her with an ejectment, the court will not set aside a defence taken by her accordingly.

Saunders moved to set aside a defence which had been taken by one of the parties served with the ejectment, on the ground of her husband being alive. The affidavit on which he rested his application stated that the husband of the defendant emigrated some time previously to America, and was alive, according to information recently received.

PROCTOR, C. B.—Having treated her as a *feme sole*, by serving her with a copy of the ejectment, you cannot prevent her from taking defence.

No rule on the motion.

* Crampton and Perrin, J. J., were absent.

ROLLS COURT.

M'ALPINE v. ST. GEORGE.—Dec. 21.

Attachment—Third Party—Rents.

When an order has been made for the appointment of a receiver, an attachment will be granted against a third party, who, before service of the order on the tenants, interferes with the rents, when he has notice of the order for the appointment of the receiver.

This was a motion for an injunction to restrain Alexander Graydon from negotiating, or suing upon certain bills of exchange obtained by T. H. Graydon from the tenants of the defendant, and for an attachment against the said A. Graydon, for his contempt of a certain order pronounced by the Lord Chancellor, on the 9th of September, 1848, whereby the said Thomas H. Graydon was directed to furnish to the receiver in this cause a schedule of the particulars connected with the said bills. Thomas H. Graydon, who had been the agent of the defendant, took bills of exchange and promissory notes from the tenants, for arrears of rent. The affidavit of the receiver stated that he believed those securities were obtained after the order appointing the receiver was made—that the order of reference was made on the 16th of February, 1848, and the receiver appointed on the 24th of March following. On the 26th April, an order was made directing the defendant to furnish a rental, which was furnished on the 31st of May, and shewed an arrear of £606 19s. 11d., up to the 1st November, 1847—that on going to the lands, he was informed by the tenants that they had given bills of exchange or promissory notes, dated March, 1848, either to the defendant, St. George, or to T. H. Graydon—that the said securities were obtained by Graydon with the privity of St. George, and as his agent, and that there was an agreement with the tenants that they were not to be called on for the amount of the said bills—that the receiver, on inquiry from the tenants, ascertained that bills were passed to T. H. Graydon for £1,000, which included the arrears of £606 returned on the rental—that the securities were passed by Graydon to other parties to recover the amount, and that Graydon was aware of the order of 16th February, 1848, when he obtained these securities from the tenants.

The affidavit of A. H. Graydon stated, that he had obtained these bills *bonâ fide*, and that they were indorsed to him, previous to their maturity, by Thomas H. Graydon, who was indebted to him in a sum of £1,000, advanced by said Alexander H. Graydon to his father, for the purpose of paying a bond for that amount which was passed by his father to Mr. Billing, the solicitor for said Thomas H. Graydon—that the proceedings to recover the amount of these securities by civil bill at the Quarter Sessions, in the name of Thomas H. Graydon, was without his consent or privity.

Hughes, Q.C., for the motion.—In no part of the affidavit of A. Graydon does he deny his knowledge of the appointment of the receiver, and that the bills were received from the tenants of the court. On the petition motion before the Chancellor, T. H. Graydon was the admitted holder

of those bills, and his solicitor then attended; there was then no allegation that A. H. Graydon was the holder of the bills, and this motion was on the 8th of September, three months after their maturity. If the court have not jurisdiction in this case, there is an end to the protection to which tenants of the estates under its control are entitled; but it has never been doubted that this court has jurisdiction to attach any party who interferes with tenants after the appointment of a receiver.

F. Fitzgerald, Q.C., appeared for the plaintiff in the cause.

Radcliffe, Q.C., contra, denied the jurisdiction of the court to interfere with the rights of A. H. Graydon. He is a holder for value, and it is sworn that these securities were taken before the order for the appointment of the receiver; and though T. H. Graydon might be bound by that order, A. H. Graydon could not be bound by it, for he swears he was ignorant of these proceedings, and that he paid full value for these securities; but even T. H. Graydon ought to be considered entitled to hold these securities under the circumstances of the case, for he had received them before the order for the appointment of the receiver.

Mr. O'Driscoll in reply.—An executory agreement of the kind which is stated to have existed between the inheritor and Mr. Graydon cannot attach the rents in the hands of the tenants. The rule that rents are not considered to be attached till the service of the order, is one purely for the protection of the tenants, but does not apply to third parties, who, from the moment they are fixed with notice of the appointment of the receiver, cannot interfere with the rents under pain of an attachment. The assertion that the court wants jurisdiction in this case is untenable, for it can attach the tenants for non-payment of their rents to the receivers, and, if so, on what principle is it contended that it cannot reach third parties, whose interference with the rents is a direct contempt of the order of the court. Mr. Graydon cannot be injured by the injunction we seek for; he is clearly incapacitated from recovering the amount of these bills *at law*, inasmuch as they appear to have been indorsed to him after maturity, and the infirmity of title which attached to them in the hands of T. H. Graydon follows them into the hands of Mr. Alex. Graydon, but the court in an instance of this kind will protect the tenants from being forced to the expensive alternative of making separate defences at law.

MASTER OF THE ROLLS.—I allowed this case to stand over for the purpose of giving Mr. Graydon an opportunity of explaining the case made against him; his affidavit has failed in doing so. Although the tenants may, as has been stated, have a good defence at law, I cannot permit them to be harassed by proceedings of that kind. I have no doubt as to my jurisdiction in this case. I find it laid down in Mr. Smith's book, that "the court will attach third parties who interfere with the rents after they are aware of the appointment of the receiver. I shall state upon the face of the order my reasons for granting it.

"And it appearing to the court that Alexander H.

Graydon, Esq., has taken proceedings by civil bill against several of the tenants of the lands over which the receiver in this cause has been appointed for the recovery of several promissory notes passed by said tenants on or after the 6th of March, 1848, for rent, and arrears of rent, due by said tenants on the 1st of November, 1847, and it also appearing that the order of reference for the appointment of the receiver was made on the 15th of February, 1848, before said notes were passed, and that T. H. Graydon had full notice of said order when he took such promissory notes from the tenants, and it further appearing that A. H. Graydon had notice of such order, for the appointment of said receiver, before the said notes were endorsed to him, and had also notice, before such endorsement, of the consideration for which such notes were passed, and has, notwithstanding, served civil bill processes to recover such promissory notes. Let an attachment issue in this cause against said A. H. Graydon for his contempt in interfering with, and disturbing, the possession of the said receiver in this cause, such attachment not to issue till further order; and let A. H. Graydon pay to plaintiffs, and to the receiver, their costs of this motion, when taxed and ascertained, and refer it to one of the Taxing Masters of this court to tax said costs."—Lib. 278, fol. 217.

WYSE v. WATERS.—Jan. 18.

Bill filed by an uncertificated bankrupt to raise the arrears of an annuity, making the assignee a defendant, and charging that the arrears due amounted to £646, that of the creditors who proved under the commission all had signed a composition deed save one, to whom the sum of £180 was due, and also charging specific collusion between the assignee and the debtor. Demurrer by the assignee allowed without costs.

The bill in this case was filed to raise the arrears of an annuity, and stated that in the year 1790 Thomas Wyse married F. M. Bagge, and had issue three sons, Thomas, George, and Francis, the plaintiff. That one Francis Wyse having devised certain lands to Thomas the elder, same were conveyed to the use of P. C. Dalton and J. Scully, their executors, administrators, and assigns for 100 years, upon trust, in case the said F. M. Bagge survived her husband, to pay an annuity of £100 per annum, late Irish currency, for every younger child of the said T. Wyse the elder, for their support and maintenance, during their lives, provided their mother should so long live. That in July, 1835, Thos. Wyse the elder died, leaving Frances, his wife, surviving him, who died on the 28th of October, 1842. That on the 21st of September, 1833, a commission of bankruptcy, on the petition of T. M. Waters, issued against the plaintiff, and said T. M. Waters and R. Greene were appointed assignees of plaintiff's estate. That R. Greene went to reside in America, where he then was. That in January

1842, plaintiff instituted certain proceedings in the Court of Common Pleas against the said T. M. Waters, and that a compromise was entered into, by which the said T. M. Waters and certain other creditors agreed to release all claims against plaintiff, to aid him in superseding the commission of bankruptcy, and execute a release which would permit plaintiff to possess and enjoy any property which he then might have in possession or expectancy, or then vested in his assignees, and in consideration thereof plaintiff agreed to pay a composition of one shilling in the pound, one moiety upon the execution of the release and agreement, and the other at the expiration of twelve months. That on the 8th of June, 1844, an indenture of agreement and release was executed between the parties, by which the assignee and all the creditors of plaintiff who proved their debts under the commission, save one, and some of the creditors who had not proved, released all claims against the plaintiff, and executed a consent that said commission should be superseded. That plaintiff paid to his creditors one moiety of said composition, and executed his promissory notes for payment of the residue, which were duly paid. That only three creditors proved under said commission, and to one of them, being the firm of Powell, Brothers & Co., the sum of £180 was due, which was the only outstanding debt due by plaintiff to any of his creditors who had proved. That T. M. Waters, the assignee, by sale of plaintiff's property, received various sums of money, more than sufficient to pay all the creditors who proved under the commission, including the claim of the said Powell and Co. That the release of the said T. M. Waters from responsibility, on account of such receipts, was one of the considerations which induced him to sign the deed of June, 1844. That after the payment of every debt due and payable by plaintiff under the commission, a large surplus of his estate would legally and properly belong to him; that at the time of his mother's death, in 1842, there was on foot of plaintiff's annuity of £100 Irish, due to the plaintiff, or to his estate, or to his assignee, upwards of £646, which had not been paid by T. Wyse the younger, who, at the death of his father, entered into possession of the lands charged therewith, but which was then due to the plaintiff or to his estate,—or, at all events, to the residue thereof—over and above the sum of £180, which he was willing should be paid to said Powell and Co., plaintiff's sole remaining creditor. Plaintiff claimed as his own property the surplus of £516 and upwards. That plaintiff called upon said T. M. Waters, as his assignee under the commission of bankruptcy, which had not been superseded, to proceed for the recovery of the said sum. That about the 25th of August, 1848, having gone to London to urge the said T. M. Waters to adopt such proceedings, he explained to him the danger of delaying beyond the month of October then next, when the statute of limitations might bar such claim, and plaintiff offered to pay all costs of same, and to secure said T. M. Waters by such valid security as counsel should approve of. That the said T. M. Waters refused to comply with such applications, alleging

that he possessed no possible personal interest in such proceeding, and that being on terms of special intimacy and friendship with the said Thomas Wyse, he would not undertake or aid in any such proceeding, which, on the part of the said T. M. Waters, would appear ungracious and unkind towards the said T. Wyse. That plaintiff solicited said T. M. Waters to institute such proceedings, as his assignee, as would prevent the operation of the statute of limitations, with which he refused to comply, whereupon he served notice in writing requiring him to proceed, and offering to indemnify him, but said T. M. Waters neglected to take such proceedings as were necessary to preserve the rights of plaintiff. That said T. M. Waters was acting in collusion with the said T. Wyse. That plaintiff presented a petition to the Lord Chancellor, who directed that he should be at liberty to surrender to the said commission, and that the commissioner should be at liberty to direct the said T. M. Waters, the assignee, to take proceedings to recover said demand, plaintiff indemnifying said assignee. That on the 24th of October, 1848, plaintiff surrendered to the said commission, and the security to be given to T. M. Waters was measured to £400, for which plaintiff was unable to procure sureties and give the indemnity required. The bill then prayed that the said sum of £646 might be decreed well charged on the lands subject thereto; that T. Wyse might be directed to pay same; that a receiver might be appointed, and that said sum might be paid to plaintiff after deducting therefrom what might appear due to plaintiff's only outstanding creditors, Powell & Co., and for an account. To this bill the defendant, T. M. Waters, demurred for want of equity, and that it appeared said plaintiff was a bankrupt, and that at the time of his becoming a bankrupt, and previously thereto, he was entitled to said annuity, and that said commission of bankruptcy never superseded. That it did not appear that said plaintiff ever obtained a certificate, and that the subject matter of said suit was never divested from said assignees, but was then vested in them.

Mr. Hughes and Mr. C. Leach, for the demurrer. This is a bill by an uncertificated bankrupt, and cannot be sustained. There are but few cases in which a bankrupt can file a bill; he may for discovery, but not for relief, or for his own personal protection, or for the abatement of a nuisance. In *Lowndes v. Taylor*, (1 Mad. 423,) the bill was for a discovery in aid of defence to an action at law. By the 150th section of 6 W. 4, c. 14, a bankrupt is entitled to any surplus which remains after payment in full of all creditors; but in this bill there is no statement that all the creditors have been paid. In *Hammond v. Atwood*, (3 Mad. 158) it was held a bankrupt could not sue. Counsel also referred to *Bailey v. Vincent*, (5 Mad. 48); *Yewens v. Robinson*, (11 Sim. 105); *Tarleton v. Hornby*, (1 Y. & C. Ex. 162); *Benfield v. Solomons*, (9 Ves. 82); *Spragg v. Bink*, (5 Ves. 583; 1 Dan. Ch. Pr. 56; 1 Mit. E. P. 81, note, last ed.); *Heath v. Chadwick*, (2 Phil. 649); *Ferguson v. Livingston*, (9 I. E. R. 212)

Jan. 19.—*Mr. F. Fitzgerald*, and *Mr. Thomas O'Hagan*, in support of the bill.—If there be a

clear surplus, and collusion between the assignee and a third party, this bill can be maintained. In *Hammond v. Atwood* there was a statement that the commission was invalid, and the court could not determine that question; also in *Kelly v. Dowling*, (cited in the note to 2 Moll. 433,) it is stated that *Hammond v. Atwood* had been overruled. In *Bailey v. Vincent*, (5 Mad. 48,) the bill sought to impeach the commission. In *Yewens v. Robinson*, (11 Sim. 101,) the bill was objectionable, as requiring the assignees to account. Counsel also distinguished *Spragg v. Binks*, *Benfield v. Solomons*, *Heath v. Chadwick*, *Latour v. Holcombe*, (8 Sim. 76,) shews that under certain circumstances an uncertificated bankrupt can sue. In *Barton v. Jayne*, (7 Sim. 24,) a charge of collusion was held sufficient to maintain the bill. In *Utterston v. Mair*, (4 B. C. C.) it would appear there was no charge of collusion. *Preston v. Wilson*, (5 Hare 185, S. C. 11 Jur. 201). In the present case there is a clear statement of collusion by the assignee, and that there is a surplus; and, if relief is not granted, there will be a failure of justice. The statement in this bill is, that only three creditors proved under the commission; that two who signed the deed have been paid their compositions, and the sum due to the other is not to be ascertained by an account.

MASTER OF THE ROLLS.—In this case a bill has been filed to raise the arrears of an annuity, amounting to between £600 and £700, which determined on the 6th of October, 1842. On the 28th of October, 1848, this bill was filed, and the demand would seem to be barred by the statute of limitations, unless that objection is got rid of by something which does not as yet appear; however, it is not necessary to consider that point. The question now is, whether a bill filed by an uncertificated bankrupt can be sustained, and it has been admitted that the general rule is against the plaintiff. However, in various cases attempts have been made to take them out of this rule by the statement of particular circumstances, but these cases do not appear to apply to the question before the court, and the latest which have been referred to would seem to be those in which the commission of bankruptcy itself has been impeached, and such bills could not be sustained, for the validity of the commission is to be ascertained by petition to the Lord Chancellor to supersede it, or by action against the assignee. Therefore a bill will not lie to try that question, and those cases were decided on that plain ground. As a general rule, an uncertificated bankrupt cannot take any proceeding against his assignee; for instance, a bill for an account will not lie, for matters of this nature can be investigated in as satisfactory manner by means of the statutable jurisdiction of the Court of Bankruptcy, as in the Court of Chancery, and this jurisdiction is considered to be exclusive, as stated by V. C. Wigram in *Preston v. Wilson*, (5 Hare 185). The effect of the bankrupt law is to exclude the jurisdiction of this court, in cases to which it would otherwise extend. To take cases out of this rule, into some bills the statement has been introduced that there would be a surplus to which the bankrupt would be entitled, and in others the

charge of collusion has been made against the assignee, but the effect of all the decisions taken together would seem to show that if the surplus is to be ascertained by an account, a court of Equity will not interfere; and it is well settled that the refusal of an assignee to sue will not, of itself, give this court jurisdiction. In the case of *Kaye v. Fosbrooke*, (8 Sim.,) both circumstances occurred; there was the allegation of a surplus, and a refusal by the assignee to sue, yet it was held insufficient. As to the case of *Barton v. Jayne*, (in 7 Sim.) referred to as an authority, I do not think I would be justified in acting upon it after the observations by Lord Cottenham in the case of *Heath v. Chadwicks*. He says:—" *Barton v. Jayne*, and the case under appeal are the only decisions I am aware of holding that such bills can be maintained." The authority of *Barton v. Jayne* I consider is much affected, if not overruled by that case. It is plain the fact of there being a surplus is not sufficient, and a refusal to sue will not take the case out of the rule. The present bill, however, is sought to be sustained on the ground that there are distinct charges to shew that there is a surplus ascertained, and also collusion on the part of the assignee, who refuses to sue. The bill also states that Thomas M. Waters (the assignee) being on terms of intimacy and friendship with the said Thos. Wyse would not undertake or aid in any proceeding such as was then proposed to him, and which would appear ungracious and unkind towards the said Thomas Wyse. Thus, there is a statement of an ascertained surplus, and specific collusion. The authorities on this point cannot be considered as well settled until the opinion expressed by Lord Cottenham in the case referred to, and from the great authority of his decisions I cannot easily be induced to decide against any opinion clearly expressed by him. It is to be remarked, however, that there is not a single case referred to by Lord Cottenham in his judgment which has decided this question. In *Kaye v. Fosbrooke* there was no charge of collusion, while in the case before Lord Cottenham there was such a charge, therefore it is not an authority on the point. In *Spragg v. Binkes* (5 Ves.) there was no charge of collusion. In *Hammond v. Atwood*, (3 Mad. 158,) the bill sought to impeach the commission, and could not be sustained on that ground. The most important case upon the subject was that of *Tarleton v. Hornby*, in the Court of Exchequer, and was not alluded to by Lord Cottenham in his judgment. In that case it was decided that an uncertificated bankrupt cannot file a bill for an account, and, if the bill is not maintainable independently of the collusion, such a charge is not sufficient to sustain it. The existence of a surplus, with a statement of collusion, is not sufficient to enable this court to assume jurisdiction, and take the case out of the Bankruptcy Court. It is said, however, that the effect of there being an ascertained surplus distinguishes this case, but I do not think the allegation of a surplus is sufficiently clear to distinguish this case from the one before Lord Cottenham. As to the fact of there being a specific surplus, it appears an arrangement was made by the plaintiff with his creditors who proved, and a composition entered into, save as to one person,

who did not execute the deed, to whom the sum of £130 was due. Now, the bill contains no allegation that there were no other creditors, and, if there were, it is impossible to treat that surplus as ascertained by deducting this sum of £130 from the arrears, to recover which this suit is instituted. I cannot come to the conclusion that this allegation of a surplus, and a friendly feeling of the assignee to T. Wyse, will take this case out of the general rule. With the exception of the case of *Barton v. Jayne*, which must now be considered as almost overruled by the case of *Heath v. Chadwicks*, there is no authority to show that this bill is maintainable, and I do not think I can so decide consistently with the high authority of Lord Cottenham. I will therefore allow this demurrer without costs. In *Preston v. Wilson*, (11 Jur. 201, 5 Hare,) the assignee submitted to act as the court should direct, and the reasonable course in the present case would have been for the assignee to leave the matter to be settled between the plaintiff and the principal defendant, for the assignee has not the slightest personal interest in the matter. The amount of security for using his name has been settled, but the plaintiff is unable to give it, and has been driven to file this bill himself. If this suit had been instituted before *Heath v. Chadwicks*, there would be some ground for holding that the bill was maintainable. In *Kaye v. Fosbrooke* it appears that if collusion had been charged, the bill would have been sustained. The analogy suggested between the case of an executor and of an assignee does not exist; there is a special jurisdiction in the latter case. If an assignee refuse to discharge his duty, the course is not to file a bill against him, as it would be against an executor; the proper course is to apply to the Lord Chancellor sitting in bankruptcy, and obtain an order directing the assignee to sue, upon an offer to indemnify, the very course which has been taken in the present case. If the demand is not barred by the statute of limitations, there will be a sum of £516 to which the plaintiff will be entitled, there being only one debt of £130; and though, for the purpose of this demurrer, I may have considered it probable there may be other creditors, still, with a view to costs, I may reasonably infer there are none. The assignee should have submitted to the court, and not have endeavoured to assist his friend, as appears from the statements in the bill, and, as in the case of *Preston v. Wilson*, (5 Hare) should have submitted to the jurisdiction of the court, and have aided the plaintiff in the recovery of this sum.

Allow this demurrer without costs.

EX PARTE JOHNSON IN THE MATTER OF THE INCUMBERED ESTATES ACT.—Feb. 10.

In this case *Mr. Lawson* moved that the Master, on an undertaking being lodged in his office, might set the house and lands of Donnybrook. A petition had been presented for a sale, and a receiver appointed.

MASTER OF THE ROLLS.—It never was contemplated that proceedings under this act should be delayed; and in this case, it appears, there are only four incumbrances, and there is no reason why

a sale cannot be had immediately. I will, therefore, say, no rule on this motion.

Feb. 12.—Mr. Lawson, on this day, having stated that the rental of the lands amounted to only £400 per annum, and there were incumbrances to the amount of £5,600, besides an annuity affecting them; and that, under those circumstances, it was matter of considerable importance not to press for a sale at present, the depreciation of landed property being so great.

MASTER OF THE ROLLS.—The object of the legislature, in passing this act, was to bring the proceedings to as speedy a conclusion as possible. In this case, however, there may be some reason for not proceeding to a sale, and the present depression in value of property may be sufficient to justify the delay. I will, therefore, make this order.

EQUITY EXCHEQUER.—HILARY TERM.

STAFFORD v. HENRY.

33 Geo. 2, c. 14—*Incidental Trading—Banker.*

A., being a stockbroker and notary public, received money on deposit and paid it out on cheques, like a banker, and in some other respects acted as a banker; he did not, however, hold himself out to the public as a banker, nor did it appear he was generally believed to be one; and in his books the alleged banking accounts were mixed with others, as a stockbroker and trader.

Held, he was not a banker within the provisions of 33 Geo. 2, c. 14, requiring the enrolling and registering of bankers' deeds.

Qu.—Does that act apply to banks not issuing notes?

This was a suit to raise the amount of a mortgage made in the year 1831, by Abel Labertouche. Shortly before the filing of the bill, Labertouche had become bankrupt, and the defendants, as his assignees, were entitled to the equity of redemption. The defendants, in answer to the plaintiff's claim, alleged that Labertouche, at the time of the execution of the mortgage, was a banker within the meaning of the 8 Geo. 1, c. 14, and 33 Geo. 2, c. 14, and that the deed of mortgage, not having been enrolled and registered in the manner required by those statutes (which was admitted), was void as against them, as creditors of Abel Labertouche. The whole question in the cause, therefore, was, whether or not Abel Labertouche, in 1831, was a banker within the meaning of the above acts. The evidence went to shew that Labertouche, at the time of the execution of the deed of mortgage, was a stockbroker and notary public; and it was shewn, to some extent, that he received deposits of money from his customers, which he paid out again to their order—that he occasionally discounted bills—that he also collected them—and that he was engaged extensively in trade. On the production of his books, they appeared to contain entries of transactions similar to those of a banker, mixed, in several instances, with others referring to his other callings as stockbroker and trader.

J. D. Fitzgerald, Q.C., for plaintiff, contended that Labertouche did not come within the scope of

these acts. The 8 Geo. 1, c. 14, is entirely repealed by the 33 Geo. 2, c. 14; but the latter act expressly refers to "such" bankers as came within the former, and that was wholly directed against bankers issuing notes. Moreover, from the 16th section of 33 Geo. 2, c. 14, it would appear as if the legislature contemplated, all through, the issuing of notes by the "bankers" referred to by the acts. The 29 Geo. 2, c. 16, which imposes a penalty on bankers using any other trade, also appears to contemplate bankers issuing notes; but no where has the word "banker" been defined, although there are a good many statutes relating to them. In the old Bankrupt Acts, the word "scrivener" is used along with the word "banker;" and it is agreed that a scrivener was a person receiving a deposit of money, and paying it out on requisition; so that a banker was something different, or it would have been unnecessary to insert the word. It is settled that an army agent is not a banker, although he keeps money to be paid out in cheques. Moreover, it is not sufficient to prove that Labertouche was a banker in the popular sense; he must be shewn to be within the acts; and upon the face of those acts they appear to apply only to bankers issuing notes. His receiving and disbursing money may be referred to his trade as a stockbroker—it is the constant practice of stockbrokers. The case of the army agent is accurately in point. Moreover, on the act 33 Geo. 2, the defendant is not entitled to this defence; for the bankrupt has not been shewn to have failed as a banker, but as a stockbroker. No proceedings have been taken against him as a banker. Besides, this deed is valid, at any rate, against the bankrupt; and his assignees, who stand in his shoes, ought not be suffered to impeach it. (*Pennefather, B.*—Are they not trustees for his other creditors? *Pigot, C.B.*—It has been settled by Sir E. Sugden they are creditors.) They should, at any rate, have filed a cross bill impeaching the deed, and not have indirectly attacked it in this manner. Counsel referred to and commented on *Hayden v. Rivers* (3 Ridg. P. C. 545); *Vincent v. Hackett* (2 Law Rec. O. S. 258); *Faucett v. Hodgins*; *Atkinson v. Hodgins* (3 Ir. Eq. Rep.); *Wilson's case* (1 Atk. 218); *Coote v. O'Reilly* (7 Ir. Eq. 359).

Brewster, Q.C., for defendants—This deed is void against us, and we may make this defence without cross bill. For though this deed may have a *prima facie* validity between the parties, the act declares that, as against us who represent the creditors, it shall, if the party were a banker, be void. It is contended, at the other side, the acts only contemplated bankers who issued notes; but the court will hesitate before it agrees to such a construction. It appears on evidence that this man traded in every way in money. A banker is a person receiving money on deposit and paying it out to order, and discounting bills with it, as this man did. Certainly the 8 Geo. 1, c. 14, appears only to apply to bankers issuing notes; but the terms of the 33 Geo. 2 extend to all bankers; and there is, moreover, a clause in the first section expressly saying that nothing in the first act shall limit or confine the operation of the second—an

express answer to the argument used here. As to the necessity of the question being raised by a creditor of the bank, that is disposed of by Lord Clare's judgment in *Hayden v. Rivers* (3 Ridgway, P. C. 590). The title of 33 Geo. 2, c. 14, shews it was not intended merely to apply to banks of issue. The statutes are remedial, and if there be any doubt, their application should be extended.

Major, Q. C., and *Hamilton Smythe* on the same side.

Hayes and Walsh for plaintiff.

PIGOT, C. B.—In this case of *Stafford v. Henry* two questions have arisen for the consideration of the court—one of them a question of fact, and the other a question of law; the first is, whether, supposing that the provisions of the Bankers' Acts (8 Geo. 1, c. 14, and 33 Geo. 2, c. 14) applied to bankers not issuing notes, the bankrupt, Labertouche, was a banker; and the second is, were those statutes intended to apply to bankers not issuing notes. Of course the second question need not be determined unless the first be affirmatively answered. It appeared, in evidence, that Labertouche was a stockbroker and notary public, and that he collected, and occasionally discounted bills. The collection of bills, of course, must have been part of his business as a notary. It appeared, further, that he received and retained lodgments of money belonging to persons with whom he dealt, and it was asserted on behalf of the defendants, that he did these several acts as a banker, and that he was thereby brought within the scope of the statutes to which I have referred. Now, in my opinion, if these acts were done incidentally to his capacity as a stockbroker, if they did not form the substantial part of his trade, they would not render him liable to the provisions of the Bankers' Acts. Those acts avoid all deeds of conveyance executed by a banker, and not registered within three months, and if it were held, that merely performing occasionally the functions of a banker, without openly and notoriously bearing that character, would constitute a banker, the greatest injustice might arise; for *bona fide* purchasers might be deprived of their estates, by their vendors happening to deal with their customers as a banker deals with his. In the present case, the injustice of such a supposition is very well illustrated. The first witness, whose depositions have been read for the defendant, was Mr. Read. He expressly says, that Labertouche did not, at the time of the execution of the mortgage in the present case, act as a banker, "unless keeping deposits and paying them out on cheques could be considered as doing so," while Labertouche himself distinctly swears he was not a banker at the time at all. So that it is proved, that at this time, neither the trader nor his customer looked upon the former as a banker. How, then, is the party to this deed to be dealt with? Ought he to be deprived of his security for not taking precautions which no one considered necessary? It appears, further, from the accounts of the bankrupt which have been produced, that their subject was principally the business of a stockbroker, and that the moneys, out of which Mr. Read's drafts were to be paid, were principally the proceeds of stock. Now, suppose a party has

£10,000 worth of bills due to him, and desires a notary public to collect them for him, and (the notary, also, happening to be a stockbroker) to invest all but £3,000, which he requires for present use, in the funds; and, stating that he will from time to time, draw on him for portions of the £3,000, requests he will, from time to time, sell out, so as always to have that sum in his hands, and invest any money which the customer may happen to pay in to him beyond that, surely such a transaction will not constitute the notary a banker. A case was cited from 1 Atk. 128 (*Richardson v. Bradshaw*), which, although not a direct authority, (and no direct authority, as far as I can ascertain, exists), still bears, to some extent, upon the case; for, although, upon the issue directed in that case, it appeared that the defendant had received deposits and paid drafts much in the manner of a banker, still the counsel for the plaintiff laid no stress upon that fact at the trial, which plainly implies, that it was not then considered sufficient to make a man a banker. Upon these grounds alone, I should, perhaps, be inclined to hold the evidence in this case insufficient to prove the bankrupt a banker; but there is, further, a class of cases which has had considerable influence on my mind in the decision of this case, in which the question has arisen under the bankrupt laws, how far acts of trading, done incidentally to another pursuit, constitute a man a trader in the way incidentally used. In all those cases, the question has been considered one of degree, and whether the act of trading was, in fact, incidental to another pursuit. In the case of *Warren*, a bankrupt, (2 Sch. and Lef. 422), Lord Redesdale takes the distinction very plainly; and on that point principally his judgment turns. [His lordship read the passages.] In the case of *Adams v. Malkin* (3 Camp.), the same doctrine was laid down and illustrated. [His lordship read from the judgment, p. 540.] So here if what was done was incidental to the bankrupt's calling as a stockbroker, it did not bring him within the scope of the Bankers' Acts; for the question is, whether merely acting as a banker, incidentally to his ordinary occupation, made him a banker? Whether, trading in a manner which, but for the nature of his regular business, would, perhaps, have constituted him a banker, did actually, under the existing circumstances, bring him within the scope of the Bankers' Acts? Upon this view of the case I have referred to, I should say not. I may have had some difficulty at first about this case; but, considering that the plaintiff has proved his case—which is, in every respect, a *bona fide* one—and that the burthen lies on the defendant to answer clearly that case so made, (in doing which, under the circumstances, the court ought to hold him to a strict proof,) I cannot say that I should feel justified here in refusing the plaintiff the relief he seeks. Having come to the conclusion that the acts given in evidence do not at all shew the bankrupt to have been a banker, it becomes unnecessary for me to express an opinion as to the applicability of the act of the 33 Geo. 2 to bankers not issuing notes. Upon that question, if we were obliged to decide it, we might, perhaps, feel considerable difficulty.

PENNEFATHER, B.—The bill in this cause has been filed by the plaintiff, as a mortgagee, claiming under a deed executed by Labertouche in 1831. On the face of that bill the plaintiff appears entitled to the usual decree; but then the defendants say, that the deed is void as against them and the creditors whom they represent, inasmuch as the mortgagor was a banker within the meaning of the 8 Geo. 1, c. 14, and 33 Geo. 2, c. 14, and the deed was not registered pursuant to those statutes. If that defence were made out, I consider that the defendant might rely thereon, without being driven to a cross bill, for such a defence goes to the very foundation of the plaintiff's title. It is insisted, then, that Labertouche was a banker, and subject to the provisions of these acts. It becomes necessary, therefore, to consider not only the evidence produced to us, but the statutes themselves. It appears to me quite clear, that the statute 8 Geo. 1, c. 14, only contemplated as bankers those persons who issued notes, and who, in the language of the statute, kept shop for the purpose of trading as bankers. If the case rested entirely on that statute, it is plain that the bankrupt, Labertouche, would not be within its provisions; but that act is repealed by the 33 Geo. 2, c. 14, and in it are omitted many of the expressions found in the former act, by which means a considerable doubt arises, as to whether the word "bankers" is to be considered confined to parties issuing notes or not. I do not think that we are in this case called upon to decide that question. If any person assumes openly, notoriously, and avowedly, the character of a banker, I should be very reluctant to hold that he was not within the meaning of that act. But still, to bring him within its scope, he ought to have been openly held out to the world as a banker, and a person carrying on that trade; and if no such character was given to him by himself or the public, it would be very dangerous to allow a *bonâ fide* creditor to be despoiled of his security, by an allegation subsequently made, that the party was a banker. In the present case the bankrupt, Labertouche, was not only a stockbroker and notary public, but also an extensive merchant; in which latter capacity he would have been liable to heavy penalties, if he were also a banker. This does not shew that he was not a banker; but it shews that neither by himself nor others was he considered to be one, and therefore, in my opinion, that he was not within the mischief or the meaning of the act. He certainly received and kept money for his customers, and paid it out again to them upon cheques; but that appears to have been done in a manner merely incidental to his business as a stockbroker. I consider this case as very like that of the army agent cited from Atkins; the acts of banking were incidental to his other occupation, and, as has been observed by my Lord Chief Baron, a trade used incidentally does not become a man's calling. In this case, Labertouche himself positively swears he never was a banker; while, on the other side, it is only shewn that he occasionally acted like a banker, and not that he ever held himself out to the public as being one. I, therefore, do not consider that he was a banker

within the meaning of the act. Moreover, nearly every act of his is perfectly reconcilable with, and referable to his calling as a stockbroker; and therefore, in a case where the court should require the defendant strictly to prove his case, I do not think we should be satisfied with the evidence which has been here produced. The defendants themselves are so conscious of the weakness of their case, that they do not even ask for an issue; indeed the court is satisfied without it. On the whole, then, I must say, that it appears to me—and rather clearly—that the plaintiff is entitled to the prayer of his bill.

RICHARDS, B.—I was unable to be in court the first day on which this case was argued, but I heard it very fully debated the second day; and nothing was then brought forward which would render it necessary that I should add anything to the learned judgments that have been pronounced, further than to say that in them I fully agree.

LEFROY, B.—I agree with my three brethren, that the defendant in this case has not made out the defence which he set up; he has not proved enough to annul the solemn act of the parties. The principle referred to with regard to acts of trading done incidentally to another, and that the principal occupation, is well established; that is a very important principle, and bears materially on the case; but everything has been said upon it, and I shall pursue it no further. Now, as regards the Act of Parliament itself, I think it is not desirable, unless we are driven to it, to express an opinion upon the application of that act to other banks than banks of issue; but whatever opinion may be formed on that point, whether the act is to be extended to banks of deposit as well as banks of issue, or not, this much is plain, that it was against the acts of persons notoriously and manifestly acting as bankers that the legislature intended, in this manner, to protect the public. For the words of the 8th of Geo. 1 were, "Where any person shall follow the trade or calling of a banker, by keeping a public shop,"—the words "keeping a public shop" are dropped in the 33 Geo. 2; but it says, [the learned Baron read the preamble of the act,] which clearly shews, it was to this public banking the legislature meant to direct the act. It is clear, that unless a party has held himself out to the public as a banker, and the public has taken him to be one, he does not come within the scope of the act. No one witness here has shewn that either of these facts existed in this man's case. In the words of Gibbs, C. J., "it was not his known occupation," and it would be hard upon him to fix him with a trade which he never intended to carry on. Moreover, all his acts are referable to his other trades, which he could carry on without being a banker. If he were a banker, his pursuing some of those callings was clearly illegal. Why, then, are we to imply, when we can suppose him to be acting legally, that he was pursuing an occupation which made other acts of his illegal? There is no similarity between the accounts produced to us and the accounts of a banker. His books were kept as no banker ever kept them. One thing, indeed, he has done like a banker—he

has had cheques drawn on him; but that was done merely incidentally to his other business, and if we were to hold that sufficient, nearly every private agent would be liable to be brought within the scope of these acts. Therefore, without giving any opinion on the Bankers' Act, I may say, that whether it applies more or less extensively, to banks of issue only, or to banks of deposit also, there has been no case to bring this party within it. I therefore concur in the judgment of my learned brethren, that the plaintiff is entitled to the prayer of his bill.

QUEEN'S BENCH.—HILARY TERM.

HORNER v. WILCOCKS.—Jun. 22.

Practice—Interpleader Act—9 & 10 Vict. c. 64.

Where a party has, by his own act, placed himself in a situation to be sued, he cannot call on the court for relief, under the Interpleader act, 9 & 10 Vict. c. 64.

This was an action of assumpsit brought by the plaintiff to recover from the defendant a sum of £86 5s 11d. The circumstances of the case, as disclosed in the affidavits, were as follows:—On the 20th August, 1844, the Rectory of Killeshill, in the Diocese of Armagh, became vacant by the death of the then Incumbent, and on the 14th of the October following, the plaintiff was inducted on the collation of his Grace the Lord Primate. On the 8th November in the same year, the said Rectory was placed under a sequestration, and the defendant appointed sequestrator. In the month of February, 1847, the sequestration was superseded, and a receiver appointed under the Court of Chancery. The defendant, while acting as such sequestrator, levied a rateable proportion of the rent-charge from the 20th August, 1844, to the 1st of November, in the same year. This sum amounted to £86 5s. 11d., and formed the subject of the present action. The defendant did not include this sum in any of the accounts which he passed as sequestrator, and assigned as a reason for not paying it over to the plaintiff, that on the 6th July, 1844, the plaintiff was discharged as an insolvent debtor, and one Henry Speer appointed his assignee; and that the attorney of the said Henry Speer had frequently cautioned the defendant not to make any payment to the plaintiff. It also appeared, that since this action was commenced, the defendant was served with a notice in

writing, by the attorney of the assignee, directing him not to pay any sum of money to the plaintiff, and informing him that the assignee was the only person authorised to receive the produce of the estate of the plaintiff, and that he would hold the defendant accountable.

On a former day in this Term, *Sterne B. Miller*, on the part of the defendant, obtained an order nisi for relief, under the Interpleader Act (the 9th & 10th Vic. c. 64, s. 1), against which

Brewster, Q.C., and *J. Murphy, Q.C.*, for the plaintiff, now shewed cause. The rent-charge, for which this action is brought, accrued due before the sequestration issued, and ought not to have been demanded or received by the sequestrator, *Waite v. Bishop* (1 Cr. Mee. & R. 507); *Egan v. Heenan* (3 Ir. Eq. Rep. 50). He has, therefore, by his own act, placed himself in a situation to be sued, and cannot now call on the court to extricate him, *Belcher v. Smith* (9 Bing. 82, S.C. 2 Mo. & Sc. 184). The assignee of the plaintiff has no right to this money, as it was not payable until after the date of the vesting order.

Napier, Q.C., appeared for the assignee, and contended that it was incumbent on the plaintiff to produce the order for his final discharge, as the assignee would be entitled to the money, unless the vesting order was prior to the month of August, 1844.

Sterne B. Miller, for the defendant, was heard in support of his rule.

BLACKBURN, C. J.—The defendant in this case calls upon the court to interpose in his behalf, and to direct the plaintiff and his assignee to interplead. From his own admission, it appears that the defendant received the sum of £84 18s. 7d. four years ago, and retained it ever since, though he had no right whatever to it. He acted under colour of his authority as sequestrator, but did not include this money in any of his accounts. This is not the case of a person who has become an involuntary stakeholder, or of a public officer acting in the discharge of his duty, but of one who, after wrongfully receiving and retaining a sum of money, now says that he has been served with a notice cautioning him against paying it over. In my judgment, there is strong evidence of collusion between the person who served that notice and the defendant. If the facts of this case were made the subject of a bill in a Court of Equity, a demurrer would lie to it. The cause shewn must be allowed with costs.

The rest of the Court concurred.

Rule discharged.

COURT OF CHANCERY.

DOWNING v. HODDER.—Feb. 10.

Practice—General Orders.

The General Orders are binding on the court, but may be relieved against, in cases of fraud, or inevitable accident.

This case came before the court on appeal from an order of the Master of the Rolls refusing a motion to dismiss the bill for want of prosecution, and granting a cross motion for liberty to amend the bill. The facts sufficiently appear in the Lord Chancellor's judgment.

Jones for the defendants.

Deasy for the plaintiff.—There is no provision in the 4 & 5 W. 4, c. 78, under which the orders are made, that they shall be laid before parliament or have the force of statutes. The orders have invariably been considered subject to the discretion of the judge, *O'Grady v. Bury* (1 I. E. R. 13); *Dyce v. Golding* (2 I. E. R. 56); *Smith v. Gould* (7 I. E. R. 271); *Millard v. Stevens* (8 Sim. 160). *Calvert v. Gandy* (1 Phil. 518) was decided on the orders of 1841, made under the act 3 & 4 Vic. c. 94, which gave them the effect of statutory enactments; the 8 & 9 Vic. c. 105, was passed to remedy the inconvenience produced by this.

LORD CHANCELLOR.—This case comes before me on appeal from an order of the Master of the Rolls. The defendant appeals on the ground that by the 82nd General Order he was entitled *ex debito justitiæ* to have the plaintiff's bill dismissed, and that the particular exceptions specified in the General Order not having existed, the court has no jurisdiction to extend the time for filing a replication. The order is certainly very stringent; it is one of the orders made under the 4 & 5 Wm. 4, c. 78, entitled "An Act for the Amendment of the Proceedings and Practice of the High Court of Chancery in Ireland," under which, power was given to the Lord Chancellor, by and with the advice and assistance of the Master of the Rolls, to make general orders. One of the general orders made under this authority is, "that the defendant (if the plaintiff shall not proceed with the cause) shall be at liberty, after the expiration of two months from the time when the defendant's answer or plea has been deemed sufficient, to move upon notice that the bill be dismissed with costs, and the bill shall be accordingly dismissed with costs, unless the plaintiff, in the mean time, shall file and duly serve a replication in the cause, or lodge with the defendant's solicitor an undertaking signed by the solicitor for the plaintiff, to set down the cause to be heard against such defendant, upon bill and answer, in the following Term; or unless the plaintiff shall appear upon the motion, and satisfy the court that he is unable to proceed in the cause by reason of any other defendant, or defendants, not having answered, and that due diligence has been used by the plaintiff in proceeding to have the bill taken as confessed against such defendant, in which case the court shall allow the plaintiff such further time for proceeding with the cause as it shall deem reasonable." Now, in this case, no doubt, the time had elapsed. No replication was filed in the cause, it

was not set down on bill and answer, nor was the plaintiff unable to proceed from any other defendant not having filed his answer, he having used due diligence. *Prima facie* the case is within the order. It appears that the answer of one defendant (the insurance company) was filed the 3rd April, 1848, subsequently to that of the defendant Hodder; and, further, that the question in this cause relates to a policy of insurance, and that documents bearing on that question appeared, for the first time, on the answer of the company, that the plaintiff here was accordingly entitled to an order against the company for their production, which he obtained on the 12th June, but which was not complied with till the 1st of August. Matters remained so till the 1st of November, when the defendant served notice to dismiss the bill for want of prosecution. On the 14th of November, the plaintiffs served a notice that they would ask leave to amend. I have to consider how to deal with respect to the facts of this case, and the rule to be adopted with respect to the orders. No doubt, there has been some fluctuation with regard to the proper mode of dealing with this and some other rules. On one hand, it has been contended that they bind the court as if they had been part of the Act of Parliament under which they were framed, and that the court cannot, under any circumstances, depart from the terms of a rule so drawn, that it is as if the act had incorporated it. On the other hand, it is contended that there exists a species of general discretion of dealing with these rules, and that they are more to guide the general practice than to govern the court, and that there exists a general power of relaxing them. These are two of the opinions which may be collected from the expressions of judges. A third is, that the orders are binding as to the ordinary practice, but are subject to the rules of Courts of Equity in all cases, and that where there is accident, fraud, or deception on the part of the opposite party, this court may dispense with the rule and give indulgence, as in many other transactions. In one case, relief was given on the ground of mistake; it must be conceded that it is not easy to define what is such mistake as to entitle to relief. These have been the three modes of viewing the orders. In considering the authorities on the point, the only clear way is to take them in the order of time. The first case is that of *Stewart v. Service* (L. & G. tem. Plun. 303). That case was decided on the orders of 1834, but they were under the same Act of Parliament; so there is no difference in that respect. It was heard first before Sir W. Mac Mahon, who adopted the middle course, although appearing to take the more stringent view. In his judgment he says, "My view of the system of orders of the 29th November, 1834, which were issued under the statute of 4 & 5 Wm. 4, c. 78, is, that they are to be considered as orders, while unrescinded, of the same nature as orders inserted in a statute; as, for example, the rules inserted in the statute 5 & 6 Wm. 4, c. 16, as to persons in custody under process, that all these orders are to be considered as the written and binding law of the court, unless when, upon the acknowledged principles of a Court of Equity, they ought to be relieved against,—viz.,

in cases of fraud or accident; but that the neglect or delay of the solicitor, in proceeding according to these orders of the court, does not constitute a case for relief upon these principles—that as to relieving upon an arbitrary principle of wide discretion, as against these orders, upon the ground of mere neglect, I do not see how it can be sustained. The grounds on which it was urged to the discretion of the court that, in this particular case, these orders ought to be relieved against, appear to me to be founded on the assumption, that it was to be treated as an irreparable mischief and failure of justice, that the party should not be privileged, by amendment, to prosecute the particular cause, whatever may be the neglect of the party, or his solicitor; but it appears to me that this proposition, thus assumed, cannot be at all sustained. It is true that it may be deemed an inconvenience to be avoided as far as practicable, consistently with the maintenance of these orders, which were framed for averting mischievous delays in Equity suits, to subject a party to file a new bill, but the costs of the suit which have been the subject of the neglect and delay will be the only loss imposed on the suitor, and his rights will remain unaffected.” That was the view taken by Sir W. Mac Mahon; and, though Lord Plunket reversed the order, there is nothing to shew what view he took of those observations. The question was not on the force of the orders, but on their construction, and that was the view taken. The next case is *O’Grady v. Barry* (1 I. E. R. 13). Sir M. O’Loghlen said, “I have the authority of the settled practice in England for saying that these general orders, being framed for the general administration of equity, must always give way when it appears to the court that the equity of any particular case requires it.” This is not very definite; and, if it means that the court is to put a construction on the orders with reference to the general merits of the case, I cannot agree with it. I cannot think that the orders are to be interpreted in different ways in different suits. I do not think that the general equity of the cause can be at all taken into consideration; but, if it means the mode of conducting the case, I can reconcile it with the words of Sir Wm. Mac Mahon. The next case is *Res v. Lyons* (1 Dr. & W. 327, vide p. 333). There Lord Plunket, speaking generally of the rules, seems to take the view that they are flexible, and says, “there is no ground for saying, nor can it be pretended, that these rules the creatures of the court are to become its masters, by assuming a nature so binding as to overrule and control the acts of that very court which gave to them existence.” The Vice-Chancellor seems to have taken a similar view in *Burrell v. Nicholson* (6 Sim. 212). The case of *Dycer v. Goulding* (2 Ir. E. R. 57), was also before Sir Michael O’Loghlen, and shews that, in his opinion, the case before the court gave a claim for indulgence, although the proper time had passed. He says, “It appears that there have been some communications between the plaintiffs’ solicitor and the defendant White, which induced the plaintiffs to delay the prosecution of their suit, and that the defendant, who now seeks to have the bill dismissed for want of prosecution, is represented by

the same solicitor who is concerned in this cause for the defendant White. So that the defendant who is now applying may be supposed to have been apprised of the not unreasonable cause of delay. I have frequently had occasion to notice the evil effect of permitting vague and casual conversations pending a cause to interrupt the regularity of the proceedings in it. However, the court is always unwilling to dismiss a bill for want of prosecution, where there is a reasonable excuse for the delay; and, under the circumstances now disclosed to the court, I think the plaintiff should be at liberty to retain the bill, upon the usual terms of paying the costs of the motion to dismiss it.” So it would seem that Sir Michael O’Loghlen took a more favourable view than Sir W. Mac Mahon, of the power of the court over these orders. In *Jeffereys v. Goodwin* (3 I. E. R. 99), the court gave indulgence on the ground of mere accident. In *Smith v. Goold* (7 I. E. R. 271), leave was given to amend, long after the time had passed. *M’Loughlin v. M’Loughlin* (8 I. E. R. 109) came before the late Master of the Rolls (the present Chief Justice). In that case, he refused to admit any departure from the rule, and seems to have taken a strong view of them, stronger than that of Sir M. O’Loghlen, and nearer that of Sir Wm. Mac Mahon. He says that the only question is, whether the plaintiff has shewn due diligence; and, so far, he takes an indulgent view of the case, in not confining the diligence to enforcing an answer. He says, it is impossible to say that this is a case of diligence, and the necessity of amending the bill cannot take the case out of the rule. Besides, it is plain that the record must be, in fact, reconstructed in the amended bill; so that I feel the less difficulty in granting the application, as the plaintiff may as well file a new bill.” In *Davies v. Davies* (10 I. E. R. 614), I have stated my opinion on these rules to be in accordance with that of Sir Wm. Mac Mahon, though not going so fully into the cases. The view I took was, that unless there was something in the conduct of the party to put the plaintiff off his guard, I could not relax them. The cases in England do not very clearly raise the question. In *Calvert v. Gandy* (1 Phill. 519), Lord Lyndhurst says, “The orders of August, 1841, were made by the Lord Chancellor, with the advice and consent of the Master of the Rolls, in pursuance of the 4th Vict. c. 94, and 4 & 5 Vict. c. 52, which provides that all rules, orders, and regulations shall be laid before the Houses of Parliament, and that from and after the making thereof they should be binding and obligatory on the court, and be of like force and effect as if the provisions therein contained had been expressly enacted by Parliament, subject, however to the rights of either house of Parliament to annul them. Those orders have, therefore, the force and effect of an Act of Parliament. I have the power, with the concurrence of any two of the other judges of the court, to rescind them and substitute others; but, without going through the forms prescribed by the act, I have no power to vary them. I should be very glad if I could put a different construction upon the act, for this is certainly a very inconvenient one, but I do not see how I can—” In my own orders of 1823,

the first intention was to have annexed them to an Act of Parliament, and I actually brought in a bill for that purpose; but afterwards I felt the very difficulty which has occurred, and accordingly did not carry through the bill, but issued the orders as the orders of the court only." It does not appear why he might not have brought in an act, like the Irish act, which does not contain those stringent clauses, if the omission of them would have lessened the inconvenience. It is said that a late act (8 & 9 Vic. c. 106) was passed to get rid of this difficulty in England, but there is some doubt whether that was the reason, and as to the effect of the act in that respect, *Mathews v. Chichester* (5 Hare, 202) was argued before the Vice-Chancellor, on an order made under the statute 8 & 9 Vic. when he restored the bill. It does not appear what view of the 8 & 9 Vic. the Lord Chancellor took, but he reversed the Vice-Chancellor's order. That case is also reported in 11 Jurist, p. 49. In this state of the authorities there cannot be said to be any definite rule. If so, the view taken by Sir Wm. Mac Mahon seems to me to answer all purposes. Before the act passed, the Chancellor had power to make rules; whether or not, to alter them is not now material; he certainly had not, under the act, any power to change them, save with the assent of the Master of the Rolls. As I said before, there has been much fluctuation of opinion as to the cases in which the rules could be relaxed; Sir Wm. Mac Mahon put it as high as fraud. It is not necessary to put it so high; inevitable accident would be sufficient. What degree of mistake would do, I will not now decide. The equity of the cause has nothing to do with it. Whatever is to be considered, must be in the conduct of the cause. Now, in the case before me, what are the facts? The plaintiff filed his bill 10th of February, 1848; so far as relates to this defendant, the case was complete, but by reason of the answer of the insurance Company, the case became incomplete; and though their answer was filed the 3rd of April, it was not, in fact, an answer till the 1st of August; for, having stated documents which were ordered to be produced on the 12th of June, it was not a complete answer till they were produced in August. We all know, that at that time there is not the same facility of considering a case. I do not say that the long vacation is to be left out in considering the rules; if it were to be, the orders should be amended. I do not think the plaintiff precluded from relief. Perhaps, if it had been in the first place before me, I might have taken a stronger view; but, considering the conduct of the cause, not only with reference to its own facts, but to orders made in other cases, I think I can come to no other conclusion than that the Master of the Rolls has taken a right view of the case. Some time elapsed between the answer and the order for the production, and a long time elapsed when the deeds were produced on the 1st of August, and then an amendment of the bill was necessary. I impute no fraud in the case, but there is enough to shew that the plaintiff might, to some extent, consider himself not liable to be stopped by this rule after the delay by the other defendant. I am not satisfied that there was any want of proper diligence. I will

not give any costs, and the appellant must get back his deposit.

Chancery Motion Book, p. 212.

ROLLS COURT.

STEEL v. FRAZER.—Jan. 17.

Service deemed good—Subpoena—Power of Attorney.

In a suit for foreclosure and sale of certain lands vested in trustees, upon trust, to sell. R. F., one of the trustees, by power of attorney, authorised R. N. T. to sell these lands. Service of subpoena, to appear and answer, upon R. N. T. deemed good service of R. F.

Reilly, on behalf of the plaintiff, moved that service of the subpoena to appear and answer the bill in this cause, and of the notice pursuant to the 15th General Order, on the defendant, Robert Frazer, by serving same on R. N. Turnbull, the attorney of the said Robert Frazer, be deemed good service on the defendant, Robert Frazer. The bill in this case was filed to raise the amount of a mortgage, and prayed for a foreclosure and sale of certain lands in the county of Dublin. From the affidavit of the plaintiff's solicitor it appeared that by indenture bearing date the 21st of December, 1844, the said lands were conveyed to the said defendant and three other persons, upon trust, by sales or mortgage to raise such sum as should be necessary to pay off the debts therein mentioned, including said mortgage. That Robert Frazer, by a power of attorney, dated the 30th of October, 1848, reciting that there were charges affecting said lands, and that same should be sold for payment thereof, and that he was about to emigrate to Australia, appointed Robert N. Turnbull, his attorney, to grant and release said lands, with full power to convey same to a purchaser.

MASTER OF THE ROLLS.—I will make the order, that service upon Robert N. Turnbull be deemed good service of the defendant Robert Frazer.

NUGENT v. LEYDEN.—Feb. 1st.

Where a bill has been filed contrary to good faith, Semble, the court has, at the instance of a defendant, summary jurisdiction to take the bill off the file.

This was an application by a defendant that the bill might stand dismissed, with costs, on the grounds that same had been filed contrary to good faith, and the agreement of the parties, and without the knowledge of the plaintiff.

It appeared that the late Elizabeth Rumley gave her bond, dated the 14th day of May, 1846, to the plaintiff for the sum of £600, together with warrant of attorney to confess judgment thereon, and on which was endorsed the following defeasance—“Memorandum, that the within bond and warrant of attorney is given for securing the payment of the principal sum of £300, with interest, from the within named Elizabeth Rumley, to the within named James Nugent, by half-yearly instalments of £25, payable on every 1st day of November, and 1st day of May, the first payment of £25 to be

made on the 1st of May next, and it is hereby declared that unless default shall be made in the payment of said instalments, or some or one of them, on the days and times above mentioned, no execution shall be sued out upon the judgment to be entered upon said warrant." The first instalment was paid on the 11th of July, 1847, for which the plaintiff gave the following receipt, "Received from Miss Elizabeth Rumley £25 sterling, amount of first instalment on her bond for £600, dated 14th May, 1846, and which should have been paid on the 1st of May, 1847; received same without prejudice to my right at any time hereafter to issue execution on said bond, notwithstanding the condition endorsed on the back thereof, such condition having been now broken by the said first instalment not having been paid on the 1st of May last." In order to secure the payment of the instalments, it appeared that Elizabeth Rumley had given the plaintiff a letter to a Mr. Thomas Carson, a tenant of her's authorizing him to pay his rent, £60 per annum, less taxes, to the plaintiff, who, it further appeared, was himself also her tenant, at a yearly rent of about £18, which paid his interest. Before the second instalment became due, Elizabeth Rumley died, and appointed the defendant her sole executrix. A caveat was entered to her obtaining probate of the will, and a litigation carried on in the Court of Prerogative, which was not decided until Nov. 1848, when a decree was made in favour of the defendant. Pending this litigation, no instalments were paid to the plaintiff, who threatened proceedings for the recovery of the judgment. In reply to his applications, the defendant had always expressed her willingness to carry out the arrangement made with Elizabeth Rumley, and it appeared that after the decree in the Prerogative Court had been obtained, and before probate was taken out, the son of the plaintiff met the son of the defendant by appointment at the office of the defendant's solicitor, when two receipts for rent, payable by Thomas Carson, the first for a year's rent, due the 25th of June, 1848, the second for a half year to fall due the 25th of December then next, were handed to the plaintiff's son, the defendant swearing that she was informed, and verily believed, such receipts were given to carry out the original agreement made with E. Rumley, and on the full understanding that no proceedings would be taken on the judgment. The plaintiff and his son denied there was any such understanding, and insisted that they took the receipts as payments generally, and that the son had no authority to make such an arrangement. It appeared that Carson paid the year's rent, due the 25th of June, less the taxes, but did not pay the rent due the 25th of December, but stated his readiness to pay in a short time. Without any further intimation to the defendant, or without being informed of Carson's asking further time, the bill was filed on the 3rd of January, 1849, and not until after it was filed was the receipt for the unpaid rent sent back. On being served with the subpoena, the defendant sent her servant to the plaintiff, who stated the proceedings were as great a surprise to him as the defendant. The plaintiff

and his solicitor, by their affidavits, stated that instructions had been given to prepare the bill many months before, and that it had been delayed through the illness of the counsel before whom the instructions had been laid, and that those instructions never had been withdrawn.

Hughes, Q. C., and *A. Hickey*, in support of the motion, relied on the want of good faith exhibited in filing the bill, and that even if the condition of the defeasance was broken by the non-payment of the instalments at the times appointed, that the subsequent acceptance of the receipts revived the agreement to accept payment by instalments *Norton v. Wood* (1 Russ. & Mylne, 178), and that the court had jurisdiction to interfere summarily, *Brangan v. Gorges* (7 I. E. R. 227); *Blake v. Smith* (1 Yo. 594); that a court of law would, in a like case, exercise summary jurisdiction, *Philpot v. Thompson* (2 Dow. & Lownd. 18.)

J. D. Fitzgerald, Q. C., and *T. W. White*, contra.—This is a question for the hearing, the condition of the defeasance has not been fulfilled, and there was no subsequent agreement to set it up again. The affidavits are contradictory; that made by the defendant was on mere hearsay.

MASTER OF THE ROLLS.—In this case, the defendant applies to dismiss the plaintiff's bill on two grounds; first, as having been filed contrary to good faith; secondly, without the sanction or knowledge of the plaintiff. I do not think I could summarily interfere on the second ground, because the plaintiff has adopted the act of his solicitor; and on the first, if I do not comply with the application in this instance, I wish it to be understood that I do not lay down the proposition, that I have not jurisdiction to do so. I have no doubt, although the affidavits of the plaintiff and his son have been framed with all the nicety of special pleading, that these receipts were accepted as payments on account of the instalments, and I should be glad to exercise summary jurisdiction, as this has been a most harsh proceeding; but, as this case is not quite clear on the affidavits, I think the safer way will be to draw up a special order, allowing the defendant to lodge money in court without prejudice to her insisting upon having the bill dismissed at the hearing. If an application to stay proceedings were not made until after bill filed, there being no breach of faith, I could only do so on payment by the defendant of all the plaintiff's demands, *Field v. Robinson* (7 Bea. 66); *Damer v. Portarlington* (2 Phi. 30); but here the objection goes to the plaintiff instituting the suit at all, and if the case were now at a hearing, there would not be much difficulty in disposing of it. I am happy to say I have jurisdiction over the costs of the motion, and I shall give none to the plaintiff. No rule on this motion, without prejudice to the defendant, Maria Leyden, insisting at the hearing that the plaintiff is not entitled to any costs of this suit, and it is ordered that the defendant, Maria Leyden be, and she is hereby at liberty to lodge in the Bank of Ireland, with the privity of the Accountant-general of this court, to the credit of this cause, such sum as she may be advised.

QUEEN'S BENCH.—HILARY TERM, 1849.

LESSEE DANKERT v. WILSON.—Jan. 17.

Ejectment—Notice to Quit—Married Woman.

Separate Estate.

Property had been devised to a wife, previous to her marriage, for her life, to her separate use. The marriage settlement did not affect the premises in question, but contained a covenant on the husband's part not to interfere with the management of the wife therein. The parties separated soon after the marriage. The defendant had never dealt with any other persons in respect of the premises, than the wife and her agent; she had paid rent on the wife's receipts. Held, that a notice to quit, signed by the wife, and describing the holding to be under herself, was sufficient.

This was an ejectment, on the title, to recover a certain dwelling house situate at Cove, in the county of Cork. The declaration contained three demises, one in the name of Mr. Dankert another in his wife's, and a third in his name jointly with his wife, whose property the premises in question had been prior to their marriage. The action had been tried at the Cork Summer Assizes of 1848, before Moore, J., on which occasion it appeared in evidence, that certain premises, including the house in question, had been demised on the 3rd of November, 1808, for a freehold term, which was still in esse, and the interest in said lease had been vested in one Fitzgerald, the father of Mrs. Dankert. He died previous to the marriage of Mr. and Mrs. Dankert, having by his will devised the premises in question to his daughter, during her life, for her sole use and benefit. The devise was directly to herself, without the intervention of trustees. In the year 1836 she married the lessor of the plaintiff, and on that occasion a settlement was executed, which did not comprise the property now in dispute. It contained, however, a covenant by the husband not to interfere with the property conveyed to the uses of this settlement, and, likewise, to permit his wife to enjoy the property which she succeeded to under her father's will, according to the terms thereof. Soon after the marriage the parties separated, and from that period to the present, the wife had received the rent of the house now sought to be evicted through her own recognized agent, and on her own receipt. The defendant had become a tenant of the said house during Mrs. Dankert's management of the property, but simply as successor to her stepfather, whose possession was antecedent to Mrs. Dankert's tenure of the premises. The defendant had never known any other persons to be concerned with the premises but Mrs. Dankert and her agent. Mrs. Dankert had caused her to be served with a notice to quit, in her own name, dated August 18, 1846, and describing the holding to be from herself. An ejectment had been brought thereon, which was tried at the Cork Spring Assizes of 1845, but the lessors of the plaintiff omitted on that occasion the production of the will and settlement, and were accordingly nonsuited,

as having failed to shew an authority from husband to wife to determine the tenancy. The present action was accordingly commenced, and the above documents having been proved, a verdict passed against the defendant, which she now sought to set aside, on the grounds that even granting the requisite authority, had been given to Mrs. Dankert, the notice to quit was invalid, by reason of its not having been given in the name of the party in whom the legal estate was vested. A conditional rule, to set aside the verdict, having been previously obtained, cause was this day shewn by *Henn, J.*, with him *Herrick*.—The joint effect of the will and settlement is to confer power on the wife to determine the tenancy. *Doe. d Earl Manners, v. Mixem*, (2 Moo. & R. 56.) It was quite unnecessary to state that it was signed on behalf of husband. *Lessee Lord Sligo, v. Davitt*, (3 Ir. L. R. 146.)

J. D. Fitzgerald, Q.C., and *Chatterton* for defendant.—The judgment of the court, in *Lord Sligo's* case, turned on the fact of a disclaimer by the tenant, and thus the necessity for a notice was removed. Here there was a misdescription of tenancy in the notice. A notice by an agent should be given in that character. (*Blackburne, C. J.*—This is a peculiar case, because the tenant here paid rent to the wife. There is actual evidence of her interest in the premises.) The tenancy, in a court of law, would be held to be under the husband, and the notice to quit ought to have been conformable. (*Moore, J.*—Would not the defendant be precluded from setting up a title in the husband.) It is admitted on the other side, that it is on the demise, in the name of the husband alone, that they can recover, and we have admitted tenancy under him. A feoffment by a wife, of her own lands, without the concurrence of her husband, is void, *Perkins tit. Grants*, 6-8. There can be no estoppel in the case of a married woman it must be mutual. The notice ought to be a safe one for the tenant. *Doe dem Lyster v. Goldwin*, (2 Q. B. 143, S. C.; 1 G. & Dav. 463.) (*Blackburne, C. J.*—Is it not the test, whether the defendant can act safely upon this notice?) That is not the only test, the notice must not merely be safe for the tenant, but give him the means of ascertaining its authority, and if it does not, the owner may still treat persons so served as tenants. (*Moore, J.*—Was it competent for the tenant to dispute the notice of the wife in this instance? It was proved that tenancy commenced after the separation.) *Doe v. Biggs*, (1 Taunton, 367,) is quite distinguishable from the present case. Here the notice actually rebuts on its face the presumption of agency. *Lessee Freeman v. Ahearn*, (Ir. Cir. Cas. 553.) The case of a receiver, under the courts, is by no means analogous. In *Lord Sligo's* case the notice did not negative the presumption of tenancy as it does here.

Herrick, in reply, was not called upon.

BLACKBURNE, C. J.—This was an ejectment on the title, in which the lessees of the plaintiff are husband and wife; and the question is, whether, under the circumstances of the case, the tenancy of the defendant has been legally determined. It appears to me that it has, and that the lessees of

the plaintiff are entitled to recover, whether on the demise of the husband and wife jointly, or of the wife alone. The husband covenanted not to interfere with his wife in the management of her estate, which was to be her's in every dealing respecting the property, and the defendant had been fixed with the notice of this arrangement, and acted accordingly. Could the defendant, therefore, be misled by a notice in the present form? It is quite clear that it could be acted on with perfect safety, notwithstanding the misdescription of tenancy. The husband could not repudiate the acts of his wife in this matter. Lord Denman's criterion in *Doe v. Goldwin* fully applies to the present case.

CRAMPTON, J., (after briefly stating the leading features of *Doe v. Goldwin*, which his lordship shewed to be distinguishable from the present case, and that the *absence of authority*, not the form of the notice, was there the ground of the decision).—Here the wife is agent for her husband. The covenant proves this fact, and the wife, at all events, was the party really interested. The case referred to is no authority against the lessors of the plaintiff.

MOORE, J.—Under the peculiar circumstances of this case, I am of opinion that the verdict ought to stand. There was a direct understanding between all parties that the wife should have the power to determine tenancies, and the tenant understood her to be so empowered; and the fact of the notice being in her own name, does not bring the case within the authorities referred to on behalf of the defendant.*

Rule discharged.

GUARDIANS OF CASTLEBAR UNION v. EARL OF LUCAN, GUARDIANS OF WESTPORT UNION v. SAME.—*Michaelmas Term, 1848; Hilary Term, 1849.*

Poor's Rate—Sect. 65 of 1 & 2 Vict. c. 56—Immediate Lessor—Rate Books not conclusive.

The 65th section of the 1 & 2 Vict. c. 56, enacts, "That the particulars of every rate made for relief of the poor shall be entered in a book, in the form given in the schedule to the act annexed, and the guardians shall, before the same is levied, sign the declaration at foot of the said form, and the said book shall, after the signature of the said declaration, be evidence of the truth of every particular so contained therein."

Actions of debt were brought by guardians of the poor, to recover from the defendant the amount of a rate made upon him, as "immediate lessor" of occupiers of hereditaments of less annual value than £4.

The guardians produced the rate-books at the trial, and relied on them as establishing conclusively the liability of defendant to the rate. Held, that the defendant was at liberty to rebut the statements contained in the rate-books, and to go into evidence for the purpose of showing he was not "immediate lessor" within the meaning of the 1st section of the 6 & 7 Vict. c. 92.

* Perrin, J., was absent.

Each of these cases was an action of debt brought by the plaintiffs for the recovery of a poor rate made upon the defendant, under the 6 & 7 Vict. c. 92, s. 1, as "immediate lessor" of the occupiers of rateable hereditaments of less annual value than £4. At the trial before Mr. Baron Lefroy at the Mayo Summer Assizes, 1848, the plaintiffs gave in evidence the rate-books, by which it appeared, that in the Castlebar case, the defendant was rated by name as the "immediate lessor," while, in the Westport case he was rated simply as "immediate lessor," without any name. In the Castlebar case, the plaintiffs relied altogether upon the rate-book as establishing the liability of the defendant; but in the Westport case they went farther, and gave parol evidence to identify the defendant as the "immediate lessor" mentioned in the rate-book. To rebut the statements in the rate-books, the defendant went into evidence to shew that he was not "immediate lessor," proving, in one instance, that by a lease dated in 1825, the defendant had demised the premises in question to a lessee, who had sublet to the occupiers; and, in another, that in 1827, the defendant had let another portion to P. G., as tenant from year to year, at a rent of £6—that the annual value of the entire premises so let to P. G. exceeded £4, but that P. G. had divided the premises between himself and two other occupiers, thereby reducing the annual value of the portion held by each of the occupiers below £4. The plaintiffs objected to the admission of this evidence, upon the ground, that by the statute, the rate-book was made conclusive evidence of every particular contained therein; and, therefore, that no evidence could be given to rebut it. The learned Baron received the evidence, subject to the objection; and, finally, it was consented that a verdict should be given for the plaintiffs in each case, subject to be turned into a verdict for the defendant, in case the court above should be of opinion that the rate-book was not conclusive evidence of the statement therein contained, viz, that the defendant was "immediate lessor" of the occupiers of the hereditaments in respect of which the rate had been made.

Brewster, Q. C., with him Napier, Q. C., and O'Donel, for the plaintiffs.—Whether the rate books are conclusive evidence of the fact, that the defendant is immediate lessor, depends upon the proper construction to be given to the 65th section of the 1 & 2 Vict. c. 56.* If the word evidence in that section means *conclusive evidence*, the plaintiffs must succeed. It is not, however, necessary to import the word conclusive into the act, because the 107 section† provides, that the rate may be

* Which enacts "that the particulars of every such rate shall be entered in a book, which shall contain an account of every particular set forth at the head of the respective columns in the form given in the second schedule to this act annexed, and the guardians, and other officers, whose duty it may be to make the said rate, shall, before the same is levied, sign the declaration at the foot of the said form; and the said book shall, after the signature of the said declaration, be evidence of the truth of every particular so contained therein."

† "Be it enacted, that the justices and Assistant Barrister before whom any appeal shall be brought, are hereby

altered, the names of persons inserted or struck out; but we submit, if the defendant felt himself aggrieved, he ought to have appealed to the Quarter Sessions, the sole and only tribunal, appointed by the legislature, for the adjudication of the matter,* and that not having done so, he cannot now dispute his liability. The following cases were cited. *R. v. Justices of Surrey*, (2 T. R. 504;) *R. v. Skone*, (6 East. 514;) *R. v. Barham*, (8 B. & C. 99;) *Marshall v. Pitman*, (2 M. & Sc. 745, S. C. 9 Bing. 595;) *Shingley v. Surridge*, (11 M. & W. 508.)

Fitzgibbon, Q. C., Walker, and Carleton, for the defendant.—Some of the occupiers, held under leases, made prior to 1843, others of them held from year to year, and it is a conceded fact, that the defendant at the trial below, gave evidence to shew he was not immediate lessor within the meaning of the act of parliament. The sole question, therefore, in the case, is, are the rate-books conclusive evidence of the statements contained therein, and to make them so, that word must be imported into the 65th section of the act. No right of appeal is given to the landlord, as to his liability. The 106th section of the 1 & 2 Vict. c. 56, only enables him to appeal as to the amount of the rate, and this right to appeal must be construed strictly. The guardians are not now obliged to make a declaration as to the correctness of the rate. They referred to 43 Eliz. c. 2; s. 6, *Eng. Milward v. Caffin*, (2 Wm. Bl. 1380;) *Governors of Bristol Poor v. Wait*, (1 Ad. & Ell. 264, S. C. 3 N. & M. 359;) *per Lord Tenterden*, in *Brandling v. Barrington*, (6 B. & C. 475, *per Patterson, J., Res. v. Burrell*, (12 Ad. & Ell. 468.)

Napier, Q. C., in reply.—It was the policy of the legislature that all parties connected with the property to be rated should come forward, and give their assistance to have the law carried into effect; that they should be always watching the proceedings, and if names were omitted which ought to have been inserted in the rate-books, or, if the amount of the rate required to be altered, the legislature had appointed the Quarter Sessions as the tribunal for the adjudication of the matter

empowered to hear, and finally determine, the matter of such appeal, and to make such order therein as to them shall seem meet; which order shall be final and conclusive upon all parties, and, in case of any appeal against any rate as aforesaid, to order the name of any person interested or concerned in the event of such appeal, and having had notice thereof, as is herein provided, to be inserted in such rate, and to be rated at such sum or sums of money, or to order the name of any such person to be struck out of such rate, or the sum or sums at which any such person is rated therein, to be altered as the said justices and Assistant Barrister shall think right, and such justices and Assistant Barrister, or some proper officer of the court, shall forthwith add to, or alter, the rate accordingly."

* The 106th section enacts, "that if any person shall find himself aggrieved by any rate made under this act, or shall have any material objection to any person being put in or left out of such rate, or to the sum charged on any person therein, it shall be lawful for such person to appeal to any Sessions of the Peace, to be held in the presence of the Assistant Barrister, in and for the county in which such rate shall have been made, within four calendar months next after the cause of complaint shall have arisen."

An ample opportunity was thus afforded to the defendant, if there were any mistake, to have had it rectified, and, not having done so, he must now be held liable.

Cwr. adv. vult.

Jan. 20.—The court having this day expressed a wish to have the case further spoken to by one counsel on each side.

O'Donel was heard for the plaintiffs, and in the course of his argument cited the following authorities; *Moss v. Lichfield*, (8 Scott, N. R. 832); *Clarke v. White*, (2 Cr. & Dix. Cir. Cas.); *Hutchins v. Chambers*, (1 Bur. 580); *Durrant v. Boys*, (6 Term Rep. 880); *Cootes v. the Kent Waterworks Company*, (7 B. & C. 314); *Bonnell v. Brighton*, (5 Term R. 182); *Reg. v. Justices of Middlesex*, (9 Ad. & Ell. 540).

Carleton, for the defendant, was not called on.

BLACKBURNE, C. J.—We cannot find anything in the 1 & 2 Vict. c. 56, which precludes the defendant from disputing his liability to the rate; and are of opinion he was at liberty to rebut the statements contained in the rate-books, and to go into evidence to shew he was not immediate lessor within the meaning of the 6 & 7 Vic. c. 92, s. 1. There must therefore be

Judgment for the defendant.

EXCHEQUER OF PLEAS.—MICHAELMAS TERM.

MITCHELL v. BULFIN.

Use and Occupation—Tenancy under the Court—Jameson v. Farrer (3 I. Eq. R. 513) considered.

The defendant was declared tenant under the court in a mortgage matter. In the month of December, 1846, on the receiver being discharged, the plaintiff (the mortgagor) distrained the defendant for rent, which the latter paid under the pressure of the distress. In the month of March following, the plaintiff put the defendant out of possession by an injunction, and brought an action for use and occupation for the period intervening between the preceding November and the time of executing the injunction. Held, that such an action was maintainable.

At the period of the letting, the following memorandum was entered in the Master's book:—
"Declare Edward Bulfin tenant to the lands, at £66 per annum, he paying the inheritor for his seed and labour, and getting, in return, compensation for the grass which has been consumed."
Held so conclusive of the nature of the agreement, that plaintiff could not sustain a count for the price and value of a crop bargained and sold.

Assumpsit. The first count of the declaration was for use and occupation of the plaintiff's land. The second count was for the price and value of a crop bargained and sold. The case was tried before the Lord Chief Baron at the sittings after last Trinity Term, when it appeared that a mortgage creditor of the plaintiff's presented a petition and obtained a receiver. The lands were advertised to be let in the matter, and the defendant was declared tenant. At the period when the letting

took place, the plaintiff insisted that he was entitled to remuneration for the *crop* which he had sown. The defendant, on the other hand, contended that he was only entitled to the value of the seed and the labour of sowing it; and, the Master (Litton) being of this opinion, the following memorandum was made by the Master in his book:—"Declare Edward Bulfin tenant to the lands, at £66 per annum, he paying the inheritor for his seed and labour, and getting, in return, compensation for the grass which has been consumed." The defendant entered into possession of the lands in the month of July, 1846. In the month of December following, the receiver was discharged, and immediately afterwards the plaintiff distrained the defendant for a half-year's rent, which the defendant paid under pressure of the distress; and in the month of March following, the plaintiff put the defendant out of possession, by an injunction, and brought this action in use and occupation to recover the rent from the preceding November, and for the value of the crop. *Martley, Q.C.*, with *O'Driscoll*, on the part of the defendant, asked his lordship for a non-suit on both counts of the declaration; first, because eviction by the landlord in the middle of a gale disentitled him to recover in use and occupation; and, secondly, because the evidence to sustain the second count, as for a *crop* bargained and sold, was contradicted by the memorandum in the Master's book, which shewed that the agreement was to pay for *seed* and *labour*. The Lord Chief Baron non-suited the plaintiff, reserving liberty to have the non-suit set aside, and a verdict entered for the plaintiff.

Fitzgibbon, Q.C., and *Short* now moved to have the non-suit set aside, and a verdict entered up for the plaintiff. This non-suit cannot stand. There was no tenancy established between these parties; the defendant was bound to surrender possession whenever the receiver was discharged, and the court, in such cases, will apportion the rent, *Jameson v. Farrer* (3 I. Eq. Rep. 513). The evidence offered upon the second count of the declaration would have entitled us to recover for the crop. We were prepared to prove that it was for the crop, and *not* for the price of the seed and labour, that the defendant agreed to pay; but the evidence was rejected by his lordship. The Master's book was not conclusive as to the terms; and, even if it were, it is not binding upon us. The custom of the county gives the crop to the outgoing tenant.

Martley, Q.C., and *O'Driscoll*, contra.—We are entitled to hold this non-suit on both counts of the declaration. Eviction by the landlord in the middle of a half-year, is a complete answer to an action for use and occupation, *Smith v. Raleigh* (3 Camp. 513). *Jameson v. Farrer* is clearly distinguishable from this. That was the case of a purchaser, between whom and the tenant there was no privity, and the court decided that the purchaser was entitled to an apportionment of the rent for a broken period. *Creed v. Creed* (8 I. E. R. 207) is more in point. The Master of the Rolls, in that case, refused to apportion the rent; and the learned Baron who delivered the judgment of the court in

Jameson v. Farrer, says, "he is not to be understood as overruling *Creed v. Creed*." But, assuming the decision in *Jameson v. Farrer* to be a sound one, it only decides that the court, by force of its equitable jurisdiction, may deal with its own tenants by compelling them to pay rent for a broken period. If, then, the plaintiffs have any remedy in this case, it is extremely clear that an action at law is not the proper proceeding. The plaintiff, it is contended on the other side, stands in the position of the receiver, and is clothed with all the powers which the court gives its officer; but we submit that he has, by his own act, disentitled himself to any remedy which he might have had against the defendant as tenant of the court. It is well settled, that submitting to a distress acknowledges a tenancy, *Panton v. Jones* (3 Camp. 372). The plaintiff entered upon the defendant's land, and made a distress on the 21st of December, for the rent due on the preceding November. In the notice of distress the plaintiff designates himself as "landlord." As to the second count, the evidence by which the defendant sought to contradict the terms of the memorandum in the Master's book, was by producing a gentleman of the name of Byrne, who alleged that he had written a letter to the plaintiff six days after the letting took place, informing him that it was the crop the defendant was to pay for. That agreement was a binding one, and the evidence offered for the purpose of contradicting it was wholly inadmissible, and it was properly rejected, *Clarke v. Royston* (13 M. & W. 752).

Short, in reply, relied on *Jameson v. Farrer*, and insisted that the letter book which contained the copy of what had been written to the plaintiff by his attorney, ought to have been received in evidence.

PER CURIAM.—The plaintiff's fails on that part of his demand which relates to the value of the crop, but is entitled to hold his verdict for the rent. As to the former branch of the case, even if the evidence of Byrne could be received, yet the plaintiff would not be entitled to recover for goods bargained and sold. This was not a contract for the price of the crop, but a qualified letting of the land; and the true evidence of its character was the memorandum entered in the Master's book. As to the other question, the nature of the tenancy under the court is clearly laid down in *Jameson v. Farrer*. The receiver continues in possession during the continuance of the cause or matter. When the receiver is discharged, the parties are remitted to their original rights, and a letting for seven years pending the cause, means that if the matter terminates before the lapse of that time the tenancy determines, and that being so, the acceptance of the rent afterwards raised the implication that a new tenancy, from year to year, was created, and one inconsistent with the tenancy under the court. That being so, the defendant cannot be held to be a trespasser, but a party holding the land by the sufferance and permission of the plaintiff remitted to his original rights.

Judgment for plaintiff on the 1st count, and for the defendant on the 2nd count.

COURT OF CHANCERY.

BENNETT v. BERNARD, SARGENT v. BERNARD.—
Feb. 13, 1849.

Statute of Limitations—Pendency of Suit.

A judgment creditor cannot avail himself of the pendency of a foreclosure suit, as keeping his debt alive, when it is barred by the Statute of Limitations.

These causes came before the court on a petition of rehearing from the decree of the Lords Commissioners. (*Reported*, 10 *I. E. R.* 589.) The facts so far as material to the view taken of the case by the Lord Chancellor, were as follows:—In July, 1811, Samuel Harden filed his bill for an account, foreclosure, and sale of the lands of Derrinboy, against G. Clarke, against whom a judgment now vested in S. M'Gloin had been recovered in Easter Term, 1809, prior to the mortgage on which the suit of *Harden v. Clarke* was founded. George Clarke was discharged as an insolvent debtor, and subsequently died. After various deaths and changes of interest, the bill in *Bennett v. Bernard* was filed, praying the account usual in an administration suit, and that it might be taken as a bill supplemental to *Harden v. Clarke*. In February, 1842, the second bill was filed, praying nearly similar relief. In 1844, a decree was made in these causes, referring it to the Master to take an account of incumbrances and to report priorities. The Master reported J. M. Gloin's judgment a charge on the land. To this the plaintiff excepted, insisting that it had been barred by the Statute of Limitations. The Lords Commissioners having overruled the exception, the plaintiff presented a petition of rehearing.

Christian, Q.C., and *Vincent Scully*, for the plaintiff, contended that the judgment was barred by the Statute of Limitations, and that there was no such pendency of suit as could prevent its operation. They argued, first, that the suit of *Harden v. Clarke*, in 1811, and all proceedings in it were, by the events that happened, altogether annihilated; and, secondly, that even if that were not so, that suit was not of such a character as to bring the case within the doctrine of *Sterndale v. Hankinson* (1 Sim. 393). As to the first point, they said that in 1829 the judgment of 1809 was barred by the statute 8 Geo. 1, c. 4; or, at all events, by the 3 & 4 Wm. 4, c. 27—that to take it out of that position, the judgment creditor must shew that the decree of 1844, under which he proved his charge, was a decree in the suit instituted before 1829. That there must be, in fact, a complete continuance of suit—the mere pendency of a suit is not enough. That if a bill is filed for a demand before the statute attaches, and that bill is given up and another filed after the statute attaches, the demand is not saved from the operation of the statute—that the bills filed subsequent to that of *Harden v. Clarke* were not, in fact, continuations of that suit, and they distinguished supplemental bills from original bills, in the nature of supplemental bills, and they cited *Mitford* on Pleading, 4th ed. 65, *Daniel's Ch. Practice*, 1402; *Lloyd v. Jones* (9 Ves. 37). As to the second point, they argued that the suit

of *Harden v. Clarke* was not such as to give the judgment creditor the benefit of the doctrine laid down in *Sterndale v. Hankinson*. That *Harden v. Clarke* was a foreclosure suit, filed against the mortgagor in his lifetime; and although it prayed, of course, for an account of prior incumbrances, it never was a general creditors' suit. That *Sterndale v. Hankinson* was decided before the 3 & 4 Wm. 4, c. 27, and it was most important that this should be borne in mind. The first case decided on the 3 & 4 Wm. 4, c. 27, was *Berrington v. Evans* (1 Y. & C. Ex. Cases, 434), and every word of Lord Abinger's judgment was applicable to the case of the creditors here. They cited on this point *Lord St. John v. Boughton* (9 Sim. 219); *Daniell's Chancery Practice*, 2 vol. 1162; *Watson v. Birch* (15 Sim. 523).

William Smith appeared for a defendant in the same interest with the plaintiff, and cited *Grenfell v. Girdleston* (2 Y. & C. Ex. Cases, 662).

Maley, for the judgment creditor, contended that the plaintiff who sought the benefit of the suit of 1811, could not repudiate it, and that the judgment creditor was entitled to the benefit of that suit—that if the suit is one in which the creditors can get relief, that is sufficient, and the court will presume that he lies by, and does not institute a suit himself, because he can get such relief under that which is pending. He cited *Birmingham v. Burke* (9 Ir. Eq. 81); *Barton v. Tattersall* (1 Russ. & Mylne, 237).

LORD CHANCELLOR—This case remains to be disposed of on one of the exceptions taken in respect of a judgment vested in a person named M'Gloin. That judgment appears by the report to have been obtained in Easter Term, 1809. It has never been revived or redocketed, and there is nothing to take it out of the Statute of Limitations if it be not supported by the pleadings in this cause. I say in this cause, because, although there was a good deal of argument before the Commissioners founded on the reasoning, that in truth the case then, and now at hearing is a recent one, and not connected with the original suit, in the case before me that point was not much pressed in argument; and I think it now admitted, that whatever was the original suit, it is now brought down before me. It appears that in 1811 that original suit commenced, but to it this judgment creditor was not a party. The bill was filed by a mortgagee for foreclosing the interest pledged in mortgage to him. At that time the connusor of the judgment was alive, and he lived many years afterwards, and that cause remained dormant till the deaths of the mortgagor and mortgagee. In the year 1841 proceedings were taken, under which it is contended that the original cause is restored, and the judgment creditor entitled to the benefit of that suit as against the Statute of Limitations. Such seems to have been the opinion of the Commissioners, who decided not only that the cause of 1811 was brought down to the present time, but that it gave the judgment creditor those rights for which he now contends. Those rights are, that he is entitled to consider that cause his own, for his benefit, and for the recovery of his demand.

Inasmuch as it is substantially necessary for the recovery of his demand to prevent the bar of the 40th section of the Statute of Limitations, on which there has been so much discussion, it is necessary to advert to that clause, in order to see what must be sustained to give the creditor the benefit of that suit. [His lordship here read the 3 & 4 Wm. 4, c. 27, s. 40.] It has been established, that that relates to actions brought after the act was passed; but it has been a question whether it does where an action or suit was then pending. It is now decided, that an ordinary creditor's suit, instituted on behalf of the plaintiff and all others who shall come in and prove, has the effect, not only of keeping alive the plaintiff's own demands, but those of all the other creditors who come in under the decree. That is decided in the well known case of *Sterndale v. Hankinson* (1 Sim. 399); and it is important to see what view was taken by Sir Anthony Hart, and the principle on which he held that doctrine. That case was before the late statute, and is so far open to observation. The marginal note of that case is, "A bill filed by one creditor, on behalf of himself and all others, will prevent the Statute of Limitations from coming against any of the creditors who come in under the decree." The bill in that suit was filed on the 5th of May, 1812, on behalf of the plaintiffs and all other creditors of George Hankinson deceased, he having died the 27th June, 1810. On the 14th of April, 1818, the usual decree was made. The Master reported against several claims, on the ground that the testator having died in 1810, and the decree not being until eight years afterwards, the claimants were barred of any remedy. To this report three of the creditors excepted. In the course of the argument, the Vice-Chancellor observed, "This is not a bill filed simply by A., but by A. on behalf of himself and all other creditors. It is, in fact, a bill by all the creditors." In his judgment, he says, "The other fallacy is, that the statute bars the suit in Equity, which it does not; but as courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years in analogy to the statute, and pleas of the statute are admitted in these courts on analogy only, but when the circumstances of a case are such as to make it against conscience to apply the rule founded on this analogy, the court will not enforce it. It has been said, that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition; for I think the court would protect a creditor against an accident of that kind." "Suits have been instituted in which creditors, in consequence of the deaths of parties, and a variety of other circumstances, have been unable to procure a decree for two or three years, although every reasonable diligence may have been used; and if the schedules to most of the reports made in suits of this nature were looked through, it would be found, by comparison of dates, that two-thirds of the creditors might have been shut out by a strict application of the rule." I entertain no doubt that every creditor has, after the filing of the bill, an inchoate interest in the suit, to the

extent of its being considered as a demand, and to prevent his being shut out because the plaintiff has not obtained a decree within the six years; and, therefore, I am clearly of opinion that this exception must be allowed." That case came under consideration in *Berrington v. Evans*, (1 Y. & C. 434, Ex.) where the court took a distinction in consequence of the party coming in stating his ignorance of the pendency of the proceedings, the court held that he could not be considered as lying by in consequence of their pendency. The Irish cases go on the same principle, and do not seem to carry it further. The first is *O'Kelly v. Bodkin*, (2 I. E. R. 361). That was a judgment creditor's bill, not filed by the plaintiff on behalf of himself and all others, and so distinguishable from *Sterndale v. Hankinson*, but the court held that the prayer of the bill being that of a bill on behalf of all creditors, was the same in effect. Woulfe, C. B., says—"But I am of opinion, and I believe the rest of the court concur with me, that the creditor coming in under the decree in this cause was entitled to the benefit of the suit as fully and effectually as if he were the party who had filed the bill in the first instance. He adopted the suit, it became his, and it is, therefore, so far as he is concerned, to be considered as having been commenced before the period to which the statute applies, being pending at the time it was passed." He then refers to *Sterndale v. Hankinson*, and to *Berrington v. Evans*, which he says, instead of shaking *Sterndale v. Hankinson*, rather corroborates it, and goes on—"The principle of that decision is, that where a bill is filed by one creditor on behalf of himself and other creditors, and the others come in under the decree, it is reasonable to presume that they were lying by, seeing that there was a suit in progress, in the course of which they would be enabled to come in and prove their demands, and it would be impolitic to lay down a rule which would make it necessary for each creditor to institute a separate suit, or commence a separate action for the recovery of his particular demand," and he then refers to, and dismisses, the distinction that that was not in form a bill on behalf of the other creditors. *Bermingham v. Burke*, (9 I. E. R. 86,) was also an administration suit. There Sir Edward Sugden, speaking of *Berrington v. Evans*, says, "It does not impeach the previous decision of *Sterndale v. Hankinson*, nor does it, I think, prevent a creditor from coming in under another creditor's bill, filed for the general benefit of creditors when his demand would not have been barred had he himself filed the bill, and he comes in according to the decree and course of the court." The only other case I shall mention at present is *Joyce v. Joyce*, (10 I. E. R. 128). It was there held that the bill in that cause was one on which a creditor might rely as being a party to it. In considering the case here, the one question is, What the bill filed in 1811 was? At that time the debtor was alive; no statute had been passed making judgments a charge upon land, and there was no direct relief for a judgment creditor in a court of Equity. If the debtor's estate were equitable, by that circumstance the donee was without

remedy at law, and might therefore come into this court, but he had properly no direct relief here in the life time of the conusor. This bill is the bill of a mortgagee; it prays an account of what is due to him; it no doubt prays an account of incumbrances, and the conusee might come in to prove his debt, but he has no priority with the plaintiff. It was not till 1841 that a bill was filed which the judgment creditor might himself have filed. Now, the language of the cases demonstrate this principle, that though the words of the act do not refer to the proof of demands under a bill, it must be at least in the nature of a bill for the recovery of the demand in question. The mortgagee's suit was not for the recovery of the judgment creditor's demand; he could not have instituted that suit, nor could any one else have filed the bill on his behalf. No doubt the bill of 1841 was one of which he might have the benefit if he were in proper time; that was for general administration, but then the judgment had been long barred. The case of *Brown v. Lynch* (9 I. E. R. 316,) seems to go on this view of the case, and takes a distinction between a mortgage suit and an administration suit, and the same distinction is taken in the argument of *O'Kelly v. Bodkin*, where counsel says—"The bill, although not filed expressly on behalf of creditors generally, was to all intents and purposes a creditor's bill; the whole frame of the suit was essentially different from that of a mortgage suit, and the prayer was plainly that of a creditor's bill." That was in argument, but, as I said, the case of *Brown v. Lynch* (9 I. E. R. 316,) went on the same principle. The original bill in that cause was filed in 1815 for foreclosure and sale. Pending the suit the defendant died, and on the 3d November, 1829, a bill of revivor and supplement was filed against the real and personal representatives of the mortgagor, which prayed the usual accounts of his real freehold and personal estates, and of his debts. A decree to account was obtained, and on the 20th of January, 1837, the applicant filed a charge on foot of a judgment of 1810, and the court gave her the benefit of the suit, expressly taking that distinction, and proceeding on the principle that the bill of 1829 gave her her rights, and not the former suit. Baron Pennefather says—"The suit, so far as it is one of which the general creditors could take advantage, was instituted in 1829," and further, "I therefore am of opinion that this question must be considered as if the applicant had duly proceeded on the charge originally filed by her, as if the proofs originally made by her had been given in due time in support of her charge. That brings the matter to the consideration of what would have been the result of a charge filed by a judgment creditor in 1837, under a decree in a suit instituted in 1829, which charge had been duly proceeded upon, when the judgment upon which that charge had been founded, had not been barred by any statute in force in Ireland antecedently to the 3 & 4 W. 4, c. 27." That bill of 1829 was exactly analogous to the case now before me, but this judgment had been barred before 1842, when the second bill in this cause was filed. Whatever may be the ultimate decision on this doctrine, I am

not required to carry it so far as this case, which is not even within the requirements of the decisions in this country. I am not quite sure, however, that *Sterndale v. Hankinson*, if re-considered by the House of Lords, would be departed from, and that the analogy of it would not be followed. In the case of *Watson v. Birch*, (15 Sim. 528,) the Vice-Chancellor, after remarking that *Sterndale v. Hankinson* was decided before the statute, says—"As I have expressed it to be my opinion that the statute prevents any proceeding being taken to enforce a judgment against either land or personal estate after the expiration of the time limited by it, it seems to me that the matter was concluded, unless there was something in the bill filed in 1817, or in the proceedings upon it, which prevented the statute from operating. I cannot, however, make out that there was anything that could have that effect." He then goes into the consideration of the question in that case, into which it is not necessary for me to follow him. I may consider the cases in this country not to be disturbed here, but by allowing this claim I should be carrying them beyond their principle, and introducing a new exception into the statute.

Chancery Hearing Book, CI., p. 125.

ROLLS COURT.—Jan. 29.

IN THE MATTER OF THE ACT TO FACILITATE THE SALE OF INCUMBERED ESTATES IN IRELAND,

EX PARTE HUGH KENNEDY, *Petitioner* ;
R. S. KENNEDY, *Respondent*.

Incumbered Estates Act—Primary Fund—Sale—Suppression of Material Facts.

H. K. being seized in fee of the lands of B., had charged same with certain incumbrances, and was also indebted by bond and simple contract debts. H. K. being also tenant for life of certain other lands, including the Burgage lands of C., and J. K. tenant in tail in remainder. By deed of 1828, providing that the lands of B. should not be sold, but should be preserved in the family, all the estates were conveyed to a trustee, upon trust as to the lands of B.—subject to a sum to be raised by mortgage—to pay the rents to H. K. for life, remainder to J. K. in fee, and as to the residue of the estates, upon trust to sell same for payment of H. K.'s debts and incumbrances. All said last mentioned lands were sold, except the Burgage lands of C. H. K., the tenant for life, presented a petition under the Incumbered Estates Act, praying for a sale of B. Held that the Burgage lands of C. being the primary fund, they remaining unsold, the lands of B. could not be sold in violation of the deed of 1828. Also H. K., the tenant for life, having by deed of 1844 parted with his life estate, and not being an owner within the act, was not entitled to present a petition as such.

This was a petition for the sale of lands under the Incumbered Estates Act, and from the verifying affidavit it appeared that by indenture of settle-

ment bearing date the 12th day of Nov. 1799, and made upon the marriage of the petitioner, Hugh Kennedy, with Grace Dorothea Hughes, the lands of Ballybeen and Carrowreagh, situate in Dundonald, were conveyed to trustees to the use of John Kennedy, the father of petitioner, for life, with remainder to petitioner for his life, with remainder to his first and other sons in tail male, and also a trust term was thereby limited for raising £2,000 for younger children, and by said indenture the lands of Craigavad were also settled to the use of petitioner for life, with remainder to the first and other sons of said marriage, in tail male, also the lands of Cashel, in the county Tipperary, were limited to the use of Thomas Hughes (father of the said Grace Dorothea,) for life, remainder to the said Grace Dorothea for life, remainder to trustees for a term of 450 years, to raise £2,000 for the younger children of said marriage, with remainder to the first and other sons in tail male. That the marriage between the petitioner and said Grace Dorothea was shortly after solemnized, and there was issue thereof John Kennedy, the eldest son, and several other children. That previous to the 1st of October, 1828, Grace Dorothea died, having survived the said Thomas Hughes. That by indenture of the 25th of December, 1807, petitioner being seized in fee of the lands of Ballycultra, or Cultra, conveyed certain part of same to the use of himself for life, with remainder to the said John Kennedy, his son, in tail male, with like remainders to the other sons of petitioner. That said John Kennedy attained his age of 21 years in the year 1823, and that in 1824 recoveries were suffered of Ballybeen, Carrowreagh, (the Dundonald estate,) Craigavad, and the Burgage lands of Cashel, and same were settled subject to such uses as petitioner and John Kennedy should appoint. That upon the second marriage of petitioner in 1824, the lands of Ballybeen and Carrowreagh, (the Dundonald estate,) were conveyed to trustees upon trust that John Kennedy might receive an annuity of £400 during the joint lives of himself and his father, and subject thereto—after securing a jointure of £500 per annum to Sophia Jane, his said second wife—to such uses as said petitioner and John Kennedy should jointly appoint, and, in default of appointment, to petitioner for life, remainder to John Kennedy in fee, and the sum of £1,000 was thereby charged on said lands as a portion for the younger children of said second marriage. That by indenture of the 1st of October, 1828, reciting said several matters, and that petitioner was then seized in fee, amongst other estates, of part of the lands of Cultra, not comprised in the deed of 1807, and the Hollywood mill, and had charged same by mortgages and other incumbrances, and was indebted by bond and simple contract debts to a considerable amount, and had proposed to said John Kennedy to join him in selling Ballybeen and Carrowreagh (the Dundonald estate) and the Burgage lands of Cashel, and had also proposed to sell the Hollywood mill and other lands; and that the produce of such sales, and also a sum of money to be raised by mortgage, as hereinafter provided, should be applied towards

the payment of said debts and incumbrances, and that petitioner proposed to settle the residue of the estates, of which he was then seized in fee, consisting of Cultra, and its various sub-denominations, upon said John Kennedy, subject to such of the debts and incumbrances affecting same as should remain unpaid by the produce of such sale; and that the said John Kennedy, considering it more advantageous to preserve Cultra, &c., in the family than to suffer same to be sold, had agreed to said proposal. Accordingly, by the said indenture, the Dundonald and Cashel estates, and the Hollywood mill, and other lands, were conveyed to a trustee, upon trust, to sell same, the produce of such sale and the rents in the meantime to be applied, in the first place, in payment of the expenses attending same, then in discharge of the incumbrances affecting the lands so sold, the residue in discharge of the incumbrances affecting the lands whereof petitioner was seized in fee, and his judgment, bond and specialty debts; and the lands of Cultra, &c., were conveyed to said trustee, subject to so much of the debts affecting same as should remain unpaid, upon trust, to pay certain annuities charged thereon and subject thereto, to raise a sum not exceeding £40,000, to be applied in payment of said charges and incumbrances, the residue of the rents to be paid to petitioner for life, with remainder to said John Kennedy, his heirs and assigns. After the execution of said indenture, the Dundonald estate and Hollywood mill were sold, and the proceeds applied according to the provisions thereof. In the month of December, 1839, John Kennedy died, having, by his will, devised all his estate in said lands to his brother, Robert Stewart Kennedy, the respondent. The affidavit of the petitioner then stated that frequent attempts had been made to sell the Burgage lands of Cashel, but without effect, no offer having been made for same. That petitioner, as owner under the Incumbered Estates Act, was desirous of selling the lands of Cultra. That a bill was filed by John Kennedy and James Barnett, as assignees of part of the sum of £2,000 charged on the Burgage lands of Cashel, but said parties consented that this petition should be presented.

Hughes, Q. C., and D. McCausland for the petitioner.

Martley, Q. C., and C. Dobbs for the respondent.—This petition is in violation of the deed of 1828, the object of which was to preserve Ballycultra in the family. The Cashel estate is the primary fund for payment of these incumbrances, and must be sold in the first instance. Also, it appears, that by a deed dated in 1844, Hugh Kennedy parted with his life estate; therefore, not being an owner within the meaning of the act, he is not entitled to present this petition.

Jan. 29.—MASTER OF THE ROLLS.—In this case a petition has been presented by Hugh Kennedy, under the second section of the Incumbered Estates Act, for a sale of the lands of Ballycultra, for payment of the incumbrances affecting same. The petitioner is a tenant for life under a settlement bearing date the 1st day of October, 1828, and made between the petitioner and Sophia Kennedy

of the first part, John Kennedy, therein described as the son and heir apparent of the petitioner of the second part, and several other persons of the third and fourth parts. From the recitals contained in that deed, it appears that by the settlement made upon the marriage of the petitioner with his first wife, and dated the 12th of November, 1799, the lands of Ballybeen and Carrowreagh, called the Dundonald estate, and Craigavad, were settled upon petitioner for life, with remainder to his first and other sons in tail male. There were other limitations of the same lands, which are not now material to state. Other lands, the property of Thomas Hughes, were also settled under this deed of 1799. This property, called the Burgage lands of Cashel, was situate in the county Tipperary, and, as appears by the schedule annexed to the petition, is of the yearly value of £966. 18s. 10d. The petitioner also, upon the death of his father, became seized in fee of the lands of Ballygraney, Ballykeel, and other lands. The said deed of 1828, after reciting these matters, stated that the petitioner was indebted, by mortgage, bond and simple contract debts, to a large amount, and that it was expedient to make some provision for payment of such debts. That Hugh Kennedy applied to his son, John Kennedy, to join him in selling the Dundonald estate and the Burgage lands of Cashel, in Tipperary, and H. Kennedy proposed to sell part of the lands of which he was seized in fee, and that a sum to be raised by mortgage as thereby provided, should be applied in payment of these debts, and also in payment of bond and simple contract debts of Hugh Kennedy, and the petitioner proposed to settle the residue of the estates of which he was seized in fee, consisting of the lands of Ballycultra—except the house and demesne, which had been settled on the eldest son by a deed of £1807—subject only to such of the debts as should remain unpaid by the produce of such sale. The deed then recited that John Kennedy being desirous of preserving the lands of Bullycultra in the family, had agreed to the proposal so made. Accordingly the settled estates, and the Cashel property, were conveyed to a trustee and his heirs, upon trust to sell the same, and, in the meantime, to receive the rents; the proceeds of the sale and the rents to be applied in payment of the necessary expenses, and then to pay off the incumbrances affecting the lands so to be sold, and the residue to be applied in payment of the charges affecting the lands of which the petitioner was seized in fee at the time of the execution of the deed of 1828, and also of the other debts of the petitioner; then follows a conveyance, by the petitioner, of Ballycultra—subject to such debts as should remain unpaid—to the trustee and his heirs, upon trust, to raise by sale or mortgage a sum not exceeding £40,000, and to pay the surplus rents to petitioner for his life, and a jointure was thereby provided for his wife, then to the use of J. Kennedy, his heirs and assigns. The trustee under the deed of 1828 acted in performance of the trusts of it, and the lands of Ballykeel, Carrowreagh, and Holywood were sold accordingly. J. H. Kennedy died in 1839, and Robert Stewart Kennedy—who opposes

this application—under the provisions of J. Kennedy's will, became entitled to the property so settled by the deed of 1828. The petition is to sell Ballycultra, the object of the deed of 1828 being that these lands should be preserved in the family. That arrangement was entered into for full and valuable consideration from J. Kennedy. In order to understand the amount of this consideration it is to be observed when J. Kennedy executed the deed of 1828, he was entitled in remainder to the settled estates, which were then only subject to the sum of £4,000. The portion of the settled estates sold after 1828 produced £38,000, the rental of the part unsold amounted to £966 per annum. The estates settled by the deed of 1799 on J. Kennedy were worth £3,000 per annum, subject only to £4,000, so that John Kennedy, as an equivalent for the lands of Ballycultra, and to prevent their alienation, gave up the lands which had been settled on him by the deed of 1799. This petition is now presented in direct violation of that deed of 1828, and the petitioner seeks to sell Ballycultra to pay his own debts, leaving unsold the lands of Cashel, which produce £966 per annum, and which, by the deed of 1828, were to be the primary fund for payment of those debts. The first question is, whether the act compels the court to assist the petitioner in so doing. I do not consider that the court is bound by anything in that act to do so. By the tenth section the court is at liberty to direct the Master to inquire "whether any such incumbrances or charges shall affect any land or estate other than the land or lease which shall have been contracted, or be desired to be sold, and whether such other land or estate shall be liable in priority, or in equal degree or in posteriority." And the 11th section directs that all the laws, rules, orders, &c., in force with respect to proceedings in suits for foreclosure and redemption, not inconsistent with the provisions of this act, shall apply to proceedings under it, so far as circumstances shall admit. It is plain if this were a plenary suit for a sale of the lands of Ballycultra, the court would direct those lands to be sold which were the primary fund, and the 11th section of the act shews that this court is not to take a different course upon this summary proceeding. I am of opinion that this petition is unsustainable, for it is framed with the intent of getting rid of this deed of 1828. It is also unsustainable on other grounds—It appears that by a deed of the 13th April, 1844, and which was registered on the 6th of July following, that the petitioner, in consideration of the sum of £1956, conveyed to one John Kennedy all his rights to the rents and profits of these lands, and appointed John Kennedy, his attorney, to receive these rents. Thus he is not an owner within the second section of the act, and has no right to present this petition. This objection appearing conclusive, it was suggested to the court that John Kennedy, to whom all the interest had been conveyed, was only a trustee, and that there was an unregistered contemporaneous deed of trust under the provisions of which the petitioner is interested, and is entitled to present this petition, being an owner within the act. I

called for this deed which was not produced, and having postponed giving judgment upon the case, a copy of this deed was sent without any date, or the names of the witnesses annexed. It is endorsed as bearing date the 30th of April, 1844, and is not of equal date with the registered deed, and there is no affidavit verifying this deed of trust. By the 7th section of this act every petition must set forth the estate or interest of the petitioner in such land or lease, and the uses or limitations, and the trusts, if any, to which the land or lease stands limited or settled, notwithstanding which the petitioner has suppressed in his petition these two deeds of 1844, in violation of the terms of the statute, and only produced the deed of trust when the court was about to give judgment on the petition. I will dismiss this petition with costs, without prejudice, however, to the presenting of a new petition which shall not suppress material facts. It was contended that this court was bound to direct a reference under the 10th section of the act, and that if the Master so report, the court could direct a sale of the lands of Cashel. In answer to this, it would be sufficient to say that is not the case made by the petition, but the answer is conclusive, that the legal estate in Ballycultra, and the other lands, is vested in the trustees of the deed of 1828, and by the registered deed of 1844, the petitioner has parted with all the rest of his estate in the lands. I cannot enter into the inquiry as to the effect of the trust deed of equal date, which has been produced; that was not referred to in the petition, which was in direct violation of the 7th section of the act, and these facts have been improperly suppressed. I will not offer any opinion as to what the effect of this deed may be if a petition properly framed is presented, seeking to sell in accordance with the trusts of the deed of 1828, and if it sets forth the important provisions of the two deeds of 1844. If the General Orders had been published when this petition was presented, these deeds could not have been suppressed without a violation of the oath which is required upon the presentation of every petition, and this shews the necessity of that provision. I think there is matter upon the face of these documents sufficient to establish that this suppression was intentional, and the petitioner was not aware that the respondent's solicitor would have searched the registry. I will dismiss this petition with costs, without prejudice to the petitioner, if so advised, to present another petition.

BESSONET v. WALLER.—Feb. 12, 14.

Practice—Receiver—Costs of Accounting—Poundage.

Mr. J.F. Waller moved, that the Master in this cause might be at liberty to allow the receiver his fees and costs, the Master having disallowed same, the account not having been passed within the time limited by the General Order. (*Master of the Rolls.*—This is not a motion, of course.) There is a consent.

MASTER OF THE ROLLS.—I cannot act upon this consent, it is not regular; and, in consequence of the very many breaches of this General Order which

have occurred, in future I shall adopt a course which, I hope, will have the effect of checking them. From the neglect of their solicitors, receivers are frequently placed in the embarrassing position of losing their poundage; and, although upon such applications I may give a receiver his poundage, if the Master thinks fit to allow it, I will uniformly disallow the costs.

Feb. 14.—On this day, **Mr. Waller** having again moved upon a consent signed by all the parties, the Master of the Rolls made the order in the terms of the consent.

EQUITY EXCHEQUER.

WHITELAW v. SANDYS.—Feb. 15.

Receiver—Distress—Injunction.

Where a tenant of the court, relying on a technical legal irregularity, has replevied goods distrained by a receiver, the court will restrain the replevin suit, even though the receiver has voluntarily taken steps in it, and direct an account of the rent due to be taken by its own officer.

In this case it appeared that a tenant of lands in the custody of the court had replevied goods distrained by the receiver, and it was admitted that the ground of replevin was an irregularity in the notice of distress. In the replevin suit the receiver had entered a rule to declare, and considering that he was irregular in so doing, had tendered the costs of the rule to the tenant, who refused to receive same. A conditional order had been obtained some time previous for staying the suit, and

Tuthill now moved that it should be made absolute. He cited *Perree Minor*, (8 I. E. R. 111); *Aston v. Heyon*, (2 Myl. & K. 390; and Smith on Receivers, 148,) and stated that **Richards, B.**, who had previously heard the case, had some doubts as to the propriety of the court interfering.

O'Callaghan, contra.—The court should not interfere in a case of replevin. All the cases cited were cases of irregularity committed, or authority exceeded by the receiver, except the case in 8 I. E. R., there no one appeared for the tenants, and those cases were cited as if applicable to replevin. If the officer chooses to have recourse to a legal remedy, he should take the consequences, especially as he has himself taken the first step after the replevin. At any rate the sureties should be declared free from liability.

PENNEFATHER, B.—So I am inclined to think, and that is the only difficulty I have, for I have but little hesitation, on the other grounds, in directing the replevin suit to be stayed. At the same time, on reflection, I do not see what injury they would sustain, as their bond is only to answer the result of the replevin suit, and cannot be affected by the result of the reference. Let the replevin suit be stayed until further order, and let it be referred to the Remembrancer to report whether any, and what, rent was due at the time of the distress; this order to be without prejudice to any question as to the liability of the sureties in the replevin

suit, or as to the costs of the said replevin suit, or the costs of this motion.

COMMON PLEAS.—HILARY TERM.

WILLDRIDGE v. CLARKE.—Jan. 30.

Practice—Action of Covenant—Bill of Particulars.

The court will compel the plaintiff to furnish a bill of particulars in an action of covenant, where the breaches alleged are numerous, and of a general character.

Action of covenant. The breaches of covenant alleged to have been committed by the defendant extended over a space of more than six years, and were set out in the declaration as follows:—"That the said defendant, to wit, on the 1st day of July, in the year of our Lord, 1842, and at divers other times from thence hitherto, did prevent and obstruct the plaintiff's tenant and tenants, or followers, from free ingress, egress, and regress into, out of, and through a certain passage," &c., in the words of the covenant.

O'Leary moved, "That the plaintiff do stop proceedings in this cause until she furnish the defendant with a bill of particulars, specifying the said alleged breaches, and the several times when they were committed, setting out the respective days, or, at least the respective weeks, on or in which they were committed, and the name and names of the plaintiff's tenant and tenants, or followers, who were prevented by the defendant from free ingress, &c., and also the means whereby the obstruction, or obstructions, complained of in the declaration were caused, and whether the same took place in the night time or in the day time." *Scarlet v. the Corporation of Dublin* (1 Law Rec. N. S. 205).

Hobart, contra.—This application cannot be granted. *Scarlet v. the Corporation of Dublin* was in assumpsit, a form of action in which a full bill of particulars is required. (Jackson, J.—Yes, and in covenant too.) The practice of the court is altered since *Scarlet v. the Corporation of Dublin*. (Ball, J.—The alteration has been, that the courts are now exceedingly liberal in granting applications of this nature.) We cannot furnish the defendant with all the particulars he seeks. (Doherty, C. J.—How is it possible for the defendant to go to trial upon the vague statement contained in your declaration? You must furnish him with the best information you can.) In *Burke v. Gogarty* (Batty's R. 218), the court says, "A vast deal of abuse might arise from obtaining bills of particulars in such cases, with a view to non-suiting the plaintiff at the trial." (Jackson, J.—There the declaration was very special, and was itself, in effect, a bill of particulars.) In *Soutter v. Hitchcock* (5 Dowl. P. C. 724), which was an action for breach of a covenant to repair, an application similar to the present was refused. (Doherty, C. J.—The defendant there had only to walk from room to room of the house for full particulars.) *Burke v. Chitty* (3 Chitty's Prac. 614, note b).

DOHERTY, C. J.—None of those cases touch the present. The distinction is abundantly plain.

Motion granted without costs.

EXCHEQUER OF PLEAS.—HILARY TERM.

JEFFREYS v. EVANS.

Agreement—Stamp.

A. had been allotted shares in a railway, which he had sold as scrip, but which had, nevertheless, been registered in his name in the books of the company. The real holder subsequently sold them to B., who sold them to C.; and B. then applied to A. to transfer them to C., by a deed according to the provisions of the act. A. executed a deed of transfer, which he delivered to B., receiving the following written undertaking:—"I have received the deed, on condition of having it executed by C., and registered." At this time, calls, amounting to more than £20 had been made on the shares, which, by the provisions of 8 Vic. c. 16, s. 16, should be paid before registering the deed. An action having been brought for a breach of the undertaking.

Held, that it did not require a stamp.

This was an action of assumpsit, brought to recover damages for breach of an agreement to procure the execution of a deed. The case had been tried before J. Moore, at the Cork Spring Assizes, 1848; and on the trial it appeared that five shares in the Cork and Bandon Railway Company had been allotted to the plaintiff, who had sold them as scrip—that in consequence of the real holder's neglecting to claim them, they had been registered as the plaintiff's in the books of the company, and had subsequently come into the possession of the defendant, who sold them to one Greer. As the plaintiff still continued the registered owner of the shares, it became necessary for the defendant, in order to complete the transfer to Greer, to procure the plaintiff's execution of a regular deed of conveyance, according to the provisions of the 8 Vic. c. 16, s. 16. The defendant accordingly had a deed of transfer prepared, and presented it to the law agent of the plaintiff, who procured the execution of it by the plaintiff, but then, at first, refused to part with it until he should see it executed by Greer and registered. Subsequently, however, he gave it to the defendant, on receiving from him the following undertaking, indorsed on a copy of the deed:—"I have received the original deed of transfer from Mr. H., on condition of having it executed by Mr. Greer, and registered accordingly." At this time, calls amounting to more than £20 on the five shares, had been made, which, by 8 Vic. c. 16, s. 16,* must be paid previous to the registration of the deed. The defendant neither procured the execution of the

* "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him."

deed by Greer, nor its registration; whereby the plaintiff remained liable to pay, and was actually compelled to pay calls amounting, in the whole, to £92, for which amount a verdict passed in his favour, on the third count of his declaration, which set out the above facts. At the trial, the defendant objected to the reception in evidence of the undertaking above mentioned, for want of a stamp, but the learned judge overruled the objection, reserving the point, however. There were other objections made to the verdict, which it is unnecessary to notice, the judgment of the court not turning on them. In April, 1848, a conditional order to set aside the verdict had been obtained, and now,

J. D. Fitzgerald, Q.C., moved that the order might be made absolute. This agreement plainly requires a stamp. A stamp is required on all agreements, the matter whereof shall be of the value of £20; the subject matter of the present contract is either the shares or the deed, and they are both of more value than £20; and we are at liberty to prove that by evidence, though it may not appear on the agreement itself. Moreover, this may be considered a contract to indemnify the plaintiff against the past and subsequent calls on the shares, and, as they amount to more than £20, a stamp would be necessary. Counsel cited *Wrigley v. Smith* (5 B. & Ad. 1117); *Shepherd v. Wheble* (8 Car. & P. 534); *Orford v. Cole* (2 Stark. 351); *Baldwin v. Aleager* (13 M. & W. 365).

Lane in support of verdict.—This cannot be said to be a contract of indemnity: no doubt the execution of the deed by Greer, and its registration, would indemnify us against some of the calls; but the agreement with the defendant has nothing to do with the consequences of the execution of the deed: it was not from him but from Greer the indemnity was to come. The damage since accruing to us does not place a value on the subject matter of this contract, which consists of the delivery of a deed on one side, and an undertaking on the other to have it executed. See *Morgan v. Amos*, (2 Man. & Ry., 180); *Latham v. Rutley*, (1 Ry. & M. 13); *Chadwick v. Sills*, (1 Ry. & M. 15); see *Lefroy v. Cox*, (6 L. Rec. N. S., 25); *Fetham v. Cartwright*, (7 Scott, 695.)

Herrick, on same side, was not called on.

Jos. H. Reeves in reply.—Unless from this contract there was an obligation on us to pay the calls due on these shares the plaintiff had no right to recover; and if there was, then this must be considered clearly a contract to indemnify the plaintiff against the payment of so much money, and, therefore, to require a stamp. The plaintiff, at the time of the contract, was liable to pay the calls; and by the 16th section of the Companies' Clauses Consolidation Act, they must be paid before the

deed was registered; if, therefore, this is considered an absolute contract by the defendant to procure registration, at all events it must be held to be an undertaking to pay so much money for the plaintiff, in other words to indemnify him to an amount exceeding £20. In this view the value of it is clearly measurable, and has been sufficiently shewn in evidence.

Pigot, C.B.—In this case it has been urged on the part of the defendant that the agreement, which formed the substantial ground of action, should not have been received in evidence as it was not stamped. The Stamp Act provides that agreements in writing shall not be received in evidence unless stamped, "when the matter thereof shall be of the value of £20." What, then, is the matter of this agreement? It is not a contract to pay calls on shares, but simply an undertaking, in consideration of the delivery of a deed by one party that the other shall procure its execution. How can that be said to be a matter of the value of £20, or how can any value in money be set upon it? The damages resulting from the breach of the contract have nothing to do with its value. In the case of *Orford v. Cole* the jury assessed the damages resulting from the breach of contract at £7000; and yet the court held that the contract which was an agreement to marry, did not require a stamp, there being no value assignable to the subject matter, if it had been fulfilled. So, likewise, in the case of contracts, by carriers of goods, neither the value of the goods, nor the damage resulting from their delay or miscarriage, is taken into account in setting a value on the matter of the contract; the application of the stamp act is determined entirely by the amount of hire to be paid for the carriage of the goods. The same principles will apply in this case. Here, at the time of the contract, a sum of money was payable in respect of shares, of which the defendant was the owner, and which he wished to have transferred to Greer; the plaintiff, being a necessary party to such a transfer, was induced by the defendant to deliver a deed, on an undertaking from the defendant that Greer should execute it, an agreement which the defendant has failed to perform. Here is nothing on one side but a promise to take some trouble, and on the other the delivery of a deed; surely no value in money can be set on the matter of such a contract. All the cases shew that the damages subsequently inflicted on the parties by the non-performance of the contract, are not to be taken into account in determining on the application of the stamp act. We therefore consider this agreement does not come within its provisions, and that the ruling of the learned judge, and the consequent verdict, were correct.

LEFROY, B., concurred.

COURT OF CHANCERY.—Feb. 26.

BELL v. AHEARNE.

Collateral Security—Policy of Assurance.

A mortgagee is not bound to account for the sums paid to him on foot of a policy effected in Ireland, on the life of his debtor, when the premiums have been paid from his own moneys, and there is no contract between mortgagees and mortgagor on the subject.

This was a redemption bill. The plaintiff, by his bill and at the bar, sought for special directions with regard to sums paid by the Standard Assurance Company, on foot of a policy which had been effected in Cork by the defendant, the mortgagee, on the life of E. Bell, who had joined in the mortgage for the better securing the debt. The plaintiff stated that the premiums had been paid, according to a contract between mortgagees and mortgagor, out of the moneys of the mortgagor. This case not having been established in evidence, the question turned upon the general doctrine.

F. Fitzgerald, Q.C., for the plaintiff, (with him *Collins and Maley*).—The question is, whether, there being a policy on the life of the debtor, and the creditor effecting the policy being paid the sum insured, that payment must not be held part payment of the debt? The other side will rely on *Humphrey v. Arabin* (L. & G. Plunk. 318). That case has been shaken by the observations of the Vice-Chancellor in *Henson v. Blackwell* (4 Har. 434). This case is governed by *ex parte Andrews* (2 Rose, 410; S. C. 1 Mad. 573); *Godsall v. Boldero* (9 East. 72). In the case of such a policy as this, there is no difference between the law here and in England. The English statute is only against wagering policies. This is not a wagering policy, and is a contract of indemnity. It is not pretended that the defendant had any interest in the life of E. Bell, save in respect of this mortgage debt. Such a policy as this would be a good policy in England as a contract of indemnity; how can it be differently construed here? *Phillips v. Eastwood* (L. & G. Sug. 270). (Lord Chancellor—Could the insurance company refuse to pay the amount due on the policy because the debtor had discharged the debt?) That is the precise point decided in *Godsall v. Boldero*. (Lord Chancellor—But was not that decided on the effect of the English statute?) *Armitage v. Winterbotham* (1 M. & G. 130).

Brewster, Q.C., for defendant, (with him *Wall and Atkins*).—The plaintiff calls on your lordship to overrule *Humphrey v. Arabin*. The English cases are not applicable, *British Insurance Company v. Magee* (Cooke & A. 182); *Milliken v. Kidd* (4 Dr. & Warr. 274).

Collins submitted that English cases did apply. Cited *Staniforth v. Lyall* (7 Bing. 169); Coote on Mortgages, 444.

LORD CHANCELLOR.—I do not feel warranted in this case, from anything that has been urged, in now overruling *Humphrey v. Arabin*. That was decided, in 1836, on very great consideration, and has not since been overruled by any case here or

in England. It was contended that this case was distinguished from it, by saying that the defendant here is a trustee, as in *ex parte Andrews*, but that has not been sustained. It is important to observe that all the cases in England have been determined on the statute, on the ground of the party having been able to effect the insurance by reason of the interest he acquired by his debt. In the case of *ex parte Andrews*, the respondent, as a trustee, was taken out of the statute by his interest in the life of the bankrupt's wife, without which he could not have effected the insurance. The court held, that having, by his character of trustee, acquired a right to make the insurance, he could not have a benefit for himself from it. Sir Thomas Plumer in that case says, "It is clear that a trustee never can use, to his own benefit, the property committed to his trust. They had it subject to all the jealousy with which the court regards a trustee acting on the property for his own benefit. They never could have insured unless the property had been assigned to them. The means, therefore, of acquiring the sum received from the insurance office originate with the bankrupt and his wife; they divest themselves of all dominion over it by committing it to trustees. It is extremely difficult to maintain that they, as trustees, being allowed this payment, are not to account for it as an advantage made of fiduciary property, acquired partly by their own act, and partly by the act of the bankrupt. Having been thus enabled, by the act of the bankrupt, to obtain part of their debt, they cannot prove the whole, they must account." It is difficult to say on what *Henson v. Blackwell* turned; save this, that the creditor had only a right to effect an insurance against the risk of the husband not being able to reduce into possession the property, and that that risk having been determined by the death of the wife, there was an end of the contract altogether. Though the Vice-Chancellor observes on the case of *Humphreys v. Arabin*, it does not appear that his attention was called to the difference between the law in this country and in England. It would be hard to contend that any right could be founded on behalf of the creditor against his debtor. If the creditor choose to pay the premiums, how could he recover them against the debtor, if the insurance company failed, or they amounted to more than the debt? And it could never be said that the debtor should have the option, if the policy proved valuable, to claim it; if worthless, to reject it. However, *Humphreys v. Arabin* has decided the question. That is a binding decision; in principle there is nothing against it, and I am content to abide by it as the law of the court.

ROLLS COURT.—Jan. 26.

O'GRADY, *Petitioner*, v. GLOVER, *Respondent*;

W. V. GREGG v. SAME;

JOHNS AND OTHERS v. SAME.

Judgment—Priority—Salvage—Advances.

A. having obtained a judgment in respect of a salvage advance, extended a receiver, already

appointed by B., a prior judgment creditor. A. moved for payment in priority. Held, that on petition the court will not decide the question of priority, B. insisting on his right to be paid according to the priority of his judgment.

In the month of April, 1847, the petitioner in the first matter having presented a petition under the provisions of the 5 & 6 W. 4, c. 55, obtained an order for a receiver, who was appointed over the lands of the respondent previously to Michaelmas, 1847. The petitioner in the third matter presented a petition on a judgment of Hilary Term, 1848, stating that in January, 1848, an arrear of renewal fines became due by the respondent, amounting to more than £500. That the head landlord refused to renew, and threatened to eject the interest in said lands, unless the renewal fines were paid, and the petitioner, having a sub-interest in said lands, had agreed to advance the amount of said fines, upon having the repayment thereof, and interest, secured by the bond and warrant of attorney of the respondent, and it was also agreed that, in respect of such advances, petitioner should rank as a salvage creditor. The petitioner in the first matter was no party to this arrangement. The petition then prayed that the receiver appointed in said first matter might be extended to the third matter, and that he might be directed to apply the rents, after payment of the head rent, &c., in discharge of the sum due to petitioner in said third matter on foot of his judgment, in priority to the demands of the petitioner in the first matter.

Orpen for the petitioner in the third matter.—In this case it may be contended that under the 32d section of the 5 & 6 W. 4, c. 55, the rents must be applied according to the priority of the judgments, but the first clause of the section gives the court full control over the money received. *Mackreth v. Simonds*, (15 Ves. 348; Sug. Powers, 863); *Kehoe v. Hales*, (5 I.E.R. 597); *Burroughs v. Molloy*, (8 I.E.R. 482); *Fetherstone v. Mitchell*, (11 I.E.R. 35.)

Leech, contra.—Under the statute the funds should be applied according to the priority of the judgments. The remedy given by this act is substitutional for that formerly obtained by *elegit*.

MASTER OF THE ROLLS.—I do not think that, in point of law, I can direct the petitioner in the third matter to be paid in priority to the petitioner in the first matter; although, in justice, he ought to have that priority. When the receiver was appointed in 1847, the estate had determined by the dropping of all the lives in the lease. Mr. Orpen's client then advanced the sum of £544, the effect of which was to render the interest secure. I do not offer any opinion as to the effect of taking a judgment for the salvage advance, or whether, by so doing, the petitioner in the third matter has lost his priority; but I am of opinion that this is not a question I can decide on petition.

Jan. 31.—The order, so far as material to this part of the motion, was as follows:—

“And the petitioner in the first matter now insisting that although said sum of £544 Os. 7d. was paid as salvage money by the petitioner in

the third matter, yet that by taking the judgment in the third matter for a sum including said sum of £544 Os. 7d., the petitioners in the third matter have lost their priority, and that the petitioner in the first matter, having the earliest judgment, is entitled under the 5 & 6 Wm. 4, c. 55, to be paid his demand in priority to such salvage claim. No rule on that part of the motion which seeks that said receiver should pay said sum of £544 Os. 7d. in priority to the claim of the petitioner in the first matter; and let this order be without prejudice to any proceedings which the petitioner in the third matter may be advised to take, by bill or otherwise, to have said sum paid in priority, and to fix the petitioner in the first matter with the costs of said proceedings so rendered necessary by his disputing the jurisdiction of the court to decide the question in a summary way, without a bill being filed,” &c.

Liber 280, fo. 178.

ANDERSON AND OTHERS v. MULVANY.—*Jan. 30. Practice—Vacation—Meaning of 93rd General Order—Publication—Passing of.*

Under the 93rd General Order, the term “vacation” is referable to the period when the court is not sitting.

The bill in this case was filed by the plaintiffs, who formed a joint-stock company for the improvement of Lough Corrib, against the Commissioners of Public Works. There were certain documents lodged in the Castle, necessary for the support of the plaintiff's case, to which they had not been able to get access, although several applications had been made for that purpose, pending which the rule for publication was entered on the 12th December, 1848, and publication passed on the 4th of January following. The solicitor of the plaintiffs stated that he was not apprised of the intention to pass publication, as on the 18th of December notice had been served by the defendant of their intention to examine a witness.

Mr. Molynous now moved that the plaintiffs might be at liberty to examine further, notwithstanding publication passed, same having been passed irregularly, and contrary to the rule of the court. Under the terms of the 93rd General Order, if the time for which publication is respited expires in vacation, publication shall not pass thereunder until the second day of the following Term. As the rule was not entered in Term, it must be considered as entered in vacation, which word has the same meaning in the courts of Equity and common law; and the division of time into Terms and vacations is recognised by the courts of Equity (Gilbert's Chancery Pr. 38). The word “vacation” is taken in its ordinary sense. *Beav. Chancery Orders*, page 33; 7th Order of 21st December, 1843; *ibid.* 44, where the distinction is taken between Term and vacation; also in the 15th Order of 15th May, 1837 (England, *ibid.* 118). In the former orders of this court, the same distinction is taken in the first of Sir R.

Bolton's rules (Smith, Suppt. 93); and in the first of Primate Boyle's Orders (ibid. 96); *vide* also Rule 54, ibid. 101.

Mr. Colles, contra.—The defendant has been perfectly regular. The practice in the office is not to consider it vacation while the court is sitting. In *Jessop v. Jessop* (3 L. Rec. O. S. 91) the Master of the Rolls decided, that while the court sat for dispatch of business after any term, the equitable term should be considered as continuing.

MASTER OF THE ROLLS.—I will not overrule the settled practice of the office. The effect of the construction which the plaintiff's counsel puts on the rule would be, that under the 3rd General Order, after the last day of Term, the offices would be open from twelve to three o'clock each day only. From the year 1843 to the present time, a period of six years, the word "vacation" has always been considered to mean the period during which the court is not sitting; and, having been informed by the officer that such is the uniform practice, I will follow it, unless clearly of opinion that it is wrong. The notice in this case is not regular, for it does not state what the documents are, an inspection of which is required. Every notice should be framed in such a manner that the court can turn it into an order; it should also specify the irregularity complained of, and the application should have been to set aside the order, publication having passed contrary to the provisions of the 93rd General Order. In accordance with the view taken by the late Master of the Rolls, I consider the word "vacation" is referable to the period when the court is not sitting. I shall obtain a certificate to shew what is the established practice which ought to be invariably observed.

"Declare that publication passed regularly according to the course and practice of the court, and refuse the motion with costs, without prejudice to the plaintiff serving a notice of motion for the present sittings, and specifying in his notice the evidence which he seeks to be at liberty to give, and the witnesses he desires to examine."

Lib. 282, fo. 50.

ABBOTT v. ABBOTT.—Feb. 9.

The Attorney-General having been made a party in respect of a recognizance entered into by a receiver, as if within the terms of the 15th and 23rd General Orders, where he should have been an answering defendant, counsel for the Attorney-General appearing at the hearing and consenting to be bound by the proceedings, the court made a decree.

W. Smith, for the plaintiff, sought the usual decree on taking the bill as confessed against the defendants for want of their answers. This was an ordinary foreclosure suit, and the bill having been filed prior to the publication of the case of *Christopher v. Cleghorn* (8 Beav. 314); it prayed that the Attorney-General, upon being waited on with a copy of the bill and notice under the 15th General Order, might be bound by the proceedings in respect

of a recognizance the crown acknowledged by the mortgagor, as security for a receiver in a civil suit after the execution of the mortgage. In the case of *Fawcett v. Biggs* (Chancery, Jan. 25, 1849) the Lord Chancellor decided, that in the case of a recognizance of this description, the crown was a royal trustee, and that the Attorney-General fully represented the rights of all the parties interested in the recognizance, and that he should be properly an answering party, as not being within the 15th and 23rd General Orders, which contemplate parties who otherwise should have been served with a subpoena to appear and answer, and because they do not specially refer to the crown. The cause having been set down for a decree *pro confesso*, the Attorney-General, by his counsel, now appears and consents to be bound by the proceedings, which will set matters right, *Dyson v. Morris* (1 Hare, 413). The Attorney-General is, in fact, a defendant on the record, though not required to answer; and this course is less expensive than going through the form of putting in an answer.

C. Kelly, for the Attorney-General, consented accordingly.

MASTER OF THE ROLLS.—I will make the decree, reciting that the Attorney-General appeared by his counsel, and consented to be bound by the proceedings.

GRAVES v. GRAVES.—Feb. 14.

Practice—Notice.

A notice of motion, served for a particular day, should state that the motion will be moved at the sitting of the court.

Hobart moved for the discharge of a receiver, he not having perfected his recognizance. The notice had been served for this day.

MASTER OF THE ROLLS.—This notice is not regular. Every notice of this nature which is served for a particular day, should state that the motion will be moved at the sitting of the court. You must, therefore, serve a new notice.

EQUITY EXCHEQUER.—Feb. 9.

IN THE MATTER OF THE IRISH SOUTH-EASTERN RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACT,

EX PARTE KELLY.

CORAM PENNEFATHER AND RICHARDS, B.B.

Railway Company—Payment out of Court—Costs—Willful Refusal.

K., the occupier of premises taken by the company, had agreed to give up the possession for £23, but when a clerk of the company afterwards came to demand possession accordingly, and stated that he had the money agreed on in his pocket, *K.* refused to surrender, on the ground that his sister had an equal interest in the premises with himself, and required compensation. The company thereupon lodged the money in court, to *K.*'s separate credit, on the ground of a refusal by *K.* to accept it, but the warrant did not set

forth the peculiar circumstances of the case. Upon *K.* presenting a petition for payment of the sum out of court—Held, first, that the money, having been lodged to his separate credit, it was an admission of his title, and he was entitled to be paid without a reference. Secondly, that the tender was insufficient and the warrant defective, and therefore that the company were not entitled to their costs; nor was petitioner, as his dealings were tainted with mala fides.

The petition of Samuel Kelly—after setting forth his title as tenant at will of the premises of which possession had been taken by the company, and the service upon him of the several preliminary notices required by the act—stated that an agreement had been entered into between petitioner and the railway company, by which he was to give up the land for the sum of £23,—that on the 9th of February, 1848, a solicitor's clerk, in the employment of the company, went, along with the sub-sheriff, to the premises in question, and, without payment or tender of the purchase money, or any sum whatever, took forcible possession of them, on the ground that the company had lodged the purchase money in court,—that petitioner had not been tendered or shewn the purchase money by the clerk, who, when he came to demand possession in the first instance, alleged that he (the clerk) had the money in his pocket. The petition prayed the payment of the money out of court, in the usual form, with the costs of the petition. The company opposed the application, and an affidavit sworn by the solicitor's clerk stated that the deponent had repeatedly told the petitioner that he was ready to pay him the £23 on getting possession of the premises, and had repeatedly requested him to accept the money, but that petitioner, in reply, had stated, in the presence of his sister, that she (his sister) was equally entitled to the premises as petitioner, and refused to give up possession until she was satisfied. The question turned on the right of a party to money lodged by a company to his separate credit, and on the construction of the 76th and 80th sections of the Lands Clauses Consolidation Act.

Bond Case for petitioner.—The money having been lodged to the separate credit of petitioner, is a *prima facie* admission of his title. Even where money is lodged to the credit of the petitioner and all other parties interested, the petitioner, on an affidavit of his title, is entitled to have the money paid to him, (*Ex parte Grange*, 3 Y. & C. 68). By the 79th section, the party in possession is to be deemed the owner and entitled to the money. (*Richards, B.*—On this branch of the case there is no difficulty; the petitioner is clearly entitled to the purchase money. The only question is as to the costs.)

Wall, Q.C., contra.—The exceptional clause of the 8th section precludes a party from costs if, by his own act, he brings himself within it. Possession was the only title which petitioner here had to shew the company, and they could not pay him until they had obtained that possession. The attempt on the part of petitioner to set up the title

of his sister was such an adverse claim as to entitle the company to lodge the money in court.

Coxe, in reply.—Authority to lodge the money in court is only given by the 79th section, after a tender and refusal. There was no legal tender, *Thomas v. Evans* (10 East. 104); *Dickinson v. Shree* (4 Esp. 67); *Peacock v. Dickman* (2 C. & P. 51, Note). The power of lodging money is a compulsory one; and if there is any doubt on the construction of the section, the landowner should have the benefit of it, *Barker v. the Great Western Railway Company*, 563 S.C. 589; *Barker v. North Staffordshire Railway Company* (12 Jur. 325). There must be a legal tender and wilful refusal to authorise a lodgment of the money under the act, *ex parte Bradshaw* (12 Jur. 888). When the petitioner set up his sister's claim, the company, instead of lodging the money, should have called upon him to make title. The money having been improperly lodged, petitioner is clearly entitled to the costs of drawing it out, as this case is not within the exceptions of the 80th section.

PER CURIAM.—There is a difficulty in this case, arising from the circumstance that the warrant under which the company lodged the money sets forth the petitioner's refusal to accept it to be the sole ground for the lodgment. Now, there was another and a more proper ground on which they should have lodged the money, and that was the adverse claim put forward by the petitioner's sister. The tender strictly was not a legal one; and the company's warrant has been very loosely framed, and should have set forth all the special facts of the case. On the other hand, an attempt has been made by the petitioner to extort more money than he had originally agreed for. We shall, therefore—as there has been default on both sides—direct the petitioner to be paid the amount in court, and pronounce no rule as to the costs of the petition.

COURT OF EXCHEQUER CHAMBER.

ROCHE v. O'BRIEN.—Feb. 1, 2.

CORAM BLACKBURN, C.J., DOHERTY, C.J., PIGOT, C.B., PENNEFATHER, B., TORRENS, J., CRAMP-
TON, J., FERRIN, J., RICHARDS, B., BALL, J.,
JACKSON, J. Absente—LEFROY, B., AND
MOORE, J.

Will—Construction—Estate Tail.

A., seized of the reversion in fee, devised it to *B.*, his nephew, "in as full a manner as he could convey it," to be enjoyed by him and his lawful begotten heirs male for ever.

Held, that *B.* took an estate in tail male.

This was error from the judgment of the Court of Queen's Bench. The action was in covenant by the heir-at-law of John Roche the lessor, claiming the reversion in fee against the assignee of William Roche, the lessee, who claimed as devisee of the reversion in fee after the estate tail created by the will of the lessor. The remaining facts appear sufficiently in the judgment of the court. The whole question turned upon the construction of the

will and codicil of John Roche, which were as follows:—

"Whenever it happens that the Aghada estate, by *want of male heirs*, to wit, of the said James Joseph Roche, or by any other contingency reverts back to me, I hereby leave it in as full a manner as I can convey it to my nephew, William Roche, to be enjoyed by him and his *lawful begotten heirs male for ever*; and, as I have perfected leases to him, in trust, of the demesne and two adjoining farms of Aghada, subject to a yearly rent according to a valuation made, I leave him my interest, if any I had, in those leases; and in case of his not coming into possession of the estate by the means above-mentioned, I leave him £8,000 of my £4 per cent. stock, to be held by trustees, the interest of which is to pay the rent of the demesne and two farms above mentioned; to my eldest grandson, James J. R. O'Brien I leave £10,000 £4 per cent. stock; to my grand-daughter, Jane O'Brien, I leave £4,000 £4 per cent. stock; to my daughter, Mary O'Brien, I leave the £4,000 £4 per cent. which I settled on her as a marriage portion on her marriage, for her use and that of her younger children; to my niece, Ellen Verling, I leave £1,000 £4 per cent. stock, with £30 a-year profit rent I leave on her brother Bartholomew Verling's stores; to my grandson, J. Roche O'Brien, I leave also my interest in White Point, after his mother's death; I leave £100 to my sister, Ellen Verling; to my sister, Julia Enery, £100; to my nephew, Doctor Verling, and his sister, Catherine Ellis, £100 each, and I desire the stock on the farm to be sold to pay these legacies; to my nephew, William Roche, and my grand-daughter, Jane O'Brien, I leave my household furniture, plate, &c., and it is my wish, if the rules of our church allow it, that they should be married and live in Aghada house; God bless and prosper them and their offspring. To the parish of Aghada, I leave the school-house, and £20 a-year for its support, and also the chapel and priest's house I leave to the parish rent-free for ever, as long as they shall be used for such specified purposes; the five slate houses I built in the village, I leave to five of the poorest families rent-free; to David Coughlan I leave the house he now lives in during his life; to my servant, James Tracy, I leave the house his wife now lives in; and to my wife's servant, Mary Ahearne, otherwise Finne, her house rent-free during their lives; and to each of those three, viz., David Coughlan, James Tracy, and Mary Ahearne, otherwise Finne, I leave £10 a-year during their lives: having had unbounded confidence in my unhappy nephew, James Roche, I did not take legal means under the settlement I made to secure those last bequests out of the Aghada estate; I trust, and hope, and desire that whosoever is in possession of the estate will confirm these my wishes and intents. I appoint my trusty friend, Henry Bennett, (my present law agent) William Roche, and my daughter, Mary O'Brien, as executors of this my last will."

The codicil to the will was as follows:—

"By my will dated the 5th day of January, 1826, I appointed my friend Henry Bennett, my nephew, William Roche, and my daughter, Mary O'Brien,

executors to that will; now, by this codicil, I annul that appointment, and appoint John Gibson, barrister-at-law, Bartholomew Hackett, of Middleton, distiller, and my nephew, William Roche, as my executors to that will, and do hereby empower them to name and appoint two trustees for the purpose of managing the sums I left to my nephew, William Roche, my grand-daughter, Jane O'Brien, and my grandson, J. O'Brien, as it is my intent and will that they should only receive the interest, and the principal to remain untouched during their lives, to go to their children; out of William Roche's interest the rent of Aghada which I have leased him is to be paid; and I desire that he and my grand-daughter Jane, who are shortly to be married, will reside there. I leave William Roche all the stock, &c., on the farm, and to him and his wife all my household furniture, plate, and china, and make them my residuary legatees; it is my will that my grandson, James R. O'Brien, shall live with them at Aghada until he is of age, which is to be at the age of twenty-five, and not before; and the trustees are to pay him until that period £100 a-year to complete his education, and another £100 a-year during that period to his mother, and the remainder of the interest of his £10,000 to be paid William Roche to assist him in keeping up Aghada during that period, and I trust by that time he will have a profession by which he will add to his income; I request and desire that nothing shall prevent his following his profession; it is my intention that William Roche and his wife shall step into possession of Aghada house, demesne, and farms, which are leased to him in the same way that I leave it when it shall please God to take me; in case of the death of William Roche before his wife, she is to be paid the interest of her £4,000, to be made up £200 a-year as her jointure; and if she dies before him, he is to have the £10,000, provided she has no issue; but if she leaves issue, it is to go to them after William Roche's death, as before directed."

Sir C. O'Loughlen for the plaintiff in error, the defendant below.—The question is, whether William Roche took an estate tail alone, or an estate tail with an expectant or reversionary fee. First, it is clear that the testator did not mean to die intestate, and, that nothing might be undisposed of, made William Roche and his wife residuary legatees. Secondly, that the testator having a contingent reversion in fee in the property, he devised it from his heir at law, and gave it to another, charging it in such a manner as to shew that whoever should have the property should take under the will. These charges cannot be enforced against the heir at law, as he takes by title paramount. Thirdly, that, having his heir at law in contemplation, he took from him that he would otherwise be clearly entitled to. He had most fully provided for him, and designedly gave the property to William Roche, for the purpose of founding a family of the name of Roche, who were to dwell in Aghada house. If the construction contended for by the plaintiff below be the true one, the manifest intention of the testator is wholly defeated. The re-

version would not be disposed of; his heir would take at law, and not under the will; and the estate would go to the very person he intended to deprive of it. The first portion of the sentence, "I hereby leave it (the Aghada estate) in as full a manner as I can convey it," conveyed the fee simple, and the subsequent words, "lawful begotten male heirs for ever," reduce it to an estate tail, with a reversion in fee. *Chyck's case*, (Dy. 357, Pasch. 19, El.) That case, as reported in Dyer, is still law, and the case reported in Benloe, 300, and Anderson, 51, by the name of *Baker v. Raymond*, is not the same. In *Abraham v. Twig*, (Moore 425, 11 Jac.); *Roberts v. Roberts*, (2 Bul. 127, 13 Jac.); *Blanford v. Blanford*, (1 Rol. 320, 21 Jac.); *Sergeant's case*, (2 Rol. 425); *Herbert v. Thomas*, (Har. and Wol. 434—per *Littledale, J.*); *Doe d. Herbert v. Thomas*, (3 Ad. & El. 128, Shaph. Touch. 445). All these authorities rely on *Chyck's case*, as cited in Dyer. *Daniel v. Uply*, (Latch. 43), is a decision to the same effect, by *Doderidge, J.*, who was either at the bar or on the bench at the time of the decision of *Chyck's case*. The following cases and authorities were also relied upon, and commented on during the argument—*Turnman v. Cooper*, (Cro. Jac. 476, S. C. Rol. Rep. 19, 23, S. C. Poph. 138; 1 Thomas's Co. Litt. 518, 21 a.); *Altham's case*, (8 Coke 154, b.) denied to be law in *Turnman v. Cooper*, (Pop. 138; Year Book, 21 Hen. 6, 723, b.). (*Blackburne, C. J.*—That was the case of a deed where the whole estate passed from the grantor.) (*Anon. Brownl. 45*); *Holland v. Fisher*, (O'Bridg. 212; 1 Steph. Black. Com. 460); *Melish v. Melish*, (2 B. & C. 520); *Barker v. Giles*, (2 P. W. 279, S. C., affirmed on appeal; 3 Bro. P. C. 297); *Littleton & Ux v. Green*, (4 M. & W. 229); *Nanfan v. Legh*, (7 Taun. 85, S. C. 2 Marsh. 107); *Doe d. Ellis v. Ellis*, (9 East. 382); *Davis v. Stevens*, (1 Doug. 321); *Doe d. Murch v. Marchant*, (6 Man. & Gr. 813).

Chatterton, with him *R. W. Greene, Q. C.*, and *F. Fitzgerald, Q. C.*, contended—That, according to the true construction of the will, William Roche took only an estate tail. That the construction contended for by the defendant below would tend further to defeat the testator's intention to found a family, than that sought to be put upon the will by the plaintiff, as the fee would be more easily alienated. That the devise shewed no intention of the testator to dispose of his whole property; the words were, not *my estate*, but "the Aghada estate," words of description only. The charges made by the testator upon the devised estate would take place on the reversion, whether the estate be taken by descent, or under the will. That the reversion was disposed of, and that there was no general intention expressed in the will inconsistent with an estate tail. The learned counsel distinguished *Chyck's case*, and *Turnman v. Cooper*, and cited and referred to *Altham's case*, (8 Coke, 154, b.); *Ossulton's case*, (3 Salk. 336); *Baker v. Wall*, (1 Lord Ray. 185); *Doe d. Lord Lindsay v. Colyear*, (11 East. 548); *Slater v. Slater*, (5 T. R. 335); *Nanfan v. Legh*, (2 Marsh. 107, S. C.; 7 Taun. 85); *Davis v. Stevens*, (Doug. 321; Co. Litt. 27, a.); *Church v. Wyatt*, (F. Moore, 637); *Wood v.*

Ingersole, (1 Bul. 63); *Doe d. Eustace v. Easley*, (1 Cr. M. & Ros. 823); *Winter v. Perratt*, (9 Cl. & Fin. 613); *Angell v. Angell*, (9 Q. B. 353); *Oddie v. Woodford*, (3 My. & Cr. 584); *Doe d. Ellis v. Ellis*, (9 East. 382); *Trenke v. Frencham*, (2 Dy. 171); *Chilton v. Cooper*, (2 B. & Ald. 610).

Napier, Q. C., in reply—The court will effectuate the intention expressed on the face of the will. It is clear from the whole testament, the testator thought he was devising the property out and out. There is first a general expression conveying the fee, and the subsequent words cannot narrow it. By the "Aghada estate," he intended his whole interest, and to convey it "in as full a manner as he could," when he should become possessed of the reversion in fee, and the charges evidence that intention to deal with the whole. He referred to *Rundall v. Tuckin*, (6 Taun. 418—per *Chambre, J.*); *Moffet v. Catherwood*, (Al. & Nap. 472); *Cotton v. Stenlake*, (12 East. 515).

Feb. 2.—BLACKBURNE, C. J., now delivered the judgment of the court.—This is an action of covenant brought by the plaintiff below as heir at law of John Roche, the testator, claiming the rent reserved in a lease executed by John Roche to Wm. Roche, whose assigns the defendants are, and the plaintiff below insists he is entitled to the reversion, as heir at law of John Roche. The declaration states a settlement executed on the marriage of the testator's nephew, James J. Roche, limiting the estate to John Roche for life, remainder to James Joseph Roche for life, remainder to him in tail male, with the reversion in fee to John Roche, the settlor. It then states the will of John Roche, devising his reversion to William Roche in tail male, and the death of William and James without issue male, and traces the descent of the reversion to the plaintiff. The plea of the defendant sets out the will and the codicil of the testator, John Roche, in *hæc verba*, on the construction of which the question in this case wholly depends. The plaintiff below alleges that Wm. Roche took only an estate tail, which has now determined. (The learned Chief Justice then read the words of the will.) It is not denied that the words in the devise give an estate tail. *Lord Ossulton's case*, (3 Salk. 336), puts this question beyond doubt. The addition of the word "for ever," makes no difference. *Baker v. Wall*, (1 Ld. Raymond 185). *Davis v. Stevens*, (1 Doug. 320), was a devise to A. of the "fee simple and inheritance of Lower Shelstone, to him and his child, or children, for ever." The language of Lord Mansfield is, every word, applicable to this case. *Nanfan v. Legh*, (7 Taun. 85), is a leading authority, and has a strong resemblance to this case, and there the devise was held to confer an estate tail, and no more, and for this position there will be found a large body of authority. The defendant below contends that there is a devise to Wm. Roche of two distinct estates, first, an estate in tail male; and secondly, of an estate in fee expectant on the reversion. To maintain this view the sentence is divided in two, and the order of it inverted, for the purpose of avoiding the absurdity that would follow. I know of no authority for so altering the plain language of a will. The context

requires no such construction, but rather the contrary. I shall only say, that in all the reasons given in the cases for this construction, it never occurred that in a devise a sentence could be stopped in the middle. The judgment of my brother Crampton in the court below contains so able a review of *Chycke's case*, that I shall not further refer to it. The judgment of Lord Ellenborough in *Doe d. Ellis v. Ellis*, (9 East. 382) which is now impugned by the defendant below contains a clear exposition of the law. No one can read that case without seeing that it militates against the whole argument of the defendant's counsel. Considering the whole will, we think the inference to be drawn from it is, that the testator intended W. Roche to take an estate tail only.

Judgment affirmed.

EXCHEQUER OF PLEAS.—HILARY TERM.

STEEVENS, *Appellant.*

STRANOMANS, *Respondent.*

A. and Co., being brewers at W., and having two licences—one authorizing them to brew for sale, and another to brew and retail beer to be consumed elsewhere than on their premises—sent a van to C. in charge of a servant, who from it on their behalf sold beer by retail, to any person who offered to buy.

Held, that no other licence for doing so was required by the 6 Geo. 4, c. 81.

Quære—Was any licence necessary for such a sale?

Semble—That in cases of serious doubt as to the true construction of statutes, and licenses thereunder, the court will be slow to inflict penalties for their infringement.

This was a case stated for the opinion of the court, pursuant to the 84th section of 7 & 8 Geo. 4, c. 53, by the justices of the peace, at the Quarter Sessions for the city of Waterford. It stated that the respondents carried on the trade of brewers, at premises in the city of Waterford—that they had also a bottling establishment in the same premises, from which beer in bottles was sent to their customers—that they had two licences, one for brewing, and the other a brewer's licence for retailing beer to be consumed elsewhere than on their premises; and that a servant of the respondent's had taken a van, with bottles of beer in it, and sold the beer publicly by retail, from the van, in the street of Clogheen, several miles distant from Waterford. The appellant had lodged an information against the respondents, for selling without the license required by the 6 Geo. 4, c. 81, which came on to be heard before three justices of the peace for the city of Waterford, by whom it was dismissed; whereupon he appealed to the general Quarter Sessions of the same city, who stated the case for the opinion of this court; and the question for the consideration of the court now was, were the respondents liable to the penalties imposed by the 6 Geo. 4, c. 81, s. 26, on persons selling without the licenses required by that act? The material

words of the second license (which alone could be supposed to legalise the sale) were, "We, &c., do license, &c., being a brewer of beer for sale, and having taken out and paid for a license to brew, &c., to retail strong beer, which he or they shall brew, and be charged with duty thereon, to be consumed elsewhere than on their premises; that is to say, to retail the same at and from their premises in the city of Waterford, being part of the entered brewing premises of the said, &c., but not elsewhere, and not to sell any beer to be drunk or consumed upon the premises where sold," &c.

Jebb, for the appellant, stated the case, and referred to sections 2, 7, 10, 26 of 6 Geo. 4, c. 81, but was stopped by the court calling on

Fitzgibbon, Q. C., for the respondents.—The respondents are not restricted to retailing the beer on their own premises alone; the license is inconsistent with any such supposition, and no restriction of the kind appears in the act. The words of the license enables them to retail beer "at and from" their premises in Waterford; and unless the word "from" be struck out, the present sale is within the license; for surely the purchaser would say he had the beer "from the respondents' premises." The 10th section certainly says, that no one license shall authorise a person to carry on his trade in more than one separate set of premises. But the respondents did not "carry on their trade," as mentioned in their license, which was for *brewing and selling*, by a mere act of selling like the present; nor could a van be considered a "set of premises," within the meaning of this section.

Harris, on same side.—The charge in the information is, that the respondents sold without taking out the license required by the statute. If any license were necessary for such an act, it must have been mentioned in the statute; but the statute contains no license whatever appropriate to such a sale as this. The respondents could not, as brewers, have got any other licenses than the two they have. The retailer's license mentioned in the act, and which it is pretended they might have had, is expressly confined to fixed premises. They shew which of the licenses mentioned in the statute the respondents should have had; and when they attempt to do so, this will be found to be a *casus omissus* in the act. *Hubbard v. Johnson* (3 Taunt. 219) shews how stringently these acts should be construed.

Smyly, in reply.—We rely on the 10th section of the statute, which says a party shall not trade, on one license, in more than one set of premises; that is a prohibition of any act of trading, not carried on in premises for which a license has been taken out.

PIGOT, C.B.—This case need not stand over. The court does not think it so clear as to warrant them in giving judgment against the respondents. There are several matters to be considered before we should inflict a penalty on them. First, is it plain that there has been a sale not within the terms of the license which the respondents had? By that license, they are permitted to retail beer "at and from" the premises which they hold in the city of Waterford. Now, the word "from" will bear two constructions; it may refer to a sale, at any place,

of beer to be subsequently delivered from the premises, or it may mean a sale, in any place, of beer already taken from the premises. If the first construction be the true one, then the respondent has gone beyond the terms of his license; but if the second be correct, he is as clearly within it. How, then, can we say—when the words of the license are so equivocal—that there has been so clear a violation of the act as will subject the respondents to penalties so heavy? And subjects are not to be punished except for breaking through the clear and plain intention of the legislature. The form of license is not any where set out in the act; but even that granted by the officers of excise themselves has not been plainly departed from. It is not necessary for us to decide what is the precise meaning of the license; it is enough for us to say, that it has not been clearly violated. But, even supposing that this sale did not fall within the terms of the license, there remains a question as to whether such a sale, without license, would be a violation of the act. The 26th section imposes a penalty on a person selling without license, where a license is required; but is there any license required for, or applicable to, a sale like this? There are four licenses for the sale of beer, the descriptions of which, in the second section of the act, contain, each of them, a reference to “premises.” Moreover, the 7th section provides, that each license shall mention the place where the trade or business is to be carried on, which, coupled with the expressions in the 2nd section, would seem to shew that the act only contemplated trading in a fixed place—a view of its enactments corroborated by the expressions of the 10th and other sections. If that be so, then a moveable depository, like a van, is not within its provisions, and we should consider the present a *casus omissus*. I do not say that such is the right interpretation of the act, but I think the respondents are not clearly liable to the penalty it imposes. I shall, therefore, not inflict them. Some inconveniences may arise from our decision, in consequence of persons like the respondents interfering with the trade of licensed retailers; but we cannot help that, the respondents are entitled to the benefit of our doubt.

RICHARDS, B.—As my Lord Chief Baron entertains a doubt on the question, I am satisfied there ought not to be a conviction. Otherwise, I should have been disposed to hold, that an offence had been committed against the act. On the general view of the statute, I think it would lead to perpetual evasions of its meaning, if the respondents could say that their's was a *casus omissus*. Upon the license, I am inclined to think, that the word “from,” instead of being intended to extend its operation, as has been urged for the respondents, was, on the contrary, intended to limit it. If this word were not inserted, a sale might, perhaps, be made “at” the premises, of liquor to be delivered

from other premises; but by the license, as it now stands, it is provided that not only shall the sale be “at,” but the goods shall be delivered “from” the premises named in the license. However, as the rest of the court differ from me, I am, as I before said, satisfied that there should be no conviction in this case.

LEFROY, B.—This case, as my Lord Chief Baron and my brother Richards have remarked, is not free from doubt. The words of the license are ambiguous, and must be construed by a reference to the act; and certainly it contains words which appear to shew that the legislature intended that the trading under a license should be only at one place. But I think we shall be assisted materially in our decision by examining what was the object of the enactment in the 7th section of the act, which declares that every license shall contain a description of the place where the business is to be carried on. If it were intended thereby to limit the entire trading carried on under the license to the place named in it, of course the present act of trading, not having taken place on those premises, cannot be within the meaning of the license. But if the place were inserted with another view, for the purpose of securing that malt should only be consumed in known premises (as I think appears from the latter part of the 10th section), then, the terms of the license being capable of being made to include this act of trading, we must look for some other cause of restriction before we can hold the respondents liable to the penalties of the act. Now, I do not think that it was meant by the legislature that the naming in the license of the place where the trade was to be carried on, should, in itself, be a limitation of every act of trading to those particular premises; for, if that were the case, the subsequent enactment in the 10th section would be superfluous and unnecessary. That being so, what other portion of the act restricts the operation of this license? It is alleged that the 10th section prohibits a party from trading from more than one set of premises, on the same license; but surely a van cannot be said to be a set of premises within the meaning of this act. The 11th section refers to the case of premises being burnt down, or becoming uninhabitable; shewing that the premises meant in it were to be habitable. They could not, therefore, be a van, which was never inhabited; and we may fairly suppose, therefore, that the premises mentioned in the 10th section are of the same character as those in the 11th, and that, therefore, a van does not come within its meaning. As the 10th section is the only one restraining the words of the license, I see no reason for saying that they are not sufficient to cover such a sale as this. Considering, therefore, the nature of the act, and the stringency with which it should be construed, I do not think the respondents in this case should be convicted.

COURT OF CHANCERY.

HUTCHINS v. O'SULLIVAN.—Feb. 3.

Practice—Allocation of Rents under the Court.

A purchaser is not entitled to arrears of rent due before the lodgment of his purchase-money, but not received till afterwards. Hargrave v. Holland (5 I. E. R. 167) overruled.

This case came before the court on appeal from an order of the Master of the Rolls. A half-year's rent had become due on the purchased lands, between the lodging of the purchase money and the completion of the conveyance, and the receiver had received a half-year's rent in the same time. There were considerable arrears on the estate, and the Master allocated the sums received to those arrears. The purchaser excepted to that report, and the Master of the Rolls overruled the exception. From that order the purchaser appealed.

F. Fitzgerald, Q.C., for the appeal, relied on *Hargrave v. Holland* (5 I. E. R. 149), as having overruled *Lee v. Moorhead* (2 Moll. 509), and pressed on the court the hardship to the purchaser of leaving his purchase money for the benefit of the parties to the cause while rents were received for him; and that the practice of the receivers of the court being to give receipts on account, and not for specific gales of rent, the rent received after the purchase money lodged might be allocated to any gale. (During this argument, the *Lord Chancellor* observed, "I have always thought the receivers of this court bound to give receipts for the special gales of rent, and I think a general order on the subject should be made; for it is most improper for any agent to give a receipt for rent on account. We must test this application on general principles. Suppose the tenant, on paying, had obtained a receipt for a particular gale, if that were due before the lodgment of the money, how could you contend that you were entitled to that rent. We should have the country in a sad condition; every estate under the courts would be disturbed, if tenants were to be informed that their payments were to be placed to the account of the last rent due. As far as I can see at present, my mind is inclined against the authority of *Hargrave v. Holland*. The purchaser seems to say the receiver has obtained nothing for me, but I want to come against another fund which he has received for another party.")

Rogers, J., in support of the report.—*Hargrave v. Holland* is the only case in support of the purchaser. *Lee v. Moorhead* is settled law. *Doorley v. Power* (not yet reported) was decided since *Hargrave v. Holland*, and is opposed to the principles of that case; and the Masters there certified that *Lee v. Moorhead* governed their practice, save in certain excepted cases.

Lawson with Rogers.

R. B. Warren, in reply, contended that *Doorley v. Power* supported *Hargrave v. Holland*. That rents differed from other debts, as the land was then the primary fund instead of the person.

LORD CHANCELLOR.—On this point, the practice of the offices, and the authorities concurred down to the case of *Hargrave v. Holland*. The

practice has since continued, notwithstanding that case, and the opinion of the present Master of the Rolls in *Doorley v. Power* and in this case, has been against that decision. The present Chief Justice, while Master of the Rolls, in *Hargrave v. Holland*, took a different view; but so far as authority goes, we have against him two judges and the course of practice. The balance, therefore, of authority is against the purchaser. However, as the present case has come before me, it is right to advert to principle, apart from all special circumstances either in favour of, or against the purchaser. What is the question? An estate is sold, paying, say £100 a-year; an arrear of £100 is due; from some reason the sale is not completed till a tenant pays the receiver a sum of £100, and gets a receipt for a gale due before the contract, and then it is contended that the purchaser is entitled to that sum. It is quite clear that as to the tenant it must be allocated as he has appointed. The purchaser completes the contract, and insists that it should be paid him, not because he is entitled to that sum, but because another gale is due to him. That is not justice. The tenant has paid the rent, and the court has it for those to whom it became due. The purchaser goes into possession with all the rights of a landlord, and if he cannot recover in his own name, he can use the name of his vendors. The tenant stands, as to him, as he ought to stand, and can be compelled to pay the gale of rent which he owes. What would be the consequence if the court took the other course? The receiver could not go back on the tenant; he has discharged him—he must have discharged him, unless he had only given him a receipt on account, on which no tenant should pay rent. The only remedy would be, to hold the purchaser a trustee on account of the arrears, which would be much more inconvenient. If he cannot recover his rents, he must be a loser; the court can give him no redress if it occur merely by casualty, though if it were by the fault of the receiver, he would have a remedy. In *Blennerhasset v. M'Namara*, (1 Moll. 81,) the deficiency of rents arising while the receiver was in default, was ordered to be made good out of the purchase money in court. And in *Campbell v. Hay*, (2 Mol. 102,) the same rule was followed as in that case. The purchaser under a decree having paid his entire purchase money was held not to be entitled to compensation out of the fund, for the difference between the amount of rent received by the receiver in the interim before possession given, and the amount which ought to have been received according to the rental which was erroneous, it appearing that he was aware when he purchased, of the discrepancy between the rental and the true rent payable, but otherwise, if rents had been lost, and the claim had been for compensation for loss accrued after he paid his purchase money, and before he could get possession. Thus the purchaser has a remedy if he has lost by the default of parties in the cause, or of the receiver, for the rents, which, if admitted to the possession of the estate, he would himself have recovered, and is entitled to compensation for such loss, but he must make out a case for that special purpose. I decide this case on the general principle; I do not touch the case

of a purchaser being a plaintiff; that might be a material element, but the question is, whether money paid by the tenant on account of prior arrears, can be transferred to another account by one receiving the gales of rent *in usum jus habentis*. If the purchaser has a case for compensation, let him make it. I must, with all respect for the late Master of the Rolls, follow *Les v. Moorhead*, which is in accordance with the current of authority.

Motion Book 4, p. 211.

REG. v. BROWN.—Feb. 10.

Practice—Substitution of Service.

One, of three consors of a recognizance had, while out of the jurisdiction of the court, filed a bill against one of the others, and obtained a receiver. In a sci. fa. on that recognizance, service of the writ on the attorney of the plaintiff in the suit, ordered to be deemed good service on the plaintiff, a copy being sent through the Post Office.

John F. Walker moved, that in proceeding on the *scire facias* which had issued in this suit on foot of a recognizance acknowledged by W. Kelly, H. Comerford, and Bernard Brown, service on Robert Power, the solicitor of the defendant, Andrew Brown, might be deemed good service on the said Andrew Brown. Notice of the application was given to Robert Power, and the motion was founded on an affidavit that the Master of the Rolls, in the cause of *Handcock v. Handcock*, had ordered proceedings on the recognizance unless, within ten days after the service of the order on Comerford, and Kelly, and on Andrew Brown, devisee and administrator of Bernard Brown, cause should be shewn to the contrary, and that service on Power of that order should be deemed good service on Andrew Brown. That order had been made absolute, no cause having been shewn. That Andrew Brown was then, and had been for some time then past, resident in Malta with his regiment. That Robert Power was then the solicitor of the said Andrew Brown, and in such capacity had on or about the 9th day of April, 1848, filed a bill in Chancery against William Kelly, and in the course of the last year had obtained an order in the said cause for the appointment of a receiver over the estate of the said William Kelly.

LORD CHANCELLOR—Let the service on Robert Power, the solicitor of the defendant, Andrew Brown, be deemed good service on the latter, and let the plaintiff's attorney transmit a copy of the said writ through the post-office.

BAKER v. M'DERMOTT.—March 3.

Practice—Setting down cause after order for liberty to amend—Order to amend without prejudice to order taking bill pro confesso.

Where the plaintiff, at the hearing, has obtained leave to amend, he cannot again set down the cause without discharging that order, or amending the bill.

An order to amend, without prejudice to the order taking the bill pro confesso against a defendant,

will not be granted where the amendment might prejudice that defendant.

This cause had been ordered to stand over, with liberty to amend the bill, by making the heir-at-law of E. M'Dermott a party. It subsequently appeared that the defendant, C. J. M'Dermott, against whom the bill had been taken *pro confesso*, was the heir-at-law, and thereupon the plaintiff set down the cause for hearing without making any amendment.

Martley, Q.C., for the plaintiff.

Mr. Synan for infant defendants.—This case has been brought on irregularly. The plaintiff ought either to have discharged the order for liberty to amend, or to have amended his bill according to the order. *Davies v. Chanter*, (15 Sim. 193; see also same case, 2 Phil. 545.)

Martley, Q. C.—It is not necessary to bring the heir before the court; he is before the court in another capacity. The order is only for liberty to amend; and we may disregard it if we think proper.

Mr. Synan.—That objection was overruled in *Davies v. Chanter*.

LORD CHANCELLOR—On the face of the record as it stands this objection is apparent.

Martley then applied for leave to amend the bill without prejudice to the order for taking the bill *pro confesso* against the defendant, C. J. M'Dermott, who would then be before the court in the other capacity. Orders for leave to amend, without prejudice to the order for taking the bill *pro confesso*, are constantly made at the Rolls.

LORD CHANCELLOR—But not where the interest of the party, against whom the bill has been taken *pro confesso*, is affected by the amendment, it is done only where the amendment is against other parties. Such an order would often work the grossest injustice.

ROLLS COURT.

TANGNEY v. HOLMES AND OTHERS.

O'KEEFFE v. HOLMES AND OTHERS.

GOOD v. HOLMES AND OTHERS.

HACKETT v. HOLMES AND OTHERS.

AND IN THE MATTER OF FRANCIS HOLMES, A MINOR.—Feb. 9.

Where a creditor's suit has been stayed by reason of a prior decree obtained in another similar suit, and the plaintiff ordered to pay the costs of the defendants in the stayed cause, he will be entitled to be repaid them only in the same priority as his own demand.

Semble.—Except those of prior incumbrancers, as to which he may make out a case to entitle him to be paid in the same priority as the incumbrancers themselves. *Loftie v. Forbes* (2 I. E. R. 443) reviewed and qualified.

Francis Fitzgerald, Q.C., (M'Obay with him) moved, on behalf of the plaintiff in the first cause, that the costs of the several defendants in that cause, which the plaintiff in the first cause had been ordered to pay, under a stay order made in the four causes, bearing date the 23rd June, 1848, should be paid to the plaintiff by the receiver

appointed in the matter and causes out of the funds then in his hands. The plaintiff Tangney had, on the 23rd day of August, 1847, instituted a suit as a simple contract creditor of Robert Holmes, deceased, for the administration of his assets. Holmes had died on the 3rd of July, in that year, in embarrassed circumstances, leaving little or no personal estate. On the 30th October, 1847, the third suit, and on the 4th November, 1847, the fourth suit were instituted, both for the same purpose as the first. On the 15th November, 1847, the suit of *O'Keeffe v. Holmes* was instituted, which was also a creditor's suit; and though the last instituted, the plaintiff therein contrived to get the first decree, which was pronounced on the 9th June, 1848. On the 23rd June, 1848, the plaintiff in *O'Keeffe v. Holmes* applied for an order to stay the proceedings in the other three causes, and such an order was accordingly pronounced on that day. On Tangney's suit being thus stayed, the several defendants proceeded to tax their costs, and applied to the court for an order that Tangney should forthwith pay them, on the authority of *Lofius v. Forbes* (2 I. E. R. 443). Several orders of this kind had been obtained; one of them was appealed from to the Lord Chancellor, *Tangney v. Holmes* (1 Ir. Jur. 125), but his lordship had confirmed the order of the Master of the Rolls, concurring in the decision in *Lofius v. Forbes*. The present application was founded on the second branch of that case, Sir Michael O'Loughlen having made such an order there as the plaintiff Tangney was now seeking. The parties who opposed the application were the first and second incumbrancers, who insisted that the money should not be paid to Tangney, on two grounds; first, because it was their money of right; and, secondly, because Tangney's bill was improperly filed. As to the latter ground, they wholly failed to make out any case. (*Master of the Rolls*.—If Tangney had been the first incumbrancer, I would, without hesitation, follow the decision in *Lofius v. Forbes*, and grant his application; but he is merely a simple contract creditor. I shall send for the affidavits which were used in the case of *Lofius v. Forbes*, to see under what circumstances the order there was made. From the case, as reported, it was impossible to know what they were. I would venture to say, that the order in that case was made in consequence of the fund having been superabundant to satisfy all demands. Is there any doubt here as to the estate being sufficient to reach Tangney's demand?) The estate is £1400 a-year, and the debts only £10,000.

Mr. Berkeley and *Mr. Escham*, for the first incumbrancer, *O'Keeffe* (who was the plaintiff in the second cause) submitted that the application was a most unreasonable one. Their client was a mortgagee of 1776, and also a specialty creditor of Robert Holmes, and there was due to her about £2000, besides a large arrear of interest. It was sworn that she was greatly inconvenienced, and almost in distress, by reason of the non-payment. Could it be contended that her money was to be paid away to Tangney, who had instituted this unnecessary suit? He had filed his bill in less than two months,

after the death of Robert Holmes, and before a personal representative was raised. He could not have made even the usual searches, for he was obliged to amend his bill four times. Mr. Fitzgerald had referred his application to no principle. If the fund were not sufficient to reach Tangney, he should lose those costs. Moreover, he had not, as yet, paid their client's costs, or proved his demand under the decree in her cause.

Mr. Collins appeared for the second incumbrancer.

Mr. M'Obry.—The question is, what is to be the practice in such cases in future? Whether a plaintiff in a stayed cause, who, in pursuance of the order of the court, had paid the costs of defendants, as here, was to get them back only in the same priority as his own demand, or whether such costs were entitled to any, and what, special preference? Treating the question as one purely of law, he submitted that the plaintiff Tangney was entitled to carry the motion, at least as to the costs of the first incumbrancers, and of title parties. As to those of other defendants, he was entitled to carry it in a qualified manner. The best mode of determining what the practice ought to be where a suit was stayed, was to consider what it was where a suit was prosecuted; for the prior incumbrancers ought not to be put in a better situation, nor the plaintiff in a worse, in the one case than in the other. What, then, was the practice as to the first incumbrancer where a suit was prosecuted? He was paid his costs in the same priority as his demand. That was laid down as the practice by Sir Edward Sugden in *Hall v. Hill* (5 I. E. R. 12), overruling *Jackson v. Curtis* (2 Molloy, 463). That being so, was it not just that when a plaintiff in a stayed cause paid the costs of such an incumbrancer, he should be allowed to stand in his place, and get back those costs, not merely in the priority of his own demand, but in that of the demand of the first incumbrancer? The costs of Mary O'Keeffe and Menus O'Keeffe were thus circumstanced. Menus O'Keeffe was the heir-at-law of a mortgagee of 1776, having in him the legal estate, and Mary O'Keeffe was the owner of the money secured by that mortgage, and the first incumbrancer. The case of Menus O'Keeffe was identical with that of *Hall v. Hill*. It was not sought to deprive any one of a shilling which would have been his had the cause been prosecuted. The only favour asked was an acceleration of payment, in consideration of the hardship of the case. He submitted that Tangney was also entitled to the costs of title parties, i. e., persons brought before the court "as necessitate;" as, for example, the costs of Francis Walker, who was one of the trustees of Robert Holmes's will. The settled practice of this court was, that when a party instituted a creditor's suit, he lost his own costs, unless the fund reached his demand, *Peyton v. M'Dermott* (1 D. & W. 234); *Nelson v. Brady* (4 I. E. R. 359); but it did not appear from those cases that, in such an event, the costs of the defendants would be also lost. These he ought not to lose, unless the suit had been instituted without any reasonable prospect that the fund would reach his demand. But he ought not to lose these costs, unless where his suit was manifestly fruitlessly instituted "*ab initio*." (*Master of*

the Rolls.—That is not the practice of this court. The costs of defendants are always added to the plaintiff's demand, and he can recover them only in the same priority. So that if the fund be insufficient, he loses all.) If that be the settled practice of this court, it must be admitted that the same rule ought to prevail in a case like this; but as to the costs of prior incumbrancers, it is obvious the rule cannot be so; for the plaintiff is entitled to be refunded these in the priority of the incumbrances themselves, even though the fund does not reach his own demand, unless in the case put of an improperly instituted suit. (*Master of the Rolls.*—Considering the rule laid down in *Hall v. Hill*, I think the plaintiff may make a case to entitle him to be so reported as to prior incumbrancers, though the practice has not been so. He might then apply to have the payment accelerated. But the notice of motion here is not framed with that object; and, moreover, O'Keeffe's costs have not, as yet, been paid by Tangney.) The party applying in *Loftie v. Forbes* had not paid the costs. The object of the application in that case, as here, was to put himself in funds to do so. (*Master of the Rolls.*—That case depended upon very peculiar circumstances.) Whatever view the court may take of the case, the plaintiff Tangney ought not to be visited with the costs of the application, since there is an express decision of the court. If Tangney can have no relief on an application like the present, it would amount to a prohibition to institute such a suit in any case, however urgent or necessary.

MASTER OF THE ROLLS.—I have perused the documents used in *Loftie v. Forbes*. The estate there was superabundant. A minute calculation as to the value of the estate and the amount of the incumbrances was made in the affidavits used, shewing that the fund was ample. This is purely a question of law. This is a case in which a simple contract creditor for £226 7s., due in respect of bills of exchange and a book debt, has filed a bill to administer the assets of his debtor, within two months after his decease. Having regard to the sound policy of discouraging unnecessary suits, certainly (if I had any discretion) I would take into consideration the conduct of the plaintiff in instituting this suit, as influencing my judgment in this case. But, regarding the matter as a mere question of law, I consider this motion cannot be sustained. If this had been the case of a first incumbrancer, I would have no hesitation in following *Loftie v. Forbes*, in which case there was a large surplus, as appears from the original affidavits. Nothing could be more just than this order made by Sir M. O'Loughlen, which I am prepared to follow in a similar case; but a plaintiff circumstanced as Tangney is here, is not entitled to have the payment of costs so due by him accelerated, and before he looked for that, he should shew that he was entitled to receive them. Here the plaintiff Tangney had not himself paid the costs which he was seeking from the receiver; and some of those costs he would not, in any event, be entitled to be repaid, except in the same priority as his own demand. As to the costs of the first incumbrancer, the plaintiff Tangney may make out a case to

entitle him to carry a motion for repayment of them; for *Hall v. Hill* certainly lays down a rule which would justify a plaintiff in seeking to have the costs of prior incumbrancers reported to him, not merely in the priority of his own demand, but of the prior incumbrances themselves. But the plaintiff's notice is not here framed in such a way as to entitle him to carry his motion as to these; and I will, therefore, refuse the application, as to all, with costs. I will, however, insert in the order that it is without prejudice to the plaintiff's applying for the costs of prior incumbrancers hereafter. But the plaintiff must serve a different notice, and shew that he has paid their costs, and that the estate is sufficient to reach such incumbrancers.

Motion refused with costs.

HELSHAM v. BURTON.—Feb. 23.

Practice—Service out of the Jurisdiction.

Mr. F. Meagher moved for liberty to enter a parliamentary appearance for defendants, Henry Bennett and wife, and to take the bill *pro confesso* against the defendants, Henry Bennett and his wife, who were served at Genoa, under the following circumstances. The bill was filed to raise a jointure of £500 per annum vested in Anne Hesham, one of the plaintiffs, and prayed a sale of the lands charged therewith; and the defendants Bennett and his wife, were made defendants, as being entitled to part of a sum of £4,000 provided for younger children by the same settlement which created the jointure. Pursuant to an order giving liberty to serve these defendants out of the jurisdiction, the plaintiff, P. G. Hesham, proceeded to Genoa, and, being unable to find any Englishman to serve the subpoena, applied to the British Consul, who refused to give any assistance. Hesham then repaired to the residence of the defendant, with an Italian named Guffioni, who, not being permitted to see the defendants, left a copy of the order giving liberty to serve them, and also of the prayer of the bill, subpoena, and notice to answer, in the hall, in presence of the servant of the defendants. This service was verified by the affidavit of Guffioni and Hesham.

MASTER OF THE ROLLS.—You can introduce a charge into your bill that these parties are out of the jurisdiction. I consider this service irregular, and will not make an order to take this bill *pro confesso*. I do not approve of a party acting as his own process-server. There are gentlemen who go abroad regularly every year for the purpose—one of them, I believe, connected with this court; and that is the best mode of serving parties out of the jurisdiction.

LORD CORK v. BLENNERHASSETT.—March 2.

Practice—Second Amendment after Demurrer has been allowed.

Mr. Franks moved for liberty to amend, under the following circumstances. A demurrer had been taken to the whole bill on the 2nd of February; on the 16th it was allowed by notice, and within the ten days allowed by the 64th General Order, an amendment was made by filing an affidavit that a

certain deed mentioned in the bill had been lost, the want of which affidavit was one of the grounds of demurrer. On the 26th, the plaintiff's solicitor went to the office for the purpose of making amendments in the bill, but was not allowed to do so, the officer being of opinion that an amendment had been already made. On the 27th, the notice was served by permission.

Mr. Sherlock, contra.—The cause is out of court. There are several grounds of demurrer; the affidavit has only rectified one. If it alone were necessary, why apply now for liberty to amend? The application proves that the demurrer has been allowed on other grounds which have not been amended within the time specified, and the facts sought to be introduced were either known previously to the plaintiff, or are statements to avoid a demurrer, such as the insertion of a statement of the confusion of boundaries.

MASTER OF THE ROLLS.—The 64th General Order is very precise. Where a demurrer is taken to the whole bill, there are two courses for the plaintiff to pursue—either to set the demurrer down for argument, or to allow it by notice; and if allowed, the plaintiff has ten days to amend. Now, in this case there was a clear amendment, within the ten days, by the filing of the affidavit; its absence was a ground of demurrer, the reason why a Court of Equity requires it, being that the jurisdiction shall not be transferred from a court of law to this court, on a bare suggestion of the loss of the deed. The affidavit is an essential part of the plaintiff's title, and the filing of it was an amendment, and a compliance with the rule. I shall permit the amendments to be made.

Motion granted.

DONOVAN v. SWEENEY.—March 9.

Head Landlord—Right to Arrears out of Fund in Court, after Interest evicted.

Deasy, Q.C., on behalf of the head landlord, moved that the receiver should, out of the balance appearing on his account then in course of being passed, pay to the head landlord the sum of £161 19s. 9d., being the amount received by him out of the lands in the notice specified, in part discharge of the arrears of head rent, or that, if necessary, it should be referred to the Master to ascertain what amount had been received out of the lands since the passing of the last account, properly applicable to the payment of head rent.

Mr. Collins, contra, resisted the motion, on the ground that the landlord had evicted the tenant's interest, and that his remedy was either at law, or by filing a bill. The point has never been decided, but the cases of *Haynes v. Colthurst* (1 Hog. 377), and *O'Keefe v. Dennehy* (Fl. & Kel. 404), are analogous. Where a landlord obtains liberty to bring an ejectment, his remedy, so far as this court is concerned, is at an end, and he does not obtain the costs of the motion. (*Master of the Rolls*.—That is a misapprehension; although where he brings his ejectment he does not get them in this court, they are taxed at law, and he receives them in that way; and if he be paid by the receiver, or out of a fund in court, he then gets them here.)

The motion is premature. The account has not yet been passed. The court will not make an order in anticipation. The receiver may not have a balance in hands.

Mr. M'Obay appeared for the receiver, and stated that the balance would not amount to the sum stated in the notice, as the receiver was entitled to large deductions for costs, but was ready to pay whatever would be the balance, as the court should direct.

MASTER OF THE ROLLS.—The practice of the court is not unsettled. It is the common course of the court, if no ejectment has been brought, to direct the receiver to pay the head landlord. Has the landlord lost his right, by bringing his ejectment, to recover those rents which it was impossible for him to have received, the property being under the control of the court, and which he cannot recover from the tenants who have already paid. It would be extremely unjust to hold that he had, and contrary to the statute law of this country, which, after judgment in ejectment, gives him the same remedies for recovery of arrears as he had previously to the ejectment being brought. I shall therefore declare that the Master be at liberty to direct payment to the head landlord of the balance on the receiver's account after all just credits.

EQUITY EXCHEQUER.—MICHAELMAS TERM.

ELLIOTT v. ELLIOTT.

When the interest in lands over which a receiver has been appointed, is evicted for non-payment of rent, if there be a fund in court received out of those lands, the landlord is entitled to have them applied in payment of the arrears of rent.

In this case, one year's head rent became due in November, 1846, and on the 10th of February, 1847, an order was made, giving liberty to the head landlord to proceed at law. In Easter Term, 1847, an ejectment was brought, and on the 19th of November following, judgment was marked, and the *habere* subsequently executed, and the period for redemption expired in May, 1847. The head landlord now applied that the accountant-general might, out of the fund in court to the credit of the cause, pay the costs of the order giving liberty to proceed at law, and that the balance might be applied in discharge of the arrears of rent due on the 1st November, 1847.

Battersby, and Forbes Johnson, for the motion, contended that the funds in court being the produce of the lands would have been paid to the landlord but for the appointment of the receiver, and should now be applied in part discharge of the arrears.

Ormsby and Concannon contra.—On behalf of the reported creditors, resisted the motion, on the ground that the landlord had evicted the tenant's interest, and the time for redemption had expired, and the court having given liberty to bring the ejectment and recover possession, would not interfere further. The case of *O'Keefe v. Dennehy*, (Fl. & K. 404,) was referred to, in which a tenant who was plaintiff in a redemption suit, having dis-

missed his own bill with costs, was allowed, after payment of the defendant's costs, to draw out of court the rent which had been lodged by him.

The Court made the order sought, declaring that the landlord was entitled to the money in court as of right, the rents being paid to the receiver in *usum jus habentis*, and they distinguished the case from that of *O'Keefe v. Dennehy*, because the landlord's remedy for the recovery of the rent still subsisted; but, in the case before the court, the tenant having paid his rent to the receiver, was not liable to pay it over again.

Motion granted.

COURT OF EXCHEQUER CHAMBER.

NEVINS v. PHELAN.—Feb. 1.

CORAM BLACKBURNE, C.J., DOHERTY, C.J., PIGOT, C.B., PENNEFATHER, B., TORRENS, J., CRAMPTON, J., PERRIN, J., RICHARDS, B., BALL, J., JACKSON, J., MOORE, J.

Pleading—Immaterial Issue—Verdict—Venire de Novo.

The defendant avowed for rent due on a particular day. The plaintiff pleaded in bar "riens in arrear" and the jury found no rent due on the particular day named in the avowry. Held, that such finding of the jury did not dispose of the actual issue knit between the parties, the precise day specified by the avowry not constituting a parcel of the issue; and in such case the time is immaterial.

This was error from a judgment of the Court of Queen's Bench. The *postea* not having been returned to the court below, the question was not argued there.

The action was replevin for goods distrained on the 17th of April, 1845. There were three avowries, and one cognizance; it was upon the third avowry that the question arose; the judgment was entered generally upon the avowries and cognizance. The third avowry, after deducing title to the defendant, (the plaintiff in error) shewed an entry by the plaintiff in replevin under a demise by defendant on the 29th of July, 1840. That before the 25th of March, 1844, plaintiff gave notice in writing that he would quit the demised lands on the 29th of September, 1844; that plaintiff did not quit, but held until the said time, when, &c. That plaintiff thereby became liable to pay double rent; that because it was not paid on the 25th of March, 1844, defendant avowed the taking, &c. Plea—*Riens in arrear*. Verdict for plaintiff below. It did not appear on the record that the judge refused to leave it to the jury whether the double rent was due on the 25th of March, 1845.

Foley.—The defect was cured by pleading over. The rent became due under statute 15 Geo. 2, c. 8, s. 9. The allegation of time is immaterial in an avowry. *Forty v. Imber*, (6 East. 434); *Smith v. Nangle*, (7 Cl. & Fin. 405). (*Crampton, J.*—This is clearly an immaterial issue. A court of error cannot award a repleader.) (*Pigot, C.B.*—There is a distinct averment that the plaintiff

became liable to pay the rent, and then comes the statement of the rent not being due in 1844). (*Blackburne, C.J.*—It is quite clear that the real question between the parties was not tried). (*Jackson, J.*—You argue that a material question has been joined, but not tried, and, in place of it, an immaterial issue has been tried).

J. E. Walsh, with him *Harris*, contra.—No ruling of the judge appears on the record on the subject. They contended—1st. That the plea was bad, repugnant, and insensible, and that the parties might fall back on the plea, and have judgment on the whole record, although the defect had been passed over. 2dly. That the issue joined was immaterial, and a repleader could not be awarded. 1st. The date is not immaterial in every sense, for it may make the pleading bad. *Ring v. Rotherborough*, (2 Cr. & Jer. 418). (*Crampton, J.*—That was on special demurrer.) The court will presume that the pleader mistook the effect of the statute, and that he supposed the half year's rent became due immediately after the service of the notice to quit. Also, it will not presume against the verdict, but rather that the real intention of the parties has been found by the jury. (*Doherty, C.J.*—It is plain that 1845 was meant.) They might as well argue that the dates in 1844 should mean 1843, and thus support the allegation of the non-payment of the rent in 1844. (*Moore, J.*—The real question is, whether the double rent was due.) (*Blackburne, C.J.*—We are bound to reverse the judgment, and the matter will go down to trial, and there will then be a finding upon the real question.) (*Pigot, C.B.*—The jury have found a question which confessedly does not touch the merits of the case.) (*Perrin, J.*—It is not denied that the holding existed, it is only denied that the rent was in arrear.) 2dly. There is only a hiatus in the record, and therefore a mere discontinuance. (*Pigot, C.B.*—There cannot be a discontinuance, if it appear on the record that there is a substantial material issue not tried.) (*Pennefather, B.*—Can it be said that an imperfect record can bind the parties for ever.) The statements preceding the averment of the plaintiff's having become liable to pay the double rent, are merely by way of inducement. There is no positive averment that the rent was actually due. An immaterial issue is defined in *Bennett v. Holbeck*, (3 Wms. Saund. 319); *Thomas v. Willoughby*, (Cro. Jac. 585). (*Perrin, J.*—The statements were not inducements, for they are the very foundation of the avowry.) (*Pigot, C.B.*—If it were a case for a repleader, when it comes to this court the course is to reverse the judgment simpliciter.) *R. v. Phillips*, (1 Burr. 294.) No *venire de novo* could issue, for the question would be the same as already tried.

Napier, Q. C., in reply.—The avowry is for the double rent. The plea denies the rent alleged in the avowry to be due; being due, it was impossible to go for anything else than the double rent in this avowry. *Marks v. Lahoe*, (4 Scott. 187).

BLACKBURNE, C.J.—I consider the finding of the jury to be absolutely immaterial. The avowry was repugnant, so far as it stated the day of the

rent being due. The dates are plain, and shew that the right to the double rent accrued on the 25th of March, 1845, *i. e.* at the expiration of the six months after the notice of surrender, and the whole of the avowry is pointed to that fact. It would have been ground for special demurrer. The plea in bar traverses the right to the double rent, and, notwithstanding the parties have taken issue on the false date, and have vitiated the finding which would have settled the rights of the parties; the judgment must be reversed.

PERRIN, J.—I feel some difficulty in the case. The avowry states grounds for claiming double rent. I think that if there had been a general demurrer to that avowry, it would have been held bad. The party, instead of demurring, joins issue, and he either joins issue upon the particular day, or not: if it were on the particular day, the finding was right. I feel great difficulty in reversing the judgment on the ground of a wrong finding.

Judgment reversed. Venire de novo.

COMMISSION OF OYER AND TERMINER.

QUEEN v. DUFFY.—Jan. 13, 18.

CORAM PERRIN, J. AND RICHARDS, B.

Felony not Capital—Demurrer—Final Judgment.

The court will not pronounce final judgment on an indictment for a not capital felony, a demurrer thereto being disallowed.

The Attorney-General, on behalf of the crown, having called on the court to pronounce their final judgment on those portions of the indictment decided to be valid, (see *ante*, 81) it was directed to stand for argument on this day.

The Solicitor-General.—The crown is now entitled to have sentence passed upon the prisoner in the same manner as if he had been found guilty by a jury. It may be contended, on the other side, that the prisoner is entitled to a *respondens oster*, but that is not the case; for, by taking this general demurrer, the facts have been admitted as set out in the indictment, 2 Hale, P. C. 258, cap. 33. According to the older authorities, even in capital cases where there is a general demurrer to an indictment, the prisoner is not entitled to plead over, and if any exception is made to this rule, it is only made in *favorem vite*, and does not apply to the present case, which is not capital. Also where a party is permitted to plead over, it is in the case of a plea, and not a demurrer. (The Year Book, 14 Ed. 4; Coke, 2 Inst. 178). If a party demurs in law, and it be adjudged against him, he shall have judgment to be hanged (P. C. lib. 2, cap. 34, fol. 98); and the same distinction is taken between a plea and a demurrer to the indictment. Hawkins 2, P. C. cap. 31, s. 7, says, "But it seems that in criminal cases not capital, if the defendant demur to an indictment, whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment. The present not being a capital case that

is a direct opinion in favour of this position. In *King v. Taylor* (3 B. & Cr. 502), it is laid down—"The reason of the rule is in favour of life; but as the reason of the rule does not apply to misdemeanour cases, the rule ought not to be extended, &c.; therefore, the judgment ought to be final." In the case of the *Queen v. Phelps* (1 C. & M. 180), which was an indictment for murder, Colman, J., says, "the prisoners may demur and plead over to the felony at the same time; or they may demur, and if the demurrer should be decided against them they may plead over to the felony." That, however, was an indictment for a capital offence. The next case was *Queen v. Adams and others* (1 C. & M. 299); an indictment for assembling to destroy a house, which offence had been capital until a short time previous to the trial, and the prisoner was allowed to demur and plead over to the felony, and the authority of the *Queen v. Phelps*, which was a capital case, was relied on. The next authority was the *Queen v. Purchase* (1 C. & M. 617), an indictment for embezzlement, and Patteson, J., says—"I think there is no doubt the prisoner may demur and plead over to the felony." These cases were overruled by *Queen v. Ogers* (2 M. & Rob. 479), which was an indictment for cutting and maiming; and Cresswell, J., says—"It is admitted that the only mode of the prisoner's taking advantage of the objection would be by demurrer; and it is said, that in felonies he might demur and plead over at the same time. I am decidedly of opinion the prisoner has no such right; and Mr. Justice Patteson and myself, after consultation on the Oxford circuit, agreed that it ought not be allowed. If a prisoner demurs, he must abide the consequences." In the *Queen v. Bowen* (C. & K. 501), which was an indictment for destroying a registry of baptism, the prisoner being called on to plead, Tindal, C. J., says—"This is not a capital case; you may, therefore, be bound by your demurrer, and may not be allowed to plead over." "It is a very doubtful point. I give no judgment; I only forewarn counsel that he may be concluded by the demurrer."

Napier, Q. C. with Butt, Q. C.—The court is now called on to make a decision, in its nature prejudicial to the administration of justice. It is the duty of the counsel on behalf of every prisoner to see that the indictment is properly framed, and if he should consider its frame likely to embarrass the prisoner in his defence, and the consideration of that question is submitted to the court, shall it be at the peril of the prisoner, and is he to be liable to transportation for an error of his counsel? In 2 Hale, 225, it is laid down, that "if a confession be extrajudicial, though it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be a felony—though upon the fact thus shewn it appears to be a felony—the court will not record his confession, but will admit him to plead to the felony not guilty." The confession is made, not for the purpose of admitting guilt in the abstract, but to know from the court whether the offence charged constitutes guilt or not. And in 4 Bl. Com. 334, it is said "some have held that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment of exe-

cution, &c." But this is denied by others, who hold that in such case he shall be directed, and received to plead the general issue, not guilty, after a demurrer determined against him. All the authorities upon this point are to be found in 2 Gab. Cr. Law. 325-6. The distinction attempted to be made between capital cases and others no longer exists. *Gray's case*, (11 Cl. & F. 482,) establishes that where there was any privilege, *in favorem vitæ*, granted to a prisoner, it is now extended to all cases of felonies. There is certainly some obscurity concerning the ancient rule as laid down in the year books, but that may be cleared up by considering that when a party demurred he could not be considered as mute, and the penance of *pein forte et dure* could not be applied, which was only to compel a party to plead, and, in such a case judgment was final, not because he demurred, and was afterwards willing to put himself on the country, but because he rested on his demurrer, and would not go to trial at all. In the Year Book 14 Ed. 4, p. 7, pl. 10, the words are, *s'il demur sur un plea*, that is, if he rests on a plea, and goes no further, if he does not put himself on the country. Brook. Pl. 86, where he says "peremptory plea," but that does not now seem to be law, for in *King v. Gibson*, (8 E. 110,) Le Blanc, J. says, "The general rule is against the defendant, and the current of authorities shew that pleading over is only allowed in case of felony *in favorem vitæ*, and in the case of the *King v. Taylor*, (3 B. & Cr. 502,) Ld. Tenterden says, on a plea which confesses a fact, if the decision is against the prisoner, it must be final, (2 Hale, 257; 2 Coke, Inst. 178.)" In favour of life a man may plead a double plea, *Sir H. Vane's case*, (6 St. Tr. 143.) There is no distinction between appeals (Com. Dig. tit. Appeal). After demurrer overruled, a party may plead, *Gavan v. Hussee*, (1 Dyer, 39, B. Pl. 65); *Hume v. Ogle*, (Cr. El. 196); *Wilson v. Law*, (1 Ld. Ray. 20); *Reg. v. Bowen*, (1 C. & K. 503); *Reg. v. Houston*, (J. & B. 103). In *Reg. v. B. R. Co.*, (1 G. & Dav. 459, Sc. 3 Q. B. R. 224,) judgment was given for the crown, and the parties had liberty to plead over. The 11 & 12 Vic. c. 12, under which this indictment is framed, plainly contemplates a conviction by verdict. The fourth and seventh sections relate only to convictions in open court. A demurrer cannot be considered such. In *Rastall*, (Ent. 584,) after a plea of sanctuary, the prisoner is told if he wished he might plead over, he did so, and was acquitted. Bacon, Ab. (tit. demurrer,) states that the judgment in demurrer is *respondere oster*. A demurrer to an indictment is the same as a plea in abatement, (2 Hale, c. 30, p. 236.) The sense in which a demurrer can be said to confess, is only because it does not deny the facts. It is only an implied admission of what is well pleaded, but here the prisoner says nothing is well pleaded. (2 Hale, c. 29, p. 225). Blackstone's Com. 239, does not agree with the opinion that the prisoner was not to

be permitted to plead over. In *Reg. v. Houston*, (2 Cr. & Dix. C.C. 349, Justice Burton expressed his opinion that in such a case as the present the judgment should be *respondere oster*.

Attorney-General in reply.—In this case, the court has no discretion, but is bound to give final judgment; and although there may not be any precedent of a case in which final judgment has been given, there is no instance of a case such as the present in which judgment of *respondere oster* was given. I understand the meaning of a demurrer to be, that a party puts himself upon trial by the court, instead of by the country; and the case referred to by Hale, in 2 P. C. 315, reported in the Year Book 14, Ed. 4, was where a party put in an imperfect plea. If an indictment is insufficient, the prisoner can move to quash it; but that is different from the course taken. Hawk. book 2, c. 23, s. 137, has been relied on, but the distinction should be borne in mind between an appeal and an indictment. An appeal was not at the suit of the crown, and was allowed to be heard after an indictment. All the precedents of appeals are after indictments for the same offence. One of the most recent cases is *Ashford v. Thornton* (1 B. & Ald. 404; see 2 Hawk. c. 31, s. 5, ed. 1824; Stanford, lib. 3, 150; and 3 Ld. R. 70); where the pleadings in *Wilson v. Law* are set out. *Gaven v. Hussee* (Dyer, 38), was an appeal, and no opinion was founded on the question now before the court. In *Hume v. Ogle* (Cro. Eliz. 196) there was no decision on the subject. In Com. Dig. Tit. Justices, W. 2 & 3, the case of *Queen v. Gray* does not go so far as has been stated; it only decides that in a trial for felony, the prisoner has a right to a peremptory challenge, but not that any privilege granted in *favorem vitæ* extends to all felonies.

Jan. 18, PERRIN, J.—In this case the court has already pronounced judgment upon the demurrer to the indictment, the effect of which is, that as to the first and third counts, the demurrer has been overruled, and as to the overt acts in all the other counts, except the first, the demurrer has been allowed. The Crown now calls for final judgment, but the prisoner's counsel insists that he is entitled to plead. In the course of the argument several cases have been cited on both sides, and we have looked into them all, but my brother Richards has furnished me with a case which was not mentioned, and it is not only the most modern, but was decided so lately as the year 1845, and since this question was under the consideration of the English judges in *Gray's case*; I allude to the case of *Queen v. Serva*, (2 Car. & K. 53), in which, after a demurrer to the indictment was overruled, the prisoner was permitted to plead over to the felony. We consider it right to follow that decision, and, as was done in the precedent referred to by Mr. Butt in *Rastall* after judgment upon the demurrer, at the desire of the prisoner we will allow him to plead to the felony.

ROLLS COURT.—Feb. 17.

REEVES v. COX.

IRWIN, Petitioner.—COX, Respondent.

Sequestration—Judgment Creditor.

A bill filed and a decree pronounced in 1848, directing the defendant to perform a certain agreement, and to pay a sum of money; and a sequestration granted to compel performance of same; upon the application of a creditor by judgment of 1839, the court refused to interfere with the possession of the sequestrators.

In this case it appeared that in Easter Term 1839, Henry Irwin the petitioner, obtained a judgment in the Court of Queen's Bench, against the respondent, for the penal sum of £2000, which was duly revived on the 3th of December, 1848. A petition was presented for a receiver on foot of said judgment, and the usual notice order obtained, which on the 30th of December, 1848, was duly served on the respondent. On the 3rd day of March, 1848, the bill in the cause of *Reeves v. Cox*, was filed to compel the specific performance of an agreement to grant an annuity, and for the payment of the amount of certain judgments. The defendant having neglected to answer; on the 17th of June, 1848, a decree *pro confesso* was pronounced, by which it was ordered, that the said agreement should be performed, and that the defendant William Cox, should within one month from the date thereof, grant an annuity, and pay to the plaintiff the amount of the judgments, and the interest due thereon, and the costs of the cause. The defendant having neglected to perform this decree; on the 20th of December, 1848, a sequestration was granted against his goods, chattels, and estates, directed to Kennedy Ryan and Michael Ryan, in order to compel performance of same.

D. R. Kane, Q.C. now moved in behalf of the petitioner, for the removal of the sequestrators and the appointment of a receiver, and relied on the cases of *Burns and wife, v. Robinson and others*, (7 I.E.R. 188). *White v. Bishop of Peterborough*. (3 Swanst. 109.)

Hughes, Q.C. contra.

Mr. Hayes in reply cited *Brooks v. Horner*. (10 I. E. Rep. 305.)

MASTER OF THE ROLLS.—In this case, the petitioner on the 9th of December, obtained liberty to serve notice of the conditional order for the appointment of a receiver; that is not, however, to be considered as affecting either the lands or rents, as it is the second order which has that effect. Under these circumstances, the question arises whether the petitioner is entitled to sue out an *elegit*. I am of opinion he is not so entitled, and that if he attempted to do so, he would be guilty of a contempt. The case of *Angell v. Smith*, (9 Ves. 336), decides that it is a contempt of court to disturb sequestrators in possession, and Lord Eldon lays it down "That a party cannot claim though by adverse title in any other way than by coming to be examined *pro interesse suo*," he goes on to say, "consider the consequence; how are sequestrators to defend their possessions against

an ejectment? the Court of King's Bench have decided that where a sequestration is awarded to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment creditor takes out execution notwithstanding the sequestration awarded, there may be a levy under the execution, intimating that if the sequestration is executed, the other though prior must come here, how can any of these parties defend as landlord; after the tenants have attorned to the receiver, the court is the landlord." And in the case of *Brooks v. Greathead*, (1 Jac. & W. 178); the Master of the Rolls speaking of a trial at law, says, "This, however, cannot be done without the leave of the court. It was so settled in *Angell v. Smith*, where the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave. But when a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*, which may perhaps often be the most convenient mode." The court is the landlord, and if the petitioner proceeded by *elegit*, he would be liable to an attachment. The only question is, whether under the sheriff's act, the receiver being substituted for proceedings by *elegit*, can I appoint a receiver and disturb the possession of the sequestrators; the proceedings under this act are in the nature of an equitable *elegit*, and I do not think the possession of the court as landlord, can be disturbed on the application of a person who is not entitled to sue out an *elegit*. There is some difficulty in the present case, the proceedings by sequestration being not to bring a sum of money alone, but also to enforce the performance of a decree, and according to the case of *Goldsmith v. Goldsmith*, (5 Hare 123), a sale cannot be had except for payments of costs.

Feb. 20.—MASTER OF THE ROLLS.—No rule on this motion, the sequestrators undertaking to enter into security by recognizance, to account for the rents and profits of the lands in the writ of sequestration mentioned; this order to be without prejudice to any application which the petitioner might make, to be paid the amount of his demand out of the rents and profits to be received by the sequestrators.

QUEEN'S BENCH.

O'BRIEN v. QUEEN IN ERROR.—Nov. 22, 1848,
Jan. 16, 1849.*

Form of Caption—Joint and Several Commission—Treason compassing the Queen's Death—Delivery of list of Witnesses to Prisoner ten days previous to Trial—Challenges—Form of

* At the conclusion of the argument in this case an application was made on behalf of T. F. Meagher, T. M'Manus, and Donohoe, who had been tried and convicted for a similar offence, and had assigned similar errors, that they should be heard by their counsel before the Court proceeded to give judgment, and *Frost's case*, (9 Car. & P. 129), was referred to. The Court arranged that one counsel should be heard on behalf of each, with liberty to the Attorney General to reply.

Allocutus—Statutes 36 Geo. 3, c. 7; 57 Geo. 3, c. 6; 11 & 12 Vic. c. 12.

Held, Crampton, J. dissentiente, that the prisoner claiming the benefit of a certain statute, not compelled with, was entitled to raise that question by a plea of a declinatory nature.

Where the caption stated, that "by virtue of a commission under letters patent, bearing date, &c., and directed to A. B., C. D., and E. F., and others, in said letters named, &c." Held that the commission was not a joint one, and that the three persons named had full power to act without the others.

Held, that the 10 Hen. 7, c. 2, extended the provisions of the 25 Edw. 3 to Ireland, and made it treason to levy war there.

Held, that the first and fourth sections of the 57 Geo. 3 do not extend to Ireland, and that as the prisoners were not indicted under the 11 & 12 Vic. c. 12, they were not entitled to the benefit of that act.

Held, that the word "treason," without any other word or qualification attached to it, meant high treason, and the prisoner, therefore, was entitled to but twenty peremptory challenges (9 Geo. 4, c. 54).

Held, that the allocutus was sufficient where the prisoner was asked why the said, &c., "should not proceed to judgment."

This was a writ of error from the judgment of the Court of Special Commission, held for the county Tipperary, before the Lord Chief Justice of the Queen's Bench, the Lord Chief Justice of the Common Pleas, and Mr. Justice Moore, in Clonmel, on the 21st of September, 1848. The indictment was for high treason, and contained six counts. The five first were for levying war, and the sixth for compassing the Queen's death. The prisoner pleaded a declinatory plea, as follows:—

"He, the said William Smith O'Brien, says that he ought not to be compelled now to answer the same, because he saith that by the indictment aforesaid, he, the said William Smith O'Brien, is charged and indicted for, amongst other offences, compassing, imagining, and intending to put our lady the Queen to death, and that by the statutable enactments in that case made and provided, and now in force in this realm, every person indicted for compassing, imagining, or intending death or destruction to our lady the Queen, is entitled to have delivered to him, ten days before his trial, and in presence of two or more credible witnesses, a copy of the indictment, and, at the same time, a list of the witnesses to be produced on the trial for proving the said indictment, mentioning the names, professions, and places of abode of the said witnesses. And the said William Smith O'Brien says that the indictment aforesaid was found a true bill of the jurors aforesaid, on Thursday, the 21st day of September, instant, and that on the said Thursday, the 21st day of September, instant, a copy of the said indictment was delivered to him, the said William Smith O'Brien, in open court, but that no list of the witnesses, or of any witnesses or witness, to be produced on the trial for proving the said indictment, was then, or at any

time since, delivered to him, the said William Smith O'Brien. And the said William Smith O'Brien says, that ten days have not elapsed since the delivery to him, the said William Smith O'Brien, of the indictment aforesaid, and this he, the said William Smith O'Brien, is ready to verify. Wherefore he prays judgment, and that he may not be compelled now to answer the said indictment, and so forth."

Demurrer and joinder therein. The demurrer being allowed, the prisoner pleaded Not Guilty. There was a verdict of guilty, and judgment thereon, on which the prisoner now brought his writ of error. The remaining portions of the record on which questions were raised were, first, on the form of the letters patent, as set out in the caption. Be it remembered, &c., at, &c., before the Right Hon. F. Blackburne, &c., Right Hon. J. Doherty, &c., and the Right Hon. R. Moore, &c., nominated and appointed to inquire, &c., "and also nominated and appointed, from time to time, to deliver, &c., under letters patent of, &c., bearing date, &c., our said lady the Queen, to them, the said Francis Blackburne, John Doherty, and Richard Moore, and others in the said letters named, directed by the oaths of," &c. And, secondly, as to the form of the *allocutus*, which was as follows:—"Upon which it is demanded of the said W. S. O'Brien, whether he now hath anything to say for himself, wherefore the said justices and commissioners ought not, upon the premises and verdict aforesaid, to proceed to judgment against him, the said W. S. O'Brien."

The errors assigned were as follows:—"That in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that judgment was given upon the record aforesaid, for our said lady the Queen, whereas, by the laws of this realm, judgment ought to have been given thereupon for the said W. S. O'Brien, and against our said lady the Queen; and, therefore, in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that the justices aforesaid, by whom said indictment was taken, and before whom the same was tried, were duly authorized in that behalf to take or try the same; and, therefore, in that there is manifest error. There is error also in this, to wit, that by the record aforesaid, it appears that the letters patent in said record mentioned, appointing and nominating Justices and Commissioners of Oyer and Terminer, and gaol delivery, for the said county of Tipperary, were directed to the justices by whom the said indictment was taken, and others in said letters patent named, but it does not appear in or by said record, that any power or jurisdiction was given to any number of the justices and commissioners to whom the said letters patent were directed, less than the whole number of such justices and commissioners, to take indictments, or to hear and determine the offences in said indictment charged; and yet by the record aforesaid, it appears that said indictment was taken by, and tried before three only of the justices and commissioners to whom the said letters patent were directed; and,

therefore, in that there is manifest error. There is error also in this, to wit, that judgment was given for our said lady the Queen, upon the demurrer put in by her Majesty's Attorney-General to the plea pleaded by said W. S. O'Brien, on the 28th day of September, aforesaid, whereby he, the said W. S. O'Brien, prayed judgment, whether he should be compelled *then* to answer the said indictment whereas, by the law of this realm, judgment should have been given upon said demurrer for the said W. S. O'Brien; and, therefore, in that there is manifest error. There is error also in this, that by the record aforesaid, it appears that a copy of the indictment aforesaid was not delivered to him, the said W. S. O'Brien, ten days before his trial upon said indictment, pursuant to the statutable enactments in that behalf made and provided; and, therefore, in that there is manifest error. There is error also in this, to wit, that by the record aforesaid, it appears that no list of the witnesses, or of any witnesses or witness to be produced on the trial for proving the said indictment, was delivered to him, the said W. S. O'Brien, ten days before his trial upon the indictment aforesaid, pursuant to the statutable enactments in such case made and provided; and, therefore, in that there is manifest error. There is error also in this, to wit, that by the record aforesaid, it appears that the challenge of him, the said W. S. O'Brien, to Southcote Mansergh, one of the jurors aforesaid, who passed upon him, the said W. S. O'Brien, on the indictment aforesaid, was disallowed by the said justices and commissioners, whereas, by the laws of this realm, said last-mentioned challenge ought to have been allowed; and, therefore, in that there is manifest error. There is error also in this, to wit, that it does not appear by the record aforesaid, that it was demanded of him, the said W. S. O'Brien, in manner in like cases used and accustomed, and by law required, what he had to say why execution should not be awarded against him; and, therefore, in that there is manifest error.

Whiteside, Q.C., Butt, Q.C., Napier, Q.C., F. Fitzgerald, and Sir Colman O'Loughlin, for the prisoners.—The caption of the indictment is defective in not showing, with sufficient certainty, that the three judges before whom the indictment was taken had jurisdiction. The authority appears on the face of the caption to have been given to them *and others*, and there is nothing from which the court can infer that these three judges had of themselves authority to hold the sessions. (Bac. Abr. Title Authority, Letter D.; 2 Hawk. 25, s. 119; 2 Hale, P. C. 166, 167); *Regina v. Hewins*, (9 Car. & P. 786; 2 Hawk. 499; Chit. Prac. Cr. L. 180, 191); *Hardy's case* (24 St. Tr. 230); *Frost's case* (9 C. & P. 129); *Rex v. Royce* (4 Burr. 2073); *Faulkner's case*, 1 Saund. 248, note a). A caption is open to a demurrer, *Rex v. Fearnley* (1 Term Rep. 316). The precedent is a novel one, and unlike any to be found in England (2 Gabbett's Cr. L. 279.) [*Blackburne, C.J.*—Have you any authority that the caption in treason is not as amendable as in other cases?] Secondly, The offence of levying war, stated in the first five counts of the indictment, is not an offence in Ireland. The 25 Edw. 3 created that

treason, and that statute, when passed, did not apply to Ireland; the words "in his realm" signified England only. Ireland, though a part of the dominions of England, formed no part of the realm of England (1 Hale, P. C. 155). The 10 Hen. 7, c. 2, which extended the English statutes to Ireland, made a careful distinction between "the realm of England" and "the land of Ireland;" and recites, "that divers good and profitable statutes having been made within the realm of England, whereby the said realm had greatly prospered, and in all likelihood so would this land, if the same statutes were used within it, wherefore be it ordered that all statutes made in the realm of England be decreed good and effectual in the law, and be accepted and used in this land of Ireland." The 10 Hen. 7 had not the effect of extending the 25th Edw. 3 to Ireland. It was not competent for an Irish Parliament to extend an English act to this country. The only effect of the 10 Hen. 7 would be to enact a statute in Ireland in precisely the words of the 25th Edw. 3. The words "in the realm," could not be substituted for "in his realm," there was no authority for the use of the words "this realm," which meant the United Kingdom of Great Britain and Ireland, and there was no law which made the levying of war in "this realm" treason. [*Perrin, J.*—Co. Litt. 141, b, shews that Poyning's law was extended to the REALM of Ireland.] By one statute, the levying of war in the land of Ireland was made treason; by another statute, the levying of war in England was made treason; but no statute had made the levying of war in the United Kingdom of Great Britain and Ireland to be treason. The crown will contend that the indictment is good at common law, but we submit there can be no treason now by the common law (3 Coke, Inst. 21; 1 Hale, P. C. 86). The 25 Edw. 3 declares what shall be treason, and what not, *King v. Speke* (1 Salk. 358; 1 Saund. 121 a; 1 Hale, P. C. 76, 77, 85); *White v. Jones* (2 Gale & D. 322); *Battersby v. Kirk* (3 Scott, 11). The next objection which formed the substance of the plea put in by the prisoners is, that a copy of the indictment and a list of the witnesses to be produced against the prisoners was not delivered to them, at the same time, and ten days before the trial. This is the most important of our objections. We submit that the 57th Geo. 3, c. 6, when originally enacted, extended to Ireland, and gave to every person indicted for the treason of compassing or imagining the death of the sovereign, the benefit of the provisions of the 7 & 8 W. 3, c. 3, and the 7 Anne, c. 11. The 7 & 8 Wm. 3, gave the prisoner a copy of the indictment five days before trial, and by the 7 Anne the party accused was entitled to a list of the witnesses to be produced on the trial, and of the jury, to be delivered to him ten days before the trial. There was nothing in the 57 Geo. 3, c. 6, to shew that Ireland was to be excluded from its provisions. The treason of compassing the death of the sovereign was originally defined by the 25 Edw. 3. The 36 Geo. 3, c. 7, was, with respect to treason, both a declaratory and an enacting statute; there were three classes of treason provided for in it, and unquestionably the treason of compassing the

death of the King, as framed by the 25th Edw. 3, was in terms comprised in the 36 Geo. 3. The 5th section of the 36 Geo. 3 gave the benefits of the acts of William and Anne to every person accused of any offence made or declared to be high treason by that act. The provisions of the 36 Geo. 3 were subsequently made perpetual by the 57 Geo. 3; the 2nd section of this latter act provided for a treason committed against the person of the sovereign, and no grounds existed for the supposition that the legislature of that day did not intend to extend that portion of the act to Ireland. According to the provisions of the 36th and 57th Geo. 3, a party tried for high treason, where the overt act charged was not one directed against the person of the sovereign, became entitled to the benefits conferred by the acts of William and Anne. The 11th Vic. c. 12, after reciting that doubts were entertained whether the provisions of the 36 Geo. 3 extended to Ireland, enacts that such of the provisions of the 36 Geo. 3 as were not thereby repealed, should extend to Ireland. All the provisions relating to attempts against the person of the monarch were repealed by the 11th Vict. Unless the overt act laid in the indictment came within the 4th section of the 57 Geo. 3, a party indicted for having levied war against the Queen was entitled to the benefit of the provisions of the statutes of William and Anne. None of the overt acts charged amounted to a direct attempt upon the life of the sovereign, as indicated in the 4th section of the 57 Geo. 3, and therefore, under the terms of the act itself, the prisoners are entitled to the benefits arising from it. The plea is good in form, and comes within the class of those specified in *Bac. Ab. Title, Pleading*, as a plea that the indictment should not then be proceeded with; it is a plea in suspension of the proceedings, and was put in at the right time, for the objection could not be taken until arraignment of the prisoners, as it was not until then that it could be known whether they would be furnished with the list ten days before the trial. The objection in *Frost's case* was of a more formal kind, and yet all the judges were of opinion that, had it been taken in due time, the effect would have been to postpone the trial to give due time for the delivery of the lists. Upon this objection the following authorities were referred to—*Thistlewood's case* (33 St. Tr. 683, 919); 1 Hale, 108; 7 Co. Rep. 10, b; *Story's case* (3 Dyer, 298, a); *Wright v. Murphy* (Jebb & B. 53); *Russell v. Ledson* (14 M. & W. 574). The peremptory challenge to the twenty-first juror ought to have been allowed. At common law, in the case of treason, a prisoner was entitled to thirty-five peremptory challenges; and the part of the 7 & 8 Wm. 3, which was extended to Ireland by the 1 & 2 Geo. 4, c. 24, recognized the right of peremptory challenge. The crown will contend that this right has been taken away by the 9 Geo. 4, c. 54, but we submit that the treason spoken of in that statute was petty treason, an offence then in existence, and not high treason. The prisoners should have been asked the specific question, why sentence of death should not be passed on them. This was an essential part of the record. *Rex v. Geary*

(1 Shower, 132), and the precedents are uniform upon the subject, *King v. Garside* (4 N. & M. 33); *Anon.* (3 Mod. 265); *Rex v. Rogers and others* (3 Burr., 1909). [*Perrin, J.*, referred to the *Duchess of Kingston's case* (20 St. Tr. 625) where the words used were "what have you to allege against judgment being pronounced upon you?"]

Attorney-General (with him *D. Lynch*) for the crown.—The caption is the same as in *S. Gray's case*, (11 Cl. & F. 427), in *Shea and Dwyer's case*, in *Hayes and Rice in error v. the Queen*, decided in 1846, in *Fogarty in Error v. the Queen*, decided in the same year, and no question was raised in any of those cases as to its validity. The caption is mere matter of description, and the one now under consideration contains every necessary averment (2 Hawk. c. 25, s. 23); *Rex v. Royce* (4 Burr. 2073). The form of the commissions in England differs from those in Ireland, and the English precedents cannot apply. The commission in Ireland is to deliver the gaol generally, and is several as well as joint. Before "A. B. and others," in the common form, is sufficient, *Leicester v. Hayden* (Plowd. 384). The next objection amounts to this, that no count can now be framed in Ireland on which a prisoner can be tried for high treason. The treasons contemplated in this indictment were not created by the 25th Edw. 3, but were treasons at common law (3 Inst. 69). The 25th Edward 3 merely declared what the common law was, and did not create any new treason (2 Hale, P. C. 189). The indictment could be framed without the words *contra formam*, &c. (1 Hale, P. C. 147); *Lord Stafford's case* (7 St. Tr. 1217). The 10 Hen. 7 extends the 25 Edw. 3 to Ireland, and no foundation exists for the distinction between the words "the realm," as applicable to England, and "this land," used in reference to Ireland; for the 33 Hen. 8, in speaking of Ireland, uses the words "this realm" and "this land" indiscriminately. Ireland, by this statute, became "the realm" of Ireland. The words "within this realm," or "his realm," are mere venue, and the offence is committed within Ireland. The third objection is founded on the assumption, that the 36 Geo. 3 was co-extensive with the 25 Edw. 3, but the former statute had only reference to such treason as from the then condition of the times it became necessary to prevent and repress; namely, immediate personal attacks upon the sovereign. A person could not be charged, under the 25th Edw. 3, with treason for personal injury to the sovereign. The overt act in this indictment could not be supported under the 36 Geo. 3; indeed it is not pretended that that statute ever applied to Ireland. The 57 Geo. 3 makes perpetual the operation of the 36 Geo. 3, but we deny that if an act makes perpetual a temporary act, it thereby extends the operation of the first act. It is conceded that the only portion of the 36 Geo. 3 which was made perpetual by the 57 Geo. 3 was the first section, and can it be said that the 11 Vic. c. 12, when extending the said recited provisions of the 57 Geo. 3 to Ireland, repealed the 36 Geo. 3, c. 31, Ir., and the 1 & 2 Geo. 4, c. 24, Ir.? We next submit that this matter is not properly the subject of a plea, and should have been

left to the discretion of the court. No merits existed in the case, nor was there any ground of hardship. It is not pretended that the plea, or objection, applies to the five counts upon which the prisoners were convicted; this is, in fact, a writ of error, brought to reverse the judgment of acquittal upon the only count upon which there was an acquittal. The argument for the prisoners, as to the non-allowance of the peremptory challenge, is grounded on the assumption, that the statute which expressly took away the right of peremptory challenge to more than twenty in Ireland, was confined to cases of petty treason; that is a fallacy, for the 10 & 11 Car. 1, c. 9, shews that twenty challenges only were allowed in cases both of high and petty treason. No difficulty exists as to the *allocutus*; the words "judgment" and "sentence" are used synonymously in the 54 Geo. 3, c. 54, which prescribes the judgment, and the word "execution" is not used; the details are comprised in the word "judgment."

Jan. 16.—BLACKBURN, C. J., now delivered judgment.—In these several cases writs of error have been brought to reverse the judgment pronounced at a special sessions under a Commission of Oyer and Terminer for the county of Tipperary. The errors which have been argued are the same in all the cases, and I shall consider them in the order in which they have been argued. The first error assigned is, that the caption of the indictment does not shew with sufficient certainty that the Commissioners before whom the Commission was held had authority to hold it. The caption states that at a Special Sessions of Oyer and Terminer and general gaol delivery, before the two Chief Justices and Mr. Justice Moore, nominated and appointed to hear and determine all treasons, felonies, &c., and from time to time to deliver the gaols of the county Tipperary, by virtue of a Commission of Oyer and Terminer and general gaol delivery directed to them and others, it was found and presented, &c. The plaintiffs in error contend that this commission conferred only a joint authority upon the three justices named, and others, and if this were so the objection would be well founded; but, in my opinion, that is not the import of the caption. It contains two averments, each distinct from and independent of the other; one averment is, that the three judges named were nominated and appointed to hear and determine the cases; and the other is, that the Commission was directed to them and others. Each of these averments refers to a different matter; one, the direction to all the commissioners; the other, the operative part of the instrument; and so distinct are they, that the address contains not the least intimation of the contents of the patent or of the authority it confers. Both the averments being matter of record, the facts averred must be taken to be true, nor is there any reason why a Commission may not be directed to many, with an authority to act severally as well as jointly. The argument of the plaintiffs in error assumed that because a commission was directed to others, the statement that the three judges were nominated and appointed was necessarily false, but there was no contradiction between the two statements put for-

ward, and it was against all right and reason that one should disprove the other, both standing upon the same authority, and being therefore entitled to the same credit. Nor were the consequences of the assumption to be lightly regarded. It amounted to no less than an imputation of the officer's making a false entry, and the three judges acting illegally in assuming an authority not conferred upon them by virtue of the commission. There was no authority to warrant any such assumption, and it also conflicted with the rule of law which maintained the regularity of judicial proceedings. English precedents had been referred to, to show that the caption in question differed from them in form. It should, however, be remembered, that the caption was only the minute or record of the proceedings under the commission; and as the contents of such commissions varied in many particulars, according to circumstances, so must the form of the caption. The precedents in England shew that the form of the commissions there differ from those in Ireland, and we have judicial knowledge that the commissions for the circuits in Ireland are joint and several. I have had a search made for commissions in the Hanaper Office, and except in commissions for counties of cities and towns, in which there is a quorum clause, all the commissions of Oyer and Terminer are joint and several, and embrace their execution by one, two, or any number of the judges. I have also had a search made in this court for captions of indictments returned by writs of error and certiorari; and though in a great many cases the objection assigned here does not exist, yet there are sixteen precedents in certiorari returns, and within a very short time eight exactly similar captions of indictments have been returned upon writs of error, and in none of them was this objection ever alleged. For these reasons, I am of opinion, that these captions are not erroneous. As I am the legal depository of this commission, I think it not improbable, that if I were silent on this point, it might be supposed that these captions were not upheld by reason and argument. I think it right to say, that any one or more of the judges are expressly authorized to execute the commission, and that there is no foundation, in fact, for the objection that the court below had no jurisdiction. The second objection is, that it is not, and never was, high treason to levy war against the sovereign of these realms in Ireland. As I entirely dissent from this position, and the grounds upon which it is rested, I shall not dwell on the answer suggested by the numerous precedents of indictments in Ireland, in which convictions have been had, and which contained counts for levying war; nor shall I do more than express my concurrence in the position, that this was treason at common law, of which the 25 Ed. 3 was only declaratory. I come, therefore, at once to consider the proposition, whether the 25 Ed. 3 became the law of Ireland by the 10 Hen. 7. That, Poyning's act made the 25 Ed. 3 the law of Ireland, in respect to the treason of compassing the death of the sovereign, is admitted; but it is denied that the offence of levying war became treason in Ireland, because it is said we must read the words "in this realm," as they were used in Poyning's

Act, as meaning England, then the only realm of the King. But what would be the use or meaning of enacting by an Irish statute that that should be treason in England which was and had been always so by the common law, or at all events from the reign of Ed. 3. If these words cannot, therefore, be understood to mean England, without leading to the most absurd conclusion, I can see no reason why they should not be understood to mean Ireland, as the king's realm or territory. That such is the effect of Poyning's Act, is established by the authority referred to by my brother Perrin in Coke Lit. 141 b.; and to the same effect is a passage from 1 Hale, 147, which refers to the statute of Edw. 3 as one of the affirmative acts introduced into Ireland. That this is the meaning and effect of the statute is obvious, from its language. After reciting that there are divers good and profitable statutes made within the realm of England, &c., it enacts that all the statutes made within the said realm shall from henceforth be deemed good and effectual in law, and be used and executed in this land of Ireland in all points, and at all times, according to the tenor and effect of the same. This language makes it impossible to doubt that the same offences which would be treason in England would be treason if committed in Ireland. But if any doubt remained, it was removed by the 5 Geo. 3, c. 21, which enacts that any person indicted in Ireland under 25 Ed. 3, should have a copy of the indictment and counsel assigned to him. This recognises and acts upon the liability of any party to be indicted in Ireland for any of the offences committed here, which were made treason by that act, and must include the levying of war. For these reasons, the second ground of error is utterly insupportable. The next ground of error is the disallowance of the plea. This indictment contains six counts. The first five are for levying war against the Queen; and the 6th for compassing the death of her Majesty, and sets forth various overt acts, all of levying war, or conspiring to levy war; and the first two averments are, that the purpose was to put our lady the Queen to death. The plea of William Smith O'Brien to this count alleges that the prisoner should not be compelled to answer the indictment, because he is thereby indicted for compassing, imagining, and intending to put our lady the Queen to death, and that by the statutable enactment, every person indicted for compassing death or destruction to our lady the Queen is entitled to have delivered to him, ten days before his trial, a copy of the indictment, and at the same time a list of the witnesses to be produced upon the trial, mentioning their names, professions, and places of abode. The plea then avers that the indictment was found on the 21st of September, and on that day a copy of the indictment was delivered to him in open court, but that no list of witnesses was delivered to him, and that ten days had not elapsed since the indictment was so delivered. It concludes with a verification, and prays judgment that he may not now be compelled to answer the indictment. The plea is the same in the case of Meagher in error *v.* the Queen, with the addition of an allegation that he ought to have been given, and was not given, a copy of the

panel of the jury. The pleas in the other cases are, that by an Act of Parliament passed in the seventh year of Queen Anne, it was enacted, that when any one should be indicted for high treason, a list of witnesses and of the jury panel should be delivered to him, together with a copy of the indictment, ten days before he was called on to plead, and that no such lists were furnished to them. The commencement and conclusion of all the pleas are the same. The Attorney General demurred to all, and that demurrer was allowed. On the form of these pleas there has been much controversy; the crown counsel have strongly insisted that the matter of them was a ground of motion and not of plea. I feel myself bound to consider what are the real merits of the case made by the plea—that is, whether the prisoners were entitled to be furnished with a copy of the indictment and a list of the witnesses ten days before being called on to plead, or whether they were entitled to the benefits which parties indicted for high treason have under the 7 & 8 W. 3, cap. 7. The counsel for the plaintiffs in error contend that by the 57th Geo. 3, cap. 6, sec. 7, they are entitled to these benefits, this act being unrepealed, and in force in Ireland. On the part of the Crown it is insisted that this section of the act does not extend to Ireland. The counsel for the plaintiffs in error in the second place contend that even though this section of the act of 57th Geo. 3, did not originally extend to Ireland, yet that under the provisions of the 11th Vic. cap. 12, it is now become the law. The counsel for the Crown insist that were the effect of the 11th Vic. c. 12, such as is contended, the present indictments are not so framed as that the plaintiffs in error can take any advantage from it. These are the three propositions which I now proceed to consider. It becomes necessary to refer to the state of the law both in England and Ireland when these different statutes were passed. The 25th Edw. 3, declared it to be treason to compass the death of the sovereign, and it was always held to include not only direct attempts against the person of the monarch, but also designs to subvert his power and authority, the accomplishment of which would naturally place his life in peril; both were equally designs against the person, and equally treason. The English act, the 7th and 8th Wm. 3, cap. 3, made it necessary to prove the overt act by two witnesses, and entitled the accused to a copy of the indictment five days before trial, and to have counsel assigned for his defence. The statute of 7 Anne, c. 11, Eng. entitled persons charged with treason to a copy of the indictment and lists of the witnesses and jurors ten days before trial. This latter act was not adopted by any act of the Irish parliament, and in fact, the only act passed in Ireland before the Union in reference to treasons was the 5th Geo. 3, cap. 21, entitled, "an act for the better regulating of trials in cases of high treason," and by which every person charged with that offence was entitled to a copy of the indictment five days before trial, and to have counsel assigned him. The next statute is the English act of the 36 Geo. 3, cap. 7, entitled "an act for the safety and protection of his Majesty's person and government against treasonable practices and attempts." The provisions of the first section of this act have not been particularly referred to, and I will therefore

only observe that they were, as to some treasons, declaratory, and as to others, enactive; that the treasons it deals with are divisible into two distinct classes, one relating to treasons against the person of Geo. 3, and of his heirs, the other to attempts against his government. The act was only temporary, to continue for the life of the king, and until the end of the session of parliament next after his decease; and though the offences thereby made treason would have that character, whether committed within the realm or without, yet the persons charged with them were only triable by courts of competent jurisdiction in England. The 5th section provided that every person accused of offences which were declared to be treasons by its provisions, should be entitled to the benefit of the acts of William and Anne. The 39th and 40th Geo. 3, cap. 93, enacted, that when the overt act was the assassination of the monarch or a direct attempt against his person, the party charged should be tried as in a case of murder. Then came the 57th Geo. 3, cap. 6, entitled, "an act to make perpetual certain provisions of the 36th Geo. 3, and to provide for the safety and preservation of his royal highness the Prince Regent against treasonable practices and attempts." The 4th sect. of this act provided that persons charged with treasons, not directed against the life of the sovereign, should be entitled to the benefit of the provisions of the statutes of William and Anne. Now it was obvious that this 4th section had reference to persons who might be indicted after its provisions should commence to operate, namely, at the end of the session of parliament next after the demise of the then George the Third. The question, therefore, is could an indictment, after the passing of this act, be maintained in Ireland for any of the offences that were made treason by the 36th Geo. 3. It is contended that Ireland is included, because it is not expressly excluded by the enactment in the first section of the act. However general the words of an act may be, the object and nature of its enactments may make it necessary to construe them in a restricted sense, and to hold that it could not have been intended that the act should operate according to its very letter. We must therefore see whether it was or could have been intended to include Ireland within the operation of the first section. Whatever be the value of the omission of words of express exclusion, it is certain that the statute does not contain any indication of an intention to extend it to this country, or to confer any power, which the 36th Geo. 3 would not have conferred, had it been perpetual *ab initio*. Indeed, I cannot reconcile with the plain meaning of the words, "continue and perpetuate," any other idea than that the law as it then stood should so continue. Until the expiration of the 36 Geo. 3, the 57 Geo. 3 could have no practical effect in England. Was it, then, to have practical effect in Ireland? There was nothing in the act to warrant the assumption that it was to have a different period for its commencement in Ireland than it had in England. If, then, its effect was to take place in both countries at one and the same time—that was, at the end of the session of Parliament next after the decease of the then king—the postponement was utterly inconsistent with the alleged intention to assimilate the

law and practice in the two countries, for they would remain in the meantime as dissimilar as they had always been. Indeed, if any such assimilation was intended, I cannot conceive any rational object for deferring in Ireland the operation of the provisions already in force in England for the preservation of the person of the king, for the period during which the postponement must necessarily take place. The construction sought to be put on this statute is opposed by the fact, that the provisions of the 36th Geo. 3 are penal in the highest degree, and cannot be extended by construction, for a penal law must be construed strictly both as to its spirit and letter. *Fletcher v. Lord Sandes*, (3 Bing. 580.) Great stress was laid by counsel for the prisoners upon the recital in the 11th sect., which showed that doubts were entertained whether the provisions of the 36 Geo. 3, made perpetual by the 57 Geo. 3, extended to Ireland. Those doubts do not relate to the 4th section of that act, or as to whether a person indicted in Ireland was entitled to the benefit of the statutes of William and Anne; it is argued that the expression of those doubts as to the 1st section, and the omission as to the 4th section shew there is no doubt that the latter section extended to Ireland. This assumption is perfectly arbitrary, and might, with equal reason, be met by the crown with as positive an assertion, that there was no doubt on the subject, and that the 4th section did not extend to Ireland; but we have what is decisive of the matter. The 1 & 2 George 4, c. 24, an act conversant with trials for high treason in Ireland, commences by reciting two of the provisions of the 7th Wm. 3, c. 3, the first requiring two witnesses to prove each overt act of treason; and the other, that no person should be indicted unless the indictment was found within three years after the treason was committed. It then recites that these provisions had not previously extended to Ireland, and that it was expedient that they should. This was a direct contradiction to the assertion that the statute of William had been extended to Ireland by the 57th Geo. 3, c. 6. These various reasons have induced me to come to the conclusion, that the 1st and 4th sections of the 57th Geo. 3, c. 8, do not extend to Ireland. I now proceed to consider the argument raised in support of the plea founded on the provisions of the act of the 11th Vic. c. 12. The first section of this act repeals all the provisions of the 36 Geo. 3, and of the 57th Geo. 3, save those which it enumerates, and which were all before set forth in the recital of the 36th Geo. 3. What the recited provisions of the 36th Geo. 3 not thereby repealed were, there is not the least difficulty in ascertaining; for it is plain that they were those which related to the compassing or intending the death or destruction, or any bodily harm tending thereunto, the maiming, wounding, imprisonment, or restraint of the heirs or successors of King George 3. These were the recited provisions, and the only recited provisions of the act of the 36th Geo. 3, which that of the 57th Geo. 3, c. 6, made perpetual, and of necessity they were the only provisions which, by the second section, were to be made law in Ireland. But it has been argued, that though the second section did not in terms refer to the fourth

section of the 57th Geo. 3, c. 6, yet that that section was not repealed by the 11th Vic. c. 12, but was included in the exceptions, and was therefore still in force, and available to persons who might be indicted in England, and hence it was inferred that it was also in force in Ireland. Now, assuming that the 4th section of the 57th Geo. 3, c. 6, was included in the exceptions, the consequence was not that it was to be in force in Ireland, but only that the law in that respect was to remain unchanged, and that the 4th section should continue, as it had previously been, the law of England; any other construction would be repugnant to the language and intention of the legislature. It has been argued, on the part of the plaintiffs in error, that if this 4th section of the 57th Geo. 3, c. 6, did not extend to Ireland, persons indicted under the 11th Vic. c. 12, for any of the treasons against the person of the sovereign, could not have the benefit of the Irish statutes, and must be sentenced, on conviction, to undergo the barbarous punishment of treason under the common law. I cannot adopt this view of the case as affording ground for questioning the conclusion to which I have arrived, as the just result arising from a great number of considerations. But though, from the terms of the 5th Geo. 3, c. 31, there might be some question whether a person so indicted should have the benefit of its provisions, I still think he would be entitled to the benefit of the 1 & 2 Geo. 4, c. 54, I now come to consider the position contended for by the crown—and, I think, successfully—that even though persons indicted under the 11th Vic. c. 12, would be entitled to the benefit of the English statutes, the plaintiffs in error here could not be so, the indictments not containing any overt acts of personal violence. I have already stated that the 36 Geo. 3, c. 7, appears to me to refer to two distinct classes of treason, the one having for its object the protection of the person of the sovereign, the other the preservation of his authority and government; and I think these two classes are unequivocally recognised and distinguished by the 11th Vic. c. 12, which, after a full recital of all the treasons made or declared by the 36th Geo. 3, c. 7, sets out in the preamble that its object was to repeal such of the provisions so recited as did not relate to offences against the person of the sovereign. This is a plain declaration that some of them do, and some do not, relate to offences against the person of the sovereign. The enactments are in exact conformity with the preamble; I have, therefore, come to the conclusion, that though now, as before the act, the charge of compassing the death of the sovereign might be sustained under the 25th Edw. 3, by any overt act against her imperial authority, as well as against her person, yet that the 11th Vic. c. 12, was confined to the latter species of treason, and that, as this indictment is framed, it cannot be considered as founded on its provisions. For these reasons, I consider the demurrer to these pleas to have been properly allowed. The next error assigned is for the rejection of the prisoners' peremptory challenge after having challenged twenty. Counsel for the crown insist that by the 9 Geo. 4, c. 54, the right of challenge is limited to twenty; and, upon the other hand,

counsel for the prisoner insist that under the words "or any other felony," the right of challenge is not so limited. If that were the intention of the legislature, the use of the word "treason" would have been superfluous; for, according to this argument, petty treason, as a felony, would be included among other felonies. I have looked over a great number of statutes in order to ascertain the sense in which the word "treason" is used and understood, and I find that the word, standing by itself, has invariably been used to signify high treason. I have not discovered one where it meant petty treason where the word "high" was not added to it; but I have met many cases where the words "treason" and "high treason" were convertible terms. The very act before us, the 11th Vic. c. 12, in the seventh section uses the word "treason" as describing high treason no less than three times; and the 6th section quotes the statute of Edw. 3, and uses the same word. But if a certain test of the exposition of the word was required, the 8th and 11th sections of this act use the word "treason" in its strongest sense. I have only further to remark, that the act 9 Geo. 4, c. 54, did not introduce for the first time this restriction of peremptory challenge. It had existed from the time of Charles 1. So far, therefore, as regards that objection, I think there is no ground of error. The last error assigned is the allocutus. It is objected that it was demanded of the prisoner whether he had anything to say why judgment should not be pronounced against him; and it is contended that it should have been added judgment "of death," or judgment "and execution." Several precedents have been cited where these terms are used, but none where judgment in the present form was held to be void. It is said the prisoner must have an opportunity afforded him of moving in arrest of judgment; when he is called upon to state why judgment should not be passed upon him, that opportunity is certainly afforded him. The judgment here is that prescribed by the 54 Geo. 3, c. 146, which does not use the word "execution" and uses the word "sentence" as synonymous with judgment. In the word "judgment" are comprised all the details which are to constitute the sentence. If, however, precedents and authorities are required to warrant the present form, they are abundant. In 4th Blackstone, c. 29, it is said, "When verdict is found, the prisoner shall be asked why judgment should not be awarded against him." In the case of the *King v. Royce* (4th Burr. 2073), the prisoner was asked why judgment should not be pronounced and sentence awarded against him. The cases cited from 3 Mod. 265 were cases in which there was no allocutus at all; in the former cases, the error assigned was, that the prisoner was not asked what he had to say why judgment should not be given against him. For these several reasons I think these causes of error should be disallowed.

CRAMPTON, J., expressed his full concurrence in the judgment of the court, except as to the reception of the plea, being of opinion that the subject matter of it should have been disposed of on motion, and not received as a plea to the indictment.

PERRIN and MOORE, JJ., expressed their entire concurrence.

Errors overruled.

ROLLS COURT.

O'CONNOR v. MALONE.—Feb. 12.

Practice—Receiver—Security.

Where the rental of lands, over which a receiver has been appointed is considerable, he will be permitted to divide his security amongst several, and the entire sum in which the sureties qualify, need not exceed double the rental.

This was an application on behalf of the receiver in this cause, that he might give security to the amount of £22,000—being more than two years gross rental of the lands over which he had been appointed—in the following manner; himself in the sum of £22,000, Sir H. C. Coote, in the sum of £11,000, Colonel F. P. Dunne, in the sum of £5,500, and H. P. Pigott, in the sum of £5,500, making together, £22,000.

Mr. Berkely, for the motion—where the rental is small, it is the practice to require each of the sureties to qualify in double the amount of the yearly rent; but when the rental is considerable, as in the present case, the receiver is permitted to give security by several persons, and the gross amount of all taken together need not exceed double the yearly rental; *Houlditch v. Marquis of Donegal*, (3 L. Rec. N. S. 65), and the case of *Lord Kingston*, mentioned in the argument in that case. Since the new general orders, a receiver cannot have more than one year's rent in his hands, therefore the parties would be perfectly secure.

Mr. Lefroy, contra—*Mr. Lestrangle*, the other candidate for the situation of receiver in this cause, is prepared to give security according to the usual practice of the court, which should not be departed from to his prejudice, for if the receiver appointed is not prepared to give security, *Mr. Lestrangle* would be appointed in his place. The security should be by two persons, each bound in every portion of the entire sum.

MASTER OF THE ROLLS.—The authority which has been cited is an express decision on the point, I will therefore make the order in the terms of the notice.

SHERLOCK v. ROE.—March 3.

Fund in Court—Title of Landlord to, after Recovery by him in Ejectment.

Ormsby moved that the fund in court to the credit of the cause might be applied in payment of the arrears of rent due to the head landlord. The interest in the lands has been evicted for non-payment of rent, and the fund in court being the produce of these lands, the landlord is entitled to have same applied in payment of the arrears. In the case of *Elliott v. Elliott*, (1 Ir. Jur. 165), in the Exchequer, an order was made similar to that which is now sought.

MASTER OF THE ROLLS.—I think the practice, as established by the case in the Court of Exchequer, is correct; besides, the landlord is entitled to sue the tenant for all arrears due after the date of the demise.

Motion granted.

March 6.

THE ATTORNEY-GENERAL AT THE RELATION OF F. JACKSON AND OTHERS v. THE CORPORATION OF DUBLIN.

Injunction—Corporation of Dublin—Pipe-water Rate.

In the year 1837, the Corporation of the City of Dublin issued debentures, charged upon the surplus pipe-water revenue, and which recited, that by a decree pronounced in 1831, it had been declared, that the surplus pipe-water revenue was the property of the corporation. In 1849, an information was filed, and upon motion for an injunction to restrain the corporation from applying the pipe-water rate in payment of the interest upon said debentures—Held, that in the absence of the majority of debenture holders this application must be refused; for, even though such payment was a misapplication of the fund, the injunction ought not be granted till the hearing of the cause, when the court could do justice to the debenture holders, by directing payment of their demands out of the private funds of the corporation.

Upon applications for injunctions, the court will take into consideration the balance of inconvenience; and, even though the act sought to be restrained is one which should not be done, if the granting of the injunction would be attended with inconvenience or injustice to third parties, the motion will be refused.

Seemle—That the entire pipe-water rate, levied under the 15th and 16th Geo. 3, c. 24, is held by the Corporation of the City of Dublin upon trust, and no part thereof is the private property of the corporation.

In this case, the information stated, that previous to the passing of the 15th and 16th Geo. 3, the corporation was in the habit of supplying water to the inhabitants of the city of Dublin; it then stated the provisions of that act, by which the corporation was empowered to borrow money upon the security of the rates, and which are sufficiently set forth in the judgment of the court; also the 43rd Geo. 3, called the Metal Main Act, which enabled the corporation to raise further sums, and which recited the debt created under the provisions of the first-mentioned act, and that the corporation were bound to apply a sum of £2,000 annually in discharge of same. The information then stated that the funds had been applied to other purposes, in violation of the trusts upon which they were held, and various facts connected with proceedings taken against the corporation on account of this misapplication were then set forth, and the Master's report made in the year 1830, by which it appeared that up to the year 1825, the sum of £74,500 had been misapplied. That in the year 1831, a decree was pronounced, by which the corporation was directed, within six months, to pay off this sum of £74,500, and cause the debentures, upon the security of which said sum had been raised, to be discharged, and that no further sums should be levied under the last-mentioned act. That this decree was confirmed on appeal—

that new debentures were issued by the corporation, under the 15th and 16th Geo. 3, to the amount of £74,500, and which the holders of the debentures issued under the Metal Main Act (43 Geo. 3) accepted in exchange for those which they held. The information then charged, that such was not a proper application of the pipe-water tax, for that the sum directed to be paid by the decree should be discharged out of the private funds of the corporation, and not out of the rate, and that said decree had not been complied with. It then stated, that the supply of water to the citizens of Dublin was insufficient—that the corporation had, without sufficient grounds, discharged several officers connected with the pipe-water establishment, whose compensation was paid out of the rate, and that such was also a misapplication of the fund. It then stated, that a considerable number of the new, or substituted debentures were lodged in the Hibernian Bank, as security for certain sums which had been borrowed by the corporation.

Brewster, Q.C., now moved for an injunction to restrain the defendants from applying any portion of the pipe-water rate in discharge of the interest on any debenture or mortgage issued or exchanged in discharge of the sum of £74,500, or of the interest upon any mortgage or incumbrance created by the corporation, over and above the said sum of £74,500, or in payment of the compensation of dismissed officers; and after stating the facts set forth in the information, and the affidavit in support of it, relied upon the cases of *Attorney-General v. Corporation of Limerick* (6 Dow. 136), *Attorney-General v. Corporation of Carlisle*, (2 Sim. 437), *Attorney-General v. Corporation of Galway* (Beat. 298), *Attorney-General v. Mayor of Liverpool* (1 M. & C. 171), *Attorney-General v. Wilson* (Cr. & Ph. 1), *Attorney-General v. Corporation of Litchfield* (13 Sim. 547), *Attorney-General v. Mayor of Norwich* (12 Jur. 424), *Attorney-General v. Corporation of Dublin*, (1 Bligh, 312), to shew that the pipe-water rate was a fund held by the corporation for charitable purposes, and could not be applied to any other use except to provide a supply of water to the inhabitants of the city of Dublin.

Christian, Q.C., contra, on behalf of the corporation, contended, that if the present application was granted, the rights of the debenture holders, which had been recognised and acted on for twelve years, would be most injuriously affected. Also, if the interest upon the sum borrowed from the Hibernian Bank was not paid within the time agreed on, it would be raised from £4 to £6 per cent.—that by the decree pronounced by Sir Wm. M'Mahon, the right of the corporation to the surplus funds produced by the pipe-water rate was admitted, and the debentures issued in substitution for the metal main debentures, were charged upon that fund, to which they were so entitled—that by the arrangement with the Hibernian Bank, the fund was considerably benefitted, as the interest payable on the sum borrowed was only at the rate of £4 per cent., while the pipe-water debentures bore a higher rate; and relied upon the cases of *Spottiswood v. Clarke* (2 Ph. 154);

Skinner's Company v. Irish Society (1 M. & Cr. 162); *Attorney-General v. Mayor of Liverpool* (1 M. & Cr. 171).

March 7.—Hughes, Q.C., for the Hibernian Bank, contended that the court could not, in the absence of the other creditors, grant an injunction against payment of the interest upon the sum advanced by the Bank, as absent parties should not be affected by the proceedings, and an injunction could not be granted against the Bank without being granted against the other debenture holders also. Besides, the questions now raised were more properly for the hearing of the cause, and ought not to be decided on motion.

Baldwin, Q.C., in reply, contended that the corporation had not properly discharged the trust reposed in them by the statutes for the supply of water to the inhabitants of the city of Dublin was totally insufficient; and even assuming that the corporation was entitled to the surplus pipe-water fund, if the trust was not properly discharged there could not be any surplus. By granting this application, less injury would be done than by refusing it, as the rights of the claimants to the fund would be only postponed till answer or decree, but if the money was paid, irreparable injury would be done.

MASTER OF THE ROLLS.—In this case a motion has been made on the part of the relators, that the defendants be restrained by injunction from applying any portion of the pipe-water rates, or rents, in discharge of the interest payable on any of the debentures for £74,500 in the informations mentioned, or on any debentures or securities issued or substituted in lieu of said sum of £74,500. 2ndly—That the defendants may, in like manner, be restrained from applying any portion of the said pipe-water rates, or rents, in payment of interest upon any mortgage or other security created by the defendants over and above the said sum of £74,500. 3rdly—That the defendants may further be restrained from applying any portion of the said pipe-water rates, or rents, in payment of compensation to dismissed officers. The information in this case was filed upon the 25th of January, 1849; it was amended in some material particulars on the 21st of February, and on the 23rd of February notice of this motion was served. No fact has been stated to the court which did not lie within the knowledge of the relators and of the citizens of Dublin for the last eleven or twelve years. The first question is, whether I should restrain the defendants, by injunction, from applying any portion of the pipe water rates, or rents, in discharge of the interest payable on any of the debentures for £74,500 in the information mentioned, or in discharge of interest payable on any debentures or securities issued or substituted in lieu of said sum of £74,500. The earliest statute which relates to the supply of the city of Dublin with water, is the 6th Geo. 1, c. 16. That statute recited that the city of Dublin had, for many ages past, been seised and possessed of a water course taken out of the River Dodder, which was the chief supply of water, not only for the inhabitants of the said city, but also for his Majesty's Castle of Dublin, and which without it would suffer ex-

ceeding great prejudice. It further recited the manner in which the water was corrupted, to the endangering the health of the inhabitants of the said city, and it enacted that the Lord Mayor, Sheriff, Commons, and citizens of Dublin, should and might peaceably and quietly have, hold, possess, and enjoy the aforesaid ancient watercourse, and have free liberty, from time to time, without being liable to any trespass or other action for the same, to enter upon any land through which the watercourse did pass, and various powers were given to the corporation to secure the supply of pure and wholesome water to the citizens of Dublin. The 15th and 16th Geo. 3, c. 24, after reciting that the inhabitants of the city of Dublin had not of late been sufficiently supplied with water, which had been occasioned by the great increase of the inhabitants of the said city, and the insufficiency of the works formerly constructed to supply such a number; and further reciting that the Lord Mayor, Sheriff, Commons, and citizens of the city of Dublin had, for many ages past, been seised and possessed of a water-course from the River Dodder, and, at a great expense, had made a basin, or reservoir, for water and other works; and reciting that the corporation to promote, as much as in it lay, a supply of water adequate to the inhabitants of the city of Dublin, had entered into a contract with the Grand Canal Company for an ample supply of pure water, at an expense of ten per cent. on the gross produce of the revenue which would arise to the said corporation of the city of Dublin from the sale of said water. It was enacted, "That the owners of every house should, and they were thereby required to provide for the use of each house a branch pipe, to convey the water from the several main pipes which then were, or thereafter should be laid in the several streets, alleys, yards, courts, squares, lanes, or on the quays in the said city, into the said house or houses in the said city. By the second section of that act it was enacted, that the owner or occupier of every house in the city of Dublin should pay to the corporation of said city certain rates specified in that section, varying according to the amount of ministers' money charged on each house. The 11th section of the said act empowered the Corporation of the City of Dublin to borrow, at interest upon the credit of said rates and rents, such sum as they should find necessary for the purposes of the act, and to demise or mortgage, by writing under the seal of the corporation, the said rates and rents as a security to any person or persons who should advance such sum or sums. The form of the mortgage or debenture is then given, by which the corporation, in consideration of the sum borrowed, grant, bargain, sell, and demise to the mortgagee, his executors, administrators, and assigns, such proportion of the whole rents arising by virtue of the said act as the sum, so borrowed, should bear to the whole sum advanced, or to be advanced on the credit thereof, to have and to hold from the day of the date of the mortgage for and during the continuance of the act, unless the said sum, with interest at the rate in the mortgage specified, should be

sooner repaid and satisfied. The 12th section authorised the transfer of this mortgage or debenture by the mortgagee, by indorsement in the form thereby directed. The 14th section provided that persons to whom these mortgages should be made should be creditors on such rates and rents in equal degree, and that there should be no preference in respect of the prior advance of money, or prior date of the mortgage or debenture. The act of the 15th and 16th Geo. 3 was amended by subsequent acts, but the amendments do not appear material to the question to be decided upon this motion. The 49th Geo. 3, c. 80 (commonly called the Metal Main Act), after reciting the 15th and 16th Geo. 3, and some of the statutes amending that act—and after reciting that it had become expedient, to secure a more ample and permanent supply of water to the inhabitants of the city of Dublin, and to prevent the frequent breaking up of the pavement of the streets of the said city, for the purpose of repairing the pipe-water works thereof, that considerable expensive and permanent alterations and improvements should be made in the said works, by making additional reservoirs therein, and by substituting cast iron or metal main service pipes instead of the timber pipes then in use—and reciting that the rates then payable for the sale of water in the city were wholly insufficient to defray the expense of such new and necessary work, the said statute enacted, that it should be lawful for the corporation of Dublin to demand and take from every owner or occupier of every house within the city of Dublin, and the liberties thereof, in the act mentioned, for the purposes of the said act, the annual rates or rents in the said act mentioned, "over and above all rates or rents then payable by them for a supply of pipe water under or by virtue of the said recited acts, or any of them." By the 11th section of the said act it was further enacted, that the Corporation of the City of Dublin might, and they were thereby empowered to borrow, at interest upon the credit of the rates and rents granted by the said act of the 15th and 16th Geo. 3, c. 24, (the Pipe Water Act), and by the said statute of the 49th Geo. 3, c. 80, (the Metal Main Act), such sum or sums as they should from time to time find necessary for the purpose of making the said reservoirs, and laying cast iron or metal main and service pipes, and to demise or mortgage the said rents, or any part thereof, as a security to any person or persons who should advance such sum or sums. The form of the mortgage or debenture is then given in the act, and it is to the same effect as the form of security set forth in the act of the 15th and 16th Geo. 3, except that the pipe water rates and rents, which the corporation are empowered to levy by the 15th and 16th Geo. 3, and the metal main rates or rents which they were empowered to levy by the 49th Geo. 3, c. 80, are both charged with the money borrowed. By the 12th section, the sum to be borrowed, under the provisions and for the purposes of the 49th Geo. 3, c. 80, was limited to the sum of £32,000. The 13th section, after reciting that there was then a debt of £67,800, secured by the rates granted by

the 15th and 16th Geo. 3, c. 24, and that it was expedient to provide a fund for redeeming and discharging the same, and all such further sums of money as should be borrowed under the 49th Geo. 3, it was enacted that it should be lawful for the treasurer of the Corporation of the City of Dublin, and his successors, treasurers for the time being, and he and they were thereby required annually to retain, out of the rates or rents granted by the 49th Geo. 3, the sum of £2,000, together with such sums of money as should be equal to the interest on the sums borrowed under the provisions of the said act, which sums were to be applied as a sinking fund, to pay off and discharge said sum of £67,800, and all such other sums as should be borrowed under the 49th Geo. 3; and the treasurer was thereby directed to apply said sinking fund from time to time in purchasing in the securities passed for such debt or debts; and the interest of the securities so purchased in, was to be applied in further aid of said sinking fund. By the 14th section, the treasurer was directed to keep separate accounts of the rates received under the Metal Main Act (49th Geo. 3), and to apply the balance of the rates levied under said act, after retaining the annual amount of such sinking fund, in payment of the interest payable on the money then due, and which should thereafter be borrowed, and in laying down metal pipes, &c., and in increasing the sinking fund. And by the 16th section it was enacted, that if there should be any surplus of the sums so received by the corporation, or on their account, under the said act of the 49th Geo. 3, or under the 15th and 16th Geo. 3, c. 24, more than should be duly expended by them under said acts, then, and as often as said surplus should exceed the sum of £500, "such excess should, from time to time, be added to the sinking fund by said act created, and be, from time to time, paid and applied in the like and same manner as the said annual sum of £2000 is by the said act directed to be applied, until the whole of the said sum or sums of money then due (i. e. the £67,800) and thereafter to be borrowed should be fully paid and discharged." By the 22nd section it was enacted that the 49th Geo. 3 should continue until the said sum of £67,800, and the several sums thereafter to be borrowed under the provisions of the said act should, by the means of the sinking fund, be fully paid off, and no longer. In the year 1823, an information was filed on behalf of the inhabitants of Dublin paying water-rates against the corporation, which stated various acts of mismanagement and misappropriation in respect of the rates, and submitted that the corporation were trustees, under the act of the 49th Geo. 3, of the rates thereby given, for uses which were charitable in their nature, and that the conduct of the corporation amounted to a breach of trust, and prayed (amongst other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the corporation and the application thereof; also of the moneys borrowed and due on the credit of the rates; also an account of the sums annually applied to the sinking fund, and amount thereof applied in payment of the debt.

Lord Manners dismissed that information, but the decision was reversed by the House of Lords; and by the decree of the lords (1 Bligh. P. C., N. S. 361) it was declared, that by the terms of the act of the 49th Geo. 3, the corporation were bound to account for and apply the several rates and rents in the said act mentioned in the manner expressed in the said act; and it was, amongst other matters, referred to the Master to take an account of all sums received by the corporation, or for their use in respect of the said rates and rents, and of the application thereof; also an account of all sums of money borrowed by the corporation on the credit of the rate granted by the said act, and by the 15th and 16th Geo. 3; and also an account of the mortgages of said rates and rents, and to whom made, or for what sums. And the Master was also directed to inquire and report the nature and particulars of the said debt of £67,800 borrowed under the provisions of the 15th and 16th Geo. 3, and whether the sinking fund had been annually retained, according to the directions of the 49th Geo. 3, for the purpose of redeeming and discharging the said sum of £67,800, and all such further sums as should be borrowed under the 49th Geo. 3; and whether all the sums so retained as a sinking fund were appropriated and applied to pay off the said sum of £67,800, and the sums borrowed under the 49th Geo. 3; and several other directions were given by the said decree, which, for the purposes of this motion, it is not necessary to advert to. [A copy of the decree is given in 1 Bligh's P. C., N. S. 361.] By the Master's report, made in pursuance of said decree, it appeared that a sum of £32,000 had been borrowed by the corporation under the provisions of the Metal Main Act (49th Geo. 3), making, with the sum of £67,800 borrowed under the pipe-water acts (15th and 16th Geo. 3, &c.), nearly the sum of £100,000; and the Master found, amongst other matters, that the sinking fund, created by the 49th Geo. 3, was not applied by the corporation in pursuance of the provisions of the said act and the trusts vested in the corporation; and that only the sum of £25,500 had been redeemed of the said sum of £100,000, and that a balance of £74,500 (which is the sum to which the first part of the present notice of motion refers) remained outstanding and unpaid: and the Master further found that if the sinking fund had been retained and duly applied as directed by the 49th Geo. 3, the entire of the £100,000 would have been paid off on the 20th of May, 1825. The cause having come on to be heard on the 24th of May, 1831, before Sir William M'Mahon, then Master of the Rolls, a decree was pronounced by him on the 7th of July, 1831, whereby, after reciting the principal facts found by the report, it was, amongst other matters, ordered, adjudged, and decreed, that the relators and the owners and occupiers of the houses subject to the pipe-water rent should be exempt from liability to the Metal Main Tax, and ought to be exonerated by the corporation from such liability; and it was further ordered, that the said corporation should, within six months from the date of the said decree, pay off and discharge

the said sum of £74,500 to the different persons who were holders of the said securities or debentures for the said sum of £74,500, and thereupon to procure the holders to acquit and discharge the said securities and debentures; and it was further ordered, that an injunction should issue to restrain the corporation from further collecting or levying said Metal Main Tax until further order. The reason, I presume, why the injunction was only until further order was, that the debenture holders who had advanced their money under the 49th Geo. 3, upon the security of the metal main rates as well as of the pipe-water rates, ought not to have been in any manner affected by the breach of trust on the part of the corporation, in misapplying the sinking fund; and if the property of the corporation had been insufficient to pay the £74,500, and if the persons to whom debentures had been issued under the 49th Geo. 3, had retained those debentures, I apprehend they would have been entitled to have had the metal main tax again collected, if the pipe-water rents, which were also pledged to them, were insufficient to make good the deficiency, if any, in the property of the corporation to discharge the £74,500. The observations of Lord Redesdale (1 Bligh, p. 349) appear to me to shew that such was his lordship's opinion. It was, in fact, the continued liability of the householders to pay rates to discharge the £74,500, notwithstanding that a sum sufficient to pay same had been levied by the corporation, which entitled the electors to file the informations upon which the decree of 1831 was founded, in order to compel the corporation to exonerate the householders. Sir Wm. M'Mahon, in giving judgment in May, 1831, after stating the provisions of the 15th and 16th Geo. 3, is reported to have said, that "the object of that statute was to prevent extortion, on the one hand, by the corporation, by fixing the rents and rates, and by creating a corporate monopoly, on the other hand, in favour of the corporation, without divesting the private property and ownership of the corporation beyond the establishment of a public duty (whether to be denominated a public trust or a charitable use), to provide for water-works that should secure a sufficient supply of water to the inhabitants, leaving the surplus profits to continue, as before the act, the private property of the corporation." The judgment is reported 4th Law Recorder, 1st series, 289. The corporation having appealed from Sir Wm. M'Mahon's decree, it was affirmed by the House of Lords, and the case on the appeal is reported in 9th Bligh, 395. The effect of that affirmance was only to establish that the corporation was bound to pay off the £74,500, and to exonerate the householders of the city of Dublin from the payment of that sum. The judgment, however, of Lord Brougham, in stating his own opinion and that of Lord Wynford, does not confirm the observations of Sir Wm. M'Mahon—that the surplus pipe-water rents, if any, are the private property of the corporation. After the decree of 1831, the corporation, purporting to act in conformity to such decree, issued in 1832 new debentures, in the form of the debenture set out in the

15th and 16th Geo. 3, and prevailed on the holders of the debentures for £74,500 to accept these new debentures in lieu of the former. This proceeding was altogether illegal. The decree of 1831 had directed the corporation to pay off the £74,500, and declared that they were bound to exonerate the inhabitants from the payment of that sum; and the corporation, instead of paying the demand, or substituting securities charged upon their private property, pledged by those new debentures the pipe-water rates, and made the £74,500 not a charge upon the surplus of those rates (if any) but a primary charge upon the rates. In consequence of this illegal proceeding, another information was filed against the corporation in 1832, or 1833, to compel them to obey the decree of 1831; and the information having been heard before Sir Wm. M'Mahon, on the 2nd of June, 1836, it was declared, that the debentures issued in 1832 were issued contrary to the duty of the corporation, and that the corporation was bound to pay off and cancel the debentures so issued since the decree of 1831; but it was by said decree of 1836 declared, that the decree did not extend to restrain or affect the right of the corporation to proceed as they might be advised to charge, according to their estate and interest, the surplus income of the corporation arising from the pipe-water rates or rents, after providing for the purposes specified in the said statutes, and subject to the prior rights of the owners and occupiers of houses in the city of Dublin which were subject to such pipe-water rates. This decree of the 21st of June, 1836, not having been complied with, an application was made on the 26th of June, 1837, to Sir Michael O'Loughlen, then Master of the Rolls, that a sequestration should issue against the corporation to compel performance of the said decree. An affidavit was made on that occasion by Sir J. K. James, the treasurer of the corporation, which, amongst other matters, contained the following statement:—"Deponent saith, that immediately after the confirmation of said Master's report of the 9th Nov., 1836, the Corporation of Dublin and this deponent proceeded with the utmost diligence and anxiety to comply with the said decree of the 2nd of June, 1836, and for that purpose immediately caused a case to be laid before eminent counsel as to the powers so declared by the said decree to be vested in said corporation, over the surplus income of said pipe-water rates, as well as to their right to charge same under the act of the 6th and 7th of his late Majesty King William the Fourth's reign, and to advise the form of debenture or mortgage by which the same could be legally and effectually charged: saith, that a form of said debenture for these purposes having been approved of by said counsel, he this deponent, as treasurer of said corporation, entered into a negotiation with several persons who held the securities directed by the said decree to be called in and cancelled, which persons were numerous, and were, in the first instance, to be satisfied of the validity of the proposed new security for those outstanding in their hands; from which circumstance, deponent humbly conceives it will be apparent to this honourable court, as the

fact truly is, that much of the time granted by said decree for the fulfilment thereof was unavoidably consumed, and that any delay which may have occurred in the complete performance of said decree arose from this cause, and not through any default, or neglect, or want of exertion on the part of the corporation to which he is treasurer, but solely and unavoidably from the peculiar circumstances of the case: saith, that after many and repeated negotiations and explanations on the part of the corporation, by deponent, with such of the holders of said debentures as were known to this deponent, it was agreed that in case the said corporation would grant unto the holders of the debentures (so ordered to be paid off) in lieu thereof, the said new debentures or mortgages, in the form approved of by counsel, and chargeable on the surplus income of said pipe-water rates, made under the powers vested in said corporation by the said decree of the 2nd June, 1836, that they, the said bondholders, would accept same in place thereof, and deliver up to be cancelled the debentures then in their possession, and ordered to be taken up by the said decree, and accordingly this deponent, with the sanction, and under the seal of the said corporation, did give unto the holders thereof new debentures, in the form of mortgages, and according to the powers vested in them for that purpose, chargeable on the surplus income of the pipe-water rents, and did take up and cancel of the debentures so ordered to be paid off (as deponent submits he was fully entitled so to do), debentures to the amount of £38,300, and which are now in his possession: saith that there now remains a balance of £26,700 sterling of said debentures still to be paid off and cancelled, and which debentures this deponent is still making every exertion to have taken up, so that said decrees may be fulfilled by the said corporation and this deponent as their treasurer." An order was made on the 26th of June, 1837, by Sir M. O'Loughlen, on said motion, whereby it was ordered that the corporation should, within one week from the date of said order, lodge in the Master's office the cancelled debentures mentioned in Sir J. K. James's affidavit; and it was further ordered, that the corporation should, within one week, furnish to Mr. Staines, the relator's solicitor, a copy of the new debentures mentioned in said affidavit; and it was further ordered, that a sequestration should issue, but not be acted on before the 26th of November then next (1837). The corporation accordingly issued new debentures in substitution of those issued in 1832, by which debentures the surplus pipe-water revenue was charged in accordance with the opinion expressed by Sir Wm. M'Mahon, in 1831, and with the decree of the 2nd of June, 1836. Those debentures recite, that by the decree of 1831, the corporation was directed to discharge and satisfy the debt therein mentioned (i. e. the 74,500), and recite that the corporation was desirous of raising such sums of money as might be necessary for that purpose, on the credit and security of their surplus pipe-water revenue thereafter particularly mentioned, "and which had been by the said decree recognised and de-

clared to be the property of the said corporation, and subject to their disposal;" and, after such recitals, the corporation, by such debentures, charged the surplus pipe-water revenue with the sums advanced by the holders of each respectively. It will be recollected that a copy of this debenture was directed to be forwarded to Mr. Staines, the solicitor for the relators, by the order of Sir Michael O'Loughlen, of the 26th of June, 1837, and there can be no doubt that such order was complied with, and that the relators in the information upon which the decree of 1836 was founded, had full notice of the form of such debentures. On the 26th of January, 1838, counsel on behalf of the corporation moved, that the writ of sequestration, awarded by the order of the 26th of June, 1837, should be discharged, on the ground that the corporation had fully performed the decree of 1836, and an order was made by Sir Michael O'Loughlen, which recites that notice of the motion had been served on Mr. Staines, the solicitor for the relators, and it was thereby ordered, that the writ of sequestration which issued under the order of the 26th of June, 1837, should be discharged, "the defendants having fully performed the decree of the 2nd of June, 1836." The debenture holders for £74,500, who were in no default whatever, having given up their original securities which they held prior to the decree of 1831, and which original securities were, in my opinion, the primary charge on the pipe-water rates, and having taken the debentures in lieu thereof, which latter debentures were cancelled under the decree of 1836, then accepted the present debentures on the faith of the opinion expressed by Sir Wm. M'Mahon, in 1831, and on the faith of the decree of 1836, and with the knowledge and acquiescence of the relators in said proceedings, as appears by the orders made by Sir Michael O'Loughlen; and I am now called upon, in the absence of the majority of those debenture holders, who are not represented in this suit, to restrain the present corporation from applying the surplus pipe-water rates, as they have been applied since the decree of 1836, in payment of the interest payable to those debenture holders, the court having no authority or jurisdiction upon this motion to compel the corporation to pay such interest out of their other property. The grounds upon which it is contended I should grant the injunction are—"1st. That Sir Wm. M'Mahon was mistaken in holding that the surplus pipe-water rates (if any) after providing water works which should secure a sufficient supply of water to the inhabitants of Dublin, were the private property of the corporation—and it was insisted on the part of the present relators, that the whole of the pipe-water rates are vested in the corporation as trustees, and for what in law is called a charitable use—and that therefore, if there be a surplus, the rates should be reduced, or the surplus applied to the extension of the mains and water works. 2nd. It is contended that there is, in fact, no surplus, there being, as is alleged, seventy streets, lanes, and alleys in Dublin, in which water mains have not been laid down. With respect to the

first question, I entertain considerable doubt, as to the opinion of Sir Wm. M'Mahon, but I shall abstain from deciding the question on this motion, because I am clearly of opinion, that if the entire of the pipe-water rates are held by the corporation upon trust for the inhabitants of Dublin, and as a charitable use, and that, therefore, it is a misapplication of those rates to apply the alleged surplus in payment of the £74,500, which should be paid out of the private property of the corporation, the injunction should not be granted until the cause shall be at hearing, when the court can do justice to the debenture holders by obliging the corporation to pay the interest and principal out of their other property. With respect to the second point—that there is properly no surplus of the pipe-water rates, there being many streets, lanes, and alleys in Dublin not supplied with water, which ought to be supplied—this allegation is denied; and, although the explanation of the corporation is not satisfactory to me, I am clearly of opinion that this is also a matter for the hearing, and not to be decided on a summary application for an injunction; and, whatever may be the result of an inquiry, if such should be directed at the hearing of the cause, the debenture holders, in my opinion, ought, under any circumstances, to be relieved at the hearing, either by remitting them to the original rights which they had on foot of the debentures which had been issued to them prior to the decree of 1831, they having advanced their money upon the faith of the act of parliament, and the security of the pipe-water rates—or the property of the corporation should be sequestered to enforce performance of the decree of 1831, and to compel the payment and discharge of the £74,500, and the interest thereon, as directed by such decree. I have already stated I have no authority on this motion to direct payment to the debenture holders out of any other fund. Lord Cottenham, in the case of *Spottiswood v. Clarke*, (P. Cooper's Reports, 262), stated that “he always took into his consideration the extent of inconvenience on the one side, and on the other side, as the injunction should be granted or withheld, on which side did the balance of harm preponderate.” On that principle I feel no difficulty in deciding the first question; and I am of opinion that it would be an act of the greatest injustice to the debenture holders to grant an injunction to restrain the corporation from applying any portion of the surplus of the pipe water rate or rents in discharge of the interest, payable on the debentures for £74,500 in the information mentioned, or on any debentures or securities issued or substituted in lieu of said sum of £74,500, the court having no power on this motion to direct the corporation to pay the interest out of their other property. The second branch of the motion, which is comparatively unimportant, is, that this corporation may be restrained by injunction, from applying any portion of the pipe water rates or rents in payment of interest upon any mortgage or other security created by them, over and above the said sum of £74,500. The only security over and above the £74,500 is a certain mortgage for £4862, vested in the Hibernian Bank.—

The facts relating to this part of the application, I understand to be as follows:—In or about the year 1845, the Hibernian Bank became the holders of pipe water debentures, (part of the £74,500), amounting to £27,600. The Hibernian Bank agreed to lend the corporation a sum of £4862, a considerable portion of which sum was charged on the security of the pipe water rent; and the Hibernian Bank agreed to reduce the interest payable on the debentures for £27,600, to £4 per cent.; the effect of which was a saving of upwards of £500 a-year, upon the interest on such debentures; and which interest I have decided, in considering, the first question, I am not justified in granting an injunction on this motion to prevent the payment of. If the interest on those debentures, and on the £4862, be not paid within a certain period after the half-yearly day of payment, the interest on the £27,600, and on the £4,862, will be raised to £6 per cent. under the deed of 1845, which was executed between the bank and the corporation. There is no doubt, that it is a misapplication of the pipe water rate, to apply it in payment of the interest of the £4,862. But the interest payable on that sum is considerably less than the saving effected by the reduction of the interest on the debentures for £27,600; and if I were to grant the injunction in relation to the interest payable on the £4,862, I should make an order which would increase the annual charge on the surplus of the pipe-water rates, as such order would have the effect of raising the interest on the £27,600, from £4 per cent.; to £6 per cent. It appears to me, that such an order would be of no advantage whatever to the relators and to the inhabitants of Dublin, who pay pipe-water rates; and I think it will be more proper, that this question also, should be decided at the hearing; and that, at all events, it should not be decided before the Hibernian Bank, and the Corporation have filed their answers to the information. The third branch of the motion is, that the corporation may be restrained from applying any portion of the pipe-water rates or rents in payment of compensation to dismissed officers. It is quite clear, that those dismissed officers are entitled, under the Municipal Corporation Act, to be paid their compensation out of the corporation property, and it would be very unjust to them, to make any order in relation to the annual payments which they receive, until the hearing of the cause; when the court can order the compensation to be paid out of the other property of the corporation; if it should appear that the pipe-water rate are not properly applicable thereto. I have no authority on motion to make any such order. The only remaining question, is the question of costs. I think it is clear, that the Hibernian Bank is entitled to the costs of appearing on this motion, as they are the holders of debentures to the extent of £27,600, and the application to restrain the payment of interest on those debentures, at this stage of the proceedings, and before the hearing of the cause, is, in my opinion, entirely unsustainable for the reasons I have stated. With respect to the costs of the corporation, I think they should not, under any circumstances, pay the costs of an application made before

answer, founded in the greater part, upon a state of facts known to, and acquiesced in, by the relators and the citizens of Dublin for eleven or twelve years, which the present corporation were no parties to, they having only followed the course adopted by their predecessors, and which appears to have been sanctioned by Sir William M'Mahon.—But as I entertain considerable doubt, as to the legality of applying the pipe-water rates, as they have been applied, I shall not give the costs of this motion to the corporation, unless they succeed in this suit. I shall make a declaration in the order, as to the costs, in accordance with what I have stated. The motion must be refused. I think those parties whose claim for compensation is in question are entitled to their costs. I must say, I never knew an injunction motion, to be brought forward under circumstances like the present, where the ground of complaint was known and acquiesced in by the relators, for a period of ten or twelve years. I do not entertain the least doubt, that the question involved, ought to be decided on the hearing of the cause; and are such as I should not be justified in deciding on a motion like the present.

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COMMON PLEAS.—Feb. 30.

REYNOLDS v. FAULKNER.
SAME v. SAME.

*Scire Facies—Judgment Debt—Evidence—
Estoppel.*

In this case, the plaintiffs brought two actions of *scire facies* upon two judgments—the first of Trinity Term, 1829, and the second of Trinity Term, 1830—to which the defendant pleaded payment, and at the trial before Mr. Justice Torrens, at the sittings after last Trinity Term, gave in evidence a series of receipts by the plaintiff to the mother of the defendant, who was a co-obligor with him on three bonds, and warrants of attorney, to enter judgment, and on which separate judgments had been obtained, two of which formed the subject of the present actions, and which payments exceeded the penalty of the three judgments; and also gave in evidence a bill in the Court of Chancery, filed by the plaintiff to recover the amount of a fourth judgment against the defendant, and the charge of the plaintiff under the decree to account in the cause, in neither of which did the plaintiff make any claim for the judgments the subject of the actions at law. To rebut this case, the plaintiff gave in evidence a bill filed in the Court of Equity

Exchequer, against the mother, various proceedings had there-under, and, amongst others, a report of the Chief Remembrancer, bearing date the 10th of May, 1842, whereby he found the entire sum due on the judgments, the subject of the actions, having appropriated the previous payments to the discharge of the third judgment, and the costs of the suit; and also gave in evidence subsequent orders, whereby the plaintiff was awarded costs of two motions against the mother, and the certificate of taxation of those costs the day before the trial, the taxation being *ex parte*, and the mother being dead at the time. Counsel for the plaintiff asked the learned judge to direct the jury that the report of the Chief Remembrancer was conclusive down to the date of it, and that the jury were bound thereby. The payments subsequent to the report were insufficient to pay the two judgments. The learned judge, however, left the case generally to the jury, who found, in both actions, for the defendant.

Battersby, Q. C., and *O'Moore* had obtained a conditional order in Michaelmas Term for a new trial, on the ground of misdirection, and that because the verdict was against the weight of evidence.

Against this order, *Rollstone* and *Hickey* shewed cause, and the case was fully argued last Term.

O'Moore for the plaintiffs.—It is plain that the defendant, claiming the benefit of payments through the mother, must be bound by an account which bound her. It was not open to the defendant to give payments in evidence further back than the remembrancers, the jury had no right to disallow the costs included in that report, that would be in fact, to constitute them taxing masters.

Mr. Hickey having been called on by the court for an authority, having cited Co. Litt. 227 a, Estoppel is there quaintly defined to be stopping of men's mouth from speaking the truth; Estoppel may be pleaded or given in evidence, a jury however, is not bound by Estoppel arising by act in pais, or by matter of writing, when given in evidence; but they may find such Estoppels, and if they will find, the court is bound to give judgment accordingly. (Smith, L. C., 440).

DOHERTY, C. J.—We are of opinion, that there was no misdirection, and that the whole case was properly left to the jury. The Remembrancer's report was no doubt evidence, and very high evidence but did not conclude the jury, and if on the face of that document, they found items manifestly improper, they were not bound by it, allow the cause shewn with costs.

ROLLS COURT.

RUSKELL v. CHURCH.—Jan. 12.

Exceptions to Report—Devise to Trustees—24th General Order.

A. B. devised his property to his wife, for life; and, after charging same with several legacies, and, amongst others, to T. V., he directed the residue, after his wife's decease, to be divided amongst the legatees in the same proportion as the legacies. The testator also authorized his wife to appoint trustees to carry the trusts of his will into execution. The widow having, by her will, appointed trustees for that purpose, after her death, a suit was instituted to carry the will of A. B. into execution, and a decree for a sale pronounced. Held, that the trustees did not sufficiently represent T. V. to bring the case within the 24th General Order, and in his absence a good title could not be made to a purchaser.

The bill in this case was filed to carry the will of Thomas Dawson into execution. It appeared that Thomas Dawson, being seized and possessed of the lands and premises, for the sale of which a decree had been pronounced, died in the month of May, 1828, having, by his will, devised to his wife, Anne Dawson, for her natural life, all his real and personal property of every kind; and, after several specific legacies to other parties, he gave to Thomas Vance the sum of £10, and by the residuary devise he directed that all the rest, residue, and remainder of his property—real, freehold, and personal—after the death of his said wife, should go to and amongst, and be divided between the several legatees thereinbefore named, rateably according to their respective legacies; and he thereby authorized his wife, by any deed, or by will, to appoint trustees to carry the trusts of his will into execution. In November, 1841, Anne Dawson died, having made her will and appointed the plaintiff, Anne Ruskell, and the defendant, M. Church, executrix and executor thereof, and she nominated them trustees to carry into execution the trusts of Thomas Dawson's will. A decree having been pronounced, and a sale had, there was a reference to the Master to report as to the title; and by his report, made the 9th of November, 1848, the Master found, "that Thomas Vance was a necessary party to the cause, and as he was not such party, that all proper parties to be bound by the proceedings in this cause were not before the court when a decree for a sale of the said lands and premises was pronounced, and a good title could not be made to the purchaser."

To this report, exceptions were taken, on the ground that the Master should not have found that the said Thomas Vance had any estate or interest in the lands to be sold, or that he was a necessary party to the cause.

Mr. Wall, in support of the objections.—By Thomas Dawson's will, the legal estate in the lands was vested in his widow, for a power of mortgaging was given to her, and she was also authorized to nominate trustees of her husband's will. This power having been exercised by her; in order

to carry the trusts of the will into execution, it is necessary that the legal estate should be vested in these trustees, who are parties to the suit. *Trent v. Hanning*, (7 East T. Rep. 96).

Hughes, Q.C., and *Mr. Maley* for the report.—

The rule only provides for cases in which there is an existing trust for sale; this suit is not by creditors, but is instituted by a legatee to carry out the trusts of Thomas Dawson's will, and not to carry into execution the will of Anne Dawson also, Anne Dawson had only an estate for life, the legal estate in remainder is given to the residuary devisees, and even if the legal estate was in Mrs. Dawson for the purpose of the trust, it did not pass to her devisees, but remains in her heir at law, it does not appear that the will of Anne Dawson was proved.

Mr. F. Fitzgerald, in reply.—Upon the true construction of both wills, the legal estate is vested in the trustees, both of whom are before the court, and a decree for a sale has been pronounced, with a full knowledge of T. Vance's absence, by which the court has assumed jurisdiction, part of the property consisted of chattels real, the legal estate in which vested in Anne Dawson, as executrix. This case comes within the 24th general order; and where the rights of a party are incidental to that of parties before the court, a complete decree can be made in his absence. *Mit. E. P.*, 31. *Mally v. Whally*, (1 Ves. 487.); *Rogers v. Linton*, (Bunb. 200); *Fell v. Brown*, (2 B. l. C. 276).

MASTER OF THE ROLLS—My present impression is, that the Master's report is right; but I will consider this question further, it is inconvenient that the court should be called upon to decide a matter which was not before the Master, for the exceptions do not properly raise the question, the first objection is, that the Master found that T. Vance was not a party to the cause; the second, that the Master found T. Vance had an estate in the lands; the third, that he found that T. Vance was a necessary party to the cause, and that all proper parties were not before the court, when the decree for a sale was pronounced. This does not raise the question which has been argued before me, the Master's attention should have been called to the fact, that T. Vance was not a necessary party, for that by the general order of the court, the trustees fully represented the estate of their *cestui que trusts*. However, I can dispose of this question, though not properly raised before the Master.

MARCH 1.—**MASTER OF THE ROLLS**.—The bill in this case, was filed to carry into execution, the trusts of the will of Thomas Dawson, and a sale was made under the decree in the cause, to pay off the legacies given by the will; and an objection has been taken to the title, that a person named Thomas Vance, was not a party to the suit; and the Master came to the conclusion, that the objection was fatal. By the will there is a bequest to Thomas Vance, and several others of £10 each; so far as that legacy is concerned, I am disposed to think, the objection could be got rid of, by investing to the separate credit of Thomas Vance, that sum and interest, and the sum of £5 for costs. That course could be taken if there was nothing more in question; but after giving a life estate to the

widow, the testator declared that his will was, "that all the rest residue, &c., of his property, real, freehold and personal, after the death of his said wife, should go to and amongst, and be divided between the several legatees, thereinbefore named, rateably, according to their, and each of their respective bequests and legacies, thereinbefore mentioned." The effect of which is, that Thomas Vance, takes an estate in the residue in the same proportion that his legacy of £10 bears to the other legacies. The objection taken is, that Thomas Vance is not before the court, or bound by the proceedings, and that is sought to be got rid of by the argument, that a power was given by Thomas Dawson to his wife, by her last will, to appoint trustees, to carry the trusts of his will into execution—that the widow made her will, appointing trustees for that purpose, and the estate being thus vested in trustees, who are parties to the suit, the 24th general order of the court, applied to this case, in answer to which, the difficulty arises, that the will of Thomas Dawson's widow has not been proved, and I am called on to say, that these trustees are properly appointed; which if I was at liberty to look at the will, I might come to the conclusion, that the legal estate was not vested in them. If this case came within the general order, the trustees may represent the persons where the legacies are given; but it does not make them represent the persons who have the estate in the residue, and Thomas Vance is a necessary party to the suit; not on account of the legacy, but in respect of his interest in the lands; and I do not see how this objection can be got rid of. On the whole, although anxious to come to a different conclusion, I cannot allow the exceptions, and must therefore, overrule them with costs.

QUEEN'S BENCH.—HILARY TERM.

CARMICHAEL v. WATERFORD AND LIMERICK RAILWAY COMPANY.—Jan. 25.

Action on the Case—Arrest—Malice—Gross Neglect—New Trial—Misdirection.

In case for maliciously and injuriously over-marking a writ of ca. sa., and causing the plaintiff to be arrested thereon, the judge having stated, that, in his opinion, proof of actual malice in fact was not necessary, but that malice might be inferred from gross neglect, told the jury, that if, in their opinion, the injury done to the plaintiff was occasioned by the gross neglect of the defendants, they were at liberty to infer malice—Held, a misdirection.

The declaration contained four counts. The first count stated, that before committing the grievances thereinafter mentioned, to wit, in Easter Term, in the tenth year of the reign of our lady the now Queen, in, &c., before, &c., the Waterford and Limerick Railway Company, &c., recovered against the plaintiff a certain debt of £1160, as also the sum of £11 1s. 3d. for, &c., by said court adjudged to said Waterford and Limerick Railway Company, and whereof the now plaintiff was convicted, as, &c. That after the recovery of said judgment, and before the suing out of the writ

thereinafter next mentioned, to wit, on the 18th of May, 1847, at Cork, aforesaid, the plaintiff paid and satisfied to the defendants all the moneys receivable or due to them on said judgment, except the sum of £274 0s. 4d.; and that at the respective times of the suing out of the writ of ca. sa., and of the delivery of the same to the sheriff, and of committing the several grievances thereinafter mentioned, the said sum of £274 0s. 4d., together with the sum of £6 15s. 8d. for interest thereon, at, &c., making together the sum of £280 16s., and no more, was due to the defendants on said judgment; and no further or greater sum than the said sum of £280 16s. was payable by the plaintiff to the defendants, or receivable by the defendants upon or in respect of the said judgment, of all which the defendants, at the respective times of the suing out and delivering of the writ thereinafter mentioned, and of committing the grievances thereinafter mentioned, had due notice, to wit, at Cork, in, &c., aforesaid. Nevertheless, the defendants, well knowing the premises, but wilfully and maliciously intending to oppress, harass, and injure the plaintiff in that behalf, and cause him to be imprisoned, and extort from him a greater sum than was due on said judgment, afterwards, to wit, on the 16th November, 1847, to wit, at the Queen's Courts, Dublin, under colour of obtaining satisfaction of the said judgment, and execution thereof, and under colour of pretence that the sum of £585 0s. 2d., with interest thereon, at, &c., from, &c., was due thereon to the defendants, wrongfully, maliciously, and unjustly sued and prosecuted out of the said court of, &c., at, &c., upon said judgment, a certain writ of, &c., called a writ of ca. sa., directed to the Sheriff of the county of the city of Cork, whereby our said lady the Queen commanded, &c. And the defendants contriving and intending as aforesaid, afterwards, and before the return of said writ, to wit, on the said 16th of November, 1847, to wit, at the Queen's Courts aforesaid, fulsely, maliciously, and injuriously, caused and procured the said writ to be marked at foot with the sum of £585 0s. 2d., as the sum due to the defendants by the plaintiff on foot of said judgment, and for which, with interest thereon as aforesaid, the sheriff was to take and arrest the plaintiff, although, in truth and in fact, the said sum of £585 0s. 2d. was not due to the defendants on foot of, or in respect of said judgment, and no further or greater sum than said sum of £280 16s. was then due or payable by the plaintiff to the defendants, or receivable or recoverable by the defendants from the plaintiff on foot of, or in respect of, said judgment. And the plaintiff further saith, that the defendants, further contriving and intending as aforesaid, afterwards, and before the return of said writ, to wit, on the day and year last aforesaid, wrongfully, maliciously, and unjustly delivered the said writ so marked as aforesaid, to the sheriff, to be executed in due form of law. And the plaintiff further saith, that the defendants, further contriving and intending as aforesaid, wrongfully, maliciously, and unjustly caused and procured the said sheriff afterwards, and before the return of said writ, on the 17th of December, 1847, to wit, at Cork, in, &c., by virtue

of the said writ, to take and arrest the plaintiff by his body, and keep and detain him in his custody under the said writ, to satisfy the said sum of £585 Os. 2d., marked at foot of said writ as aforesaid, with interest thereon, at, &c., to wit, at, &c., and caused and procured the said sheriff to detain and keep in prison the now plaintiff, for a long time, to wit, for the space of three hours then next following, under and by virtue of said writ, and until the now plaintiff, in order to procure his release and discharge from the said imprisonment, was forced and obliged to, and did then pay to the sheriff the said sum of £585 Os. 2d. so marked, &c., and the sum of £12 10s. for interest thereon, and also the further sum of £17 8s. 11d., as and for fees and poundage of the sheriff upon the said writ; said three sums, making together the sum of £614 18s. 11d., although, in fact and in truth, the said sum of £280 16s., and no more, was then due and receivable upon or in respect of said judgment, whereby the plaintiff hath not only been injured in his credit, and reputation, and circumstances, and put to great pain of mind, but also that the plaintiff hath lost and been deprived of the sum of £334 2s. 11d., being the difference between the said sum of £614 18s. 11d. aforesaid, and £280 16s., the sum really due on foot of said judgment. The second count only differed from the first in the statement of the amount paid by the plaintiff on the judgment, and the third and fourth counts omitted the words *willfully* and *maliciously*, and substituted the words *wrongfully* and *injuriouly*. Damages were laid at £2,000. The defendants pleaded the general issue, and paid into court a sum of money, composed of over-levy and interest, and £50. At the trial before Moore, J., at the last Summer Assizes for Cork, it appeared that the action was brought against the company for arresting the plaintiff, under the following circumstances. In Easter Term, 1847, the company recovered a judgment against the plaintiff for £585, and on the 18th May in the same year, the plaintiff paid on account of this judgment, into the bank at Cork, to the credit of the company, a sum of £311 15s. 6d., leaving a balance of £273 4s. 6d. still due. The secretary of the company knew of this payment having been made, and communicated the fact to Mr. Tandy, the solicitor of the company. Mr. Tandy resided in Waterford; and, when informed upon the subject, wrote to Dublin to his partner, Mr. Newman, to advise him of the payment, but this letter miscarried. On the 16th of November following, Mr. Newman issued a writ of *ca. sa.* for the entire sum of £585, and on the 17th of December the plaintiff was arrested in Cork, and, after being detained in custody for about two hours, was discharged, upon paying the entire amount marked on the writ, besides interest and sheriff's poundage. Mr. Newman was examined on behalf of the company, and deposed to the fact of his not having received the letter written by his partner in Waterford, and stated that the over-marking the writ was purely accidental, and arose solely from his not having heard of the payment having been made by the plaintiff. The learned judge was of opinion that proof of actual malice in fact was not neces-

sary, but that it might be inferred from gross neglect; and he told the jury, that if, in their opinion, the company had been guilty of gross neglect, in not communicating to their agent the fact of the payment having been made, they were at liberty to infer malice. Verdict for the plaintiff with £500 damages. A conditional rule having been obtained, in Michaelmas Term last, for a new trial on the ground of misdirection,

Henn, Q.C., and *Martley, Q.C.*, were now heard in support of the rule.—Malice cannot be inferred from mere neglect, however gross. To support this action at common law, it should have been alleged in the declaration, and proved, that the party acted maliciously, and without probable cause. *De Medina v. Grove* (10 Q. B. Rep. 152); affirmed on error (*ibid.* 172). These counts can only be maintained under the statute (6 Anne, Ir. c. 7), and proof of actual malice is necessary when proceeding under that statute, *Mills v. Nerney* (C. & Al. 81). The jury were told that proof of actual malice was not necessary, but that it might be inferred from gross neglect, whereas the true question for the jury was, whether the defendants were influenced by actual malice. When the learned judge told the jury there was no proof of express malice, he ought to have directed a verdict for the defendant. [*Moore, J.*—There being no proof of actual malice, the question is, whether legal malice can be inferred.] [*Blackburne, C.J.*—The act here being lawful, malice must be shewn.] *Scheibel v. Fairham*, (1 Bos. & P. 388); *Gibson v. Chaters*, (2 Bos. & P. 129); *Goslin v. Wilcock*, (3 Wils. 202); *Moore v. Gardner*, (16 M. & W. 595); *Hounsfield v. Drury* (11 Ad. & El. 98; 1 Saund. 130, note) were cited and commented on.

Bennett, Q.C., and *J. D. Fitzgerald, Q.C.*, contra.—It is not necessary, in point of law, to prove express malice, but a jury may infer it from neglect. [*Blackburne, C.J.*—The word means actual malice. Have you any case where a jury were told to presume malice from mere neglect alone, without proof of want of probable cause?] The declaration states in terms, that there was not probable cause; and this distinguishes the case now before the court from those which have been cited at the other side. Want of probable cause, is a question for the jury; and from the absence of probable cause, the law allows a jury to infer actual malice. When once you shew the absence of probable cause, as was done in this case, it may be left to the jury to say if there was malice in fact. [*Perrin, J.*—What is the evidence of gross neglect which was left to the jury? Tell me the facts which shew that there was malice.] The secretary of the company had promised the plaintiff that no proceedings should be taken on the judgment without giving him previous notice. [*Blackburne, C.J.*—The company is bound by the act of its officer in this transaction; but there must exist, in the mind of some one, a criminal intention, and where is the evidence from which you draw this intention?] We rely on the promise that no execution should issue without notice. The main objection relied on below was, that malice could not be inferred in a corporation. There are no counts on the 6th Anne, Ir. c. 7; we did not intend

to proceed under that statute. They cited *Crozer v. Pilling* (4 B. & C. 26; S. C., 6 Dowl. & Ry. 12); *Ravenga v. McIntosh* (2 B. & C. 693); *Sinclair v. Eldred* (4 Taunt. 7); *Austin v. Debnam*, (3 B. & C. 139); *Hardwick v. Heslop*, (26 Law Jour. 313).

PER CURIAM.—We are all of opinion, that this action was maintainable only on the ground of proof of actual malice in fact—malice being the gist of the action. We cannot, therefore, regard the present verdict as a satisfactory one, and think the rule for a new trial ought to be made absolute, upon payment of the costs of the former one. No costs upon this motion.

*Rule accordingly.**

COMMISSION OF OYER AND TERMINER.

QUEEN v. DUFFY.—Feb. 7 to 21.

CORAM BALL, J., AND LEFROY, B.†

Practice—Proceeding on Second Indictment—*Pleading*—Challenge to the Array—*Evidence*.

Where separate indictments have been found, the court has no jurisdiction to restrain proceedings on one until the other be disposed of, unless there be some allegation of illegality or injustice, or violation of duty on the part of the prosecutor.

Held, that the borough boundaries, as defined by the 3rd & 4th Vic. c. 108, are extended for the purposes as well of criminal as of civil jurisdiction.

Held, that publications were overt acts, and that the word "publication," as laid in the indictment, might be taken to mean a compassing on one day, and the expression of it on subsequent days.

Held, on a challenge to the array, that the disproportion of members of different religious persuasions was not admissible in evidence to the triers.

Held, that parting with the control of printings or writings, so that they might be read, was a publication.

Held, that speeches delivered prior to the commission of the offence charged, might be given in evidence, for the purpose of explaining the meaning of the publications alleged to be felonious.

Bills of indictment in this case having been found by the grand jury at this Commission, when the prisoner was about to be arraigned, his counsel moved, "That no proceeding be taken on this indictment until either a trial be had on the indictment preferred and found at the preceding Commission, or that it be otherwise disposed of."

BUTT, Q. C., (with whom was *Sir Colman O'Loughlen*) for the motion.—We fully admit that the prisoner is bound to answer, if arraigned, *Sir W. Withipole's case* (Cro. Car. 147); *Res v. Swan and Jefferys* (Fost. Cr. L. 106; 18 St. Tr. 1198); *Queen v. Mitchel* (1 Ir. Jur. 5). The court has clearly the power of suspending the arraignment of the prisoner, if a proper case be made. It is the court, and not the crown, that arraigns the pri-

soner. There is a discretionary power in the court, (2 Hawk. c. 25, s. 15; *Res v. Bowman* 6 Car. & P. 101). These proceedings are vexatious and harrassing to the prisoner. The law does not permit an amendment of the record, and by the adjournment of the trial, the crown has had an opportunity of doing that they could not have otherwise done; and, secondly, we are not to be deprived of the opportunity of objecting to the course the Attorney-General may take. If he enters a *nolle prosequi*, we contend it will operate as a release of all charges, upon the record, against the prisoner. The question now is not, whether that point be a good one or otherwise, but whether we shall be deprived of the benefit of raising it. [The following cases were referred to, and commented on:—*King v. Webb* (3 Burr. 1468, S. C. 19 St. Tr. 1174); *King v. Frith* (1 Leach Cr. C. 10; 2 Hal. P. C. 95).]

The *Attorney-General* (with him *J. Perria*), contra.—It is contended, that the court should not deprive the prisoner of the right he has of raising any question he may be advised, as to the effect of a *nolle prosequi*; but the court will not now be ancillary to any course that will deprive the crown of a trial upon the merits. The crown has been guilty of no delay. [They referred to *Queen v. Goddard* (2 L. Ray. 922); *Res v. Dr. Wynn* (2 East. 226).]

BALL, J.—This is professedly an application to the discretion of the court. Treating it so, our opinion has been fully disclosed during the progress of the argument. The court is called upon by reason of the many delays, as well as other causes, to say that because the case has been disposed of by the grand jury on four different occasions, that the Attorney-General, on behalf of the crown, is not to proceed to have a trial upon the merits. Is the court to forget, that if the prisoner has his rights, the court has its duty to the public to perform? Are the rights of the crown to be put an end to without any grounds being laid for the exercise of the discretion of the court? There is no statement that the Attorney-General, on the part of the crown, has done anything unjustifiable. That hardships will sometimes occur to a prisoner, is an incident necessary to all prosecutions; but unless the Attorney-General does something illegal, unjust, or in violation of his duty, the court cannot interfere. The Attorney-General is of opinion, that it is not safe or prudent to go to trial on the former indictment, and is the court to say, he shall not exercise that discretion? I have come to the conclusion, that the court ought not to acquiesce in this part of the application. With respect to the other portion, that the court should not deprive the prisoner of an objection depending on the contingency of a *nolle prosequi* being entered by the Attorney-General, which, it is said, may afford him an opportunity of setting aside the whole proceeding. Was any court ever seriously called upon to stop the crown in an undoubtedly legal course, on the ground of a possibility? What is the right claimed? It is to raise a technical objection to defeat a trial. The court has been shewn nothing to warrant it in acceding to such an application.

* See *Gibbons v. Allison* (3 C. B. Rep. 181).

† Reported by J. Blackham, Esq., Barrister-at-Law.

LEFROY, B.—I have arrived at the same conclusion with my brother Ball, and for the same reasons. My observations are not made because I can add anything, but to corroborate what he has stated to be our line of duty, and that which has been acted upon in other cases of the highest authority. *Rex v. Swan and Jefferys* (Fost. C. C. 106) is a clear authority on this question. Every hardship urged in that case, as injurious to the prisoner, is applicable to the present; the language of that case is precisely similar to that of my brother Ball. If we were trenching in the remotest degree on the rights of the prisoner, we would yield. Are we subjecting the accused party to two trials? We could not do so. But it is an equally constitutional principle, that no man can evade answering the demands of justice. It is not suggested that there is any intention to subject the accused to two trials; we are guarding him against such, and we will protect him against any undue use of the law. I have no doubt on the authority of the cases referred to, that the prisoner is bound to plead to this indictment, and that we have, in this case, no discretion. The authorities pressed upon us do not apply, and it is our duty to the crown and to the public that justice shall not be defeated.

The prisoner then pleaded in abatement, that Mr. Majoribanks, one of the grand jury, at the time of his being sworn on the grand jury, and of their finding the bills, did not reside within the county of the city of Dublin, though he did reside within the present borough boundaries.

Feb. 10.—The *Attorney-General*, for the crown, handed in a replication, to which the prisoner demurred.

J. O'Hagan, for the demurrer, contended that the residence of the grand juror was not, for the purposes of this court, within the county of the city of Dublin. That the 3 & 4 Vic. c. 108, s. 21, had not altered the borough boundaries in this respect; that the 22nd sec., in connection with the previous one, must be taken to mean courts belonging to the borough, and not courts sitting within it. That this was not a borough court, but a Court of Commission for the county of the city of Dublin, the jurisdiction of which, by the proviso to the 21st section, remained as it existed before the act. The title of the 3 & 4 Vic. c. 109, relates only to adding certain portions of counties to cities; and the first section enacted these portions should be a barony of itself till provision be otherwise made, and be a portion of the adjoining county for criminal purposes, but the boundaries were not to be altered for purposes of parliamentary representation. That the construction of these two statutes shewed clearly that the residence of the juror was in the county for criminal, and in the city for borough purposes. [He cited, on the exposition of statutes in general, *Powdler's case* (11 Rep. 34, a); *King v. Burrell* (12 Ad. & El. 468); *Queen v. Silversides* (3 Q. B. 410); and, on these statutes, *Delahunt's case* (Arm. & Mac. 257); *Reg. v. Inhabitants of Parish of St. George* (8 Ir. L. Rep. 23); *Barber v. Evans* (10 Ir. L. Rep. 480).]

The *Attorney-General*, contra, relied on the in-

convenience that would accrue if this construction were adopted—that, though the construction of the 3 & 4 Vic. c. 108, might admit of the construction contended for, that, taken in connection with the 3 & 4 Vic. c. 109, it was clear the exclusion was for parliamentary purposes alone, and that the cases of *Barber v. Evans* and *Reg. v. Inhabitants of St. George* were not distinguishable, and ruled this case.

The court called on *Butt, Q.C.*, who contended, in addition to the arguments of Mr. O'Hagan, that the court was sitting under a commission of 1 Vic., that there was no commission of adjunct, it being directed to the Lord Mayor and judges for the time being—that a juror residing in the place where this juror resided, could not have been then allowed to be sworn upon the jury, and that the 3 & 4 Vic. c. 108, and the subsequent act, had not altered the boundaries with respect to the commission. [*Ball, J.*—This objection is not open to you upon the record; the plea does not advert to it. *Lefroy, B.*—The plea merely states, that at the time of swearing, and of finding the bills, the juror did not reside in the county of the city.]

BALL, J.—The court feels no difficulty upon this question. The law is clearly settled in the cases of *Reg. v. Inhabitants of St. George* and *Barber v. Evans*, and it would require strong authority to satisfy me that the court was wrong in that decision.

LEFROY, B.—The decisions referred to are decided on the plain and settled rules of construction. Even if there was any doubt, it would be quite too much to set up our judgment against that of two other courts.

The demurrer being overruled, the prisoner's counsel then handed in a plea, by which he pleaded not guilty to the first overt act of each count, and to the charge of writing the letter to W. S. O'Brien, and demurred to the remainder, concluding that the part demurred to might be quashed.

The *Attorney-General* objected to the reception of this plea, for being bad in form.

The prisoner's counsel contended that a party might demur to part of an indictment, *Queen v. Parker* (Car. & Mar. 629). That if the demurrer was too large, it would be overruled, *Hinde v. Gray* (1 Man. & Gr. 201); *Briscoe v. Hill*, (10 M. & W. 735; 2 W. Saund. 285). We admit a portion of this indictment to be good. It was decided by Perrin, J., on the argument of the demurrer to the former indictment, that the demurrer was divisible, and the prisoner could be called upon to answer only the good parts (1 Ir. Jur. 102); and the judgment of Richards, B., (*ib.* 106).

The court declined to receive the plea.

The prisoner then demurred generally to each count.

The first count of the indictment stated, that Charles Gavan Duffy, &c., did, on the *third day of June*, in the eleventh year of the reign, &c., feloniously compass, imagine, invent, devise, and intend to deprive and depose our said lady the Queen, &c., and the said felonious compassing, imagination, invention, device, and intention, he, the said Charles Gavan Duffy, then and there feloniously did ex-

press, utter, and declare, by then and there feloniously publishing a certain printing in a certain number of a certain public newspaper, called the *Nation*, which said printing is entitled, "The Business of To-day," in certain parts of which there were and are contained certain felonious matters, &c., expressive of the felonious intention, "according to the tenor and effect following," &c., and the said felonious compassing, &c., he, the said Charles Gavan Duffy, &c., did, on the *seventeenth of June*, &c., further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number, &c., as before, and so through each of the articles.

The second count stated the charges as in the first, with the exception that the intent was charged to levy war against the Queen.

The third count charged the prisoner with divers overt acts of publication and writing on the same days, and with the same intent as in the first count, but did not set out the printings or writing, and stated a printing on the 29th of July, with intent to publish.

The fourth count was the same as the third, stating the intent as in the second.

Butt, Q.C., (with him *Sir Colman O'Loughlin*) for the demurrer.

The questions argued are so fully discussed in the judgment of the court, and having been discussed on argument of the demurrer to the previous indictment, it will be sufficient here to refer to the cases relied upon. [As to generality in indictments, *Fost. C. L. 194*; *1 Hale, P. C. 169*; *East. P. C. 121*; the cases of *Colman* (7 St. Tr. 7), *Sidney* (9 St. Tr. 817), *Thistlewood* (33 St. Tr. 684), and *Francia* (15 St. Tr. 898); *King v. Gibbons* (2 Stran. 499; 3 Coke Inst. 41; reading stat. Hen. 2 Hawk. P. C. c. 25, s. 74). As to printing with intent to publish, *1 Hale, P. C. 118*; *Fost. C. L. 102*; *Anderson's case* (12 St. Tr. 1245); *Baldwin v. Elphinstone* (W. Bl. Rep. 1037); *Queen v. Martin* (Hodges' Rep. 477-480). As to repugnancy, 2 Hawk. P. C. c. 25, p. 324. Time should be laid with a *continuando*; *Despard's case* (28 St. Tr. 345); *Watson's case* (32 St. Tr. 1); *Frost's case* (9 Car. & P. 129); *Brandreth's case* (32 St. Tr. 755); in these, all the overt acts were laid on the same day. As to quashing any portion of the indictment that might be bad, *11 Coke, 45, b*; *Com. Dig. Pl. C. 32*; *2 V. 3*; *Pinkney v. Inhabitants of Rutland* (2 Saund. 379); *Hinde v. Gray* (1 M. & G. 195); *Briscoe v. Hill* (10 M. & W. 735); *Watson's case* (32 St. Tr., charge of Bayley, J., to grand jury).

The *Attorney-General* (with him the *Solicitor-General*), contra.

Butt, Q.C., in reply.

The *Solicitor-General* in general reply.

Feb. 14.—*BALL, J.*—The objections raised to the form and substance of this indictment are six:—The first three for uncertainty, duplicity and repugnancy, are applicable to portions of the four counts. The others apply only to the third and fourth counts; and it is alleged that they are bad for want of a statement of any overt act, publications not being such, within the true construc-

tion of the 11th & 12th Vic., cap. 12. That the third overt act in each of these counts states a printing without any publication of it; and lastly, that there is no averment of any contemplated rebellion or treasonable design. As to the objection of uncertainty, it is first insisted in reference to the first overt act in the 1st and 2nd counts, that the expression of the publication is uncertain and insufficient. 2dly, that a sufficient compassing to satisfy the requirements of the statute is not shewn. 3dly, there is no averment of any treasonable design in the mind, either existing or contemplated. The last objection on this head applies to the 3rd & 4th counts, which it is said are bad, for not specifying the particular publication relied upon. The first objection under this head, applies to the 1st and 2nd counts, and the substance of it is, that the averment of the publication of "a certain printing, in a certain number of the *Nation* Newspaper; in a certain part of which said printing, there were contained certain felonious matters, &c.," does not aver that the prisoner published that portion of the printing which contained the felonious expressions. The fallacy is, that the objection assumes, that when it is averred that he expressed the felonious compassing by the guilty part, that he expressed it by the innocent also. It cannot be said that the prisoner published a felonious design by a publication containing no such crime. The second head of this class pervades all the overt acts in the four counts, except the first. The objection is, that it is not averred that the compassing on the 3rd of June—that is the first overt act, was present to the prisoner's mind at the time of the expression of each subsequent act. The objection arises from supposing the term "expression" in the statute to have a different meaning from that it really has, it does not mean a statement or indication of what the act declares must be expressed, but a narrative of what took place in his mind. I have come to the conclusion that the compassing on the 3rd of June, was present to the mind of the prisoner on the transaction of the subsequent acts. If, as was said, there should be a distinct averment of compassing to each overt act; the indictment would be objectionable for duplicity. The 5th section of the 11th & 12th Vic., c. 12., gives the prosecutor the power of stating as many overt acts as he pleases, and it would be extraordinary if this right should be conferred by the legislature, and that, at the same time, it should be so difficult to state them. As to the third head of this class, it is urged for the prisoner, that in order to make printing an overt act, there must be a publication, a treasonable design in the mind, or some reference to a treasonable design on foot. This argument is applicable to words, but not to printing, and the rule will be found fully stated in *Fost* (C. L., 198, 200, 204). I am therefore of opinion, that there is no necessity for any such averment. The last head of this class is applicable to the 3rd & 4th counts, and is, that the charge of publishing "divers other printings, in divers other numbers of a certain public newspaper," is bad, for not marking the particular publications or papers by dates or otherwise. It appears to me that the precedents *Thistlewood's case*, (33 St. Tr.

684); *Frost's case*, (9 C. & P. 129), being all the one way, and there being no authority cited to the contrary, we are bound to follow them. It is said, that the prisoner cannot know against what he is to defend himself; but the answer is, that he may apply for a bill of particulars; it was also urged that should he have occasion to plead *autre fois acquit*, he would be unable to shew what were the publications on which he was acquitted. *King v. Sheen*, (2 Car. & P. 684), answers that objection. The next class is that of duplicity and is substantially the converse of the second branch of the preceding class, and is, that the words "further expressed," make each act a distinct felony. By the 3rd sec., of the 11th & 12th Vic., cap., 12, two things are necessary to constitute the crime, the compassing, and the expression of it; the 5th section allows any number of acts to be charged. There is one compassing on the 3rd of June, the subsequent acts are merely expressions of it, and not distinct felonies; and with the exception of *Thistlewood's case*, the precedents are all so. The next objection is that of repugnancy, this objection, the force of which on a former occasion, I can understand, is removed in the present indictment. The next objection is solely applicable to the 3rd & 4th counts, and if sustained, the effect will be to blot those counts from the indictment, except the part which charges the writing the letter to W. S. O'Brien, and is, that there is no averment of any overt act, publications not being such within the meaning of the statute—it occurred to me, that in legal construction, it by no means follows, that the same act may not range under more than than one of the three modes of expression, given by the 3rd section of the statute; that though these printings may be only publications under the first, they may be a mode of expression under the third—there is a strong distinction between evidence of an intention, and the means made use of to effectuate it. I think that these publications, under the first branch of the 3rd section, are evidence of the intention; and are acts to effectuate the intention under the third. *Frost* (C. L., 202, 203, 204).—The next objection is to that portion of the count which states, a printing with the intent to publish, which, it is said, is not a publication. This objection, appears to me, to be unsustainable on the ground upon which I have ruled the preceding one. On these grounds, I am of opinion, this demurrer must be overruled.

LEFROY, B., expressed his entire concurrence.

The prisoner then pleaded not guilty.

Sir C. O'Loughlin, applied for a bill of particulars of the printings and writings to be given in evidence under the general counts—which was given him by the Attorney-General.

The prisoner challenged the array; and the Attorney-General joined issue.

Butt Q. C., addressed the triers appointed to try the issue; and told them he would prove that having regard to property and other qualifications, the number of Roman Catholics returned upon the panel was quite dis-proportionate to those of the Protestants. [Ball, J.—Was not the question of the proportions of religions decided on a former occasion. Lefroy, B.—Are we to go into an examina-

tion of the religious persuasion of the jury, when the question of proportion is not a legal one?] At the Maryborough special commission, Bushe, C. J., allowed this question to be put, and Moore, J., in the case of Mitchell, did not dissent from that authority—and at the late commission at Clonmel, the same course was allowed.

Witnesses having been examined, and the evidence being, that the panel was arrayed in conformity with the 3rd & 4th Wm. 4, c., 91. The triers found against the challenge.

Feb. 15.—LEFROY, B.—Before we go into this case, I think it right, in order to prevent any mistake or misconception, as to the question under discussion to state the rule stated in Mitchell's case, where I had the concurrence of Moore, J., that the doctrine of proportion, was not a test of the fairness, nor a criterion of the validity of the challenge to be disposed of. My brother Ball and I were led to suppose, that Pennefather, B., had taken a different view of the question; and we did not wish to set our opinion against the statement of counsel, that a ruling had been adopted at Clonmel, contrary to that in Mitchell's case, and that there the religion of several jurors had been enquired into.—With the weight of so much authority, whatever my opinion might be, I should be sorry to act upon it, and we felt it due to that authority, to acquiesce in an enquiry as to the proportion of Roman Catholics. (The learned Baron here read the opinion of Mr. Baron Pennefather, from the trial of O'Doherty, reported by Mr. Hodges, p. 523). No man should be put off or left on account of his religion; the impartiality of the panel is not to be tested by the proportion of religions; a doctrine, which if acted upon, is calculated to create most mischievous consequences, by leading to a strife we all should endeavour to repress. We were told that the Judges at the late commission at Clonmel, had acted on the rule of proportion, and admitted the enquiry, I have seen my Lord C. J., Blackburne, and I have his authority for contradicting that assertion, in the strongest terms; he said, the court had been informed, that certain jurors had been left off, on account of their religion; and that the question had been allowed on the understanding, that it would be followed by evidence to shew that the sheriff had acted illegally. On my interview with Mr. Baron Pennefather, he said, the question of religion cannot be enquired into; there must be a discretion in the sheriff, to select the persons from their intelligence best calculated to do their duty; if the sheriff is to make a panel by any proportion, his discretion is at an end. Now that we have ascertained the true ground of the decision of those Judges; I must say, that to allow this enquiry, would be a libel on every class of religions.

The prisoner then challenged as they came to the book, every person summoned on the panel aged sixty-one, and upwards, or who were non-resident within the borough, or had found bills against him at any of the commissions; which challenges were allowed. During the trial the following points arose in the evidence:—

The Attorney-General offered in evidence a letter to W. Smith O'Brien, proved to be in the

hand-writing of the prisoner, and found in the portmanteau of the former. The letter had no date.

Butt, Q.C., objected to its reception, not being connected with any charge in the indictment, and that it did not appear it was written since the passing of the 11th & 12th Vic. c. 12.

The *Attorney-General* then gave in evidence the *Nation* newspaper, of the 17th June, 1848, the statutable declaration of proprietorship, and of the place of publication of the newspaper, under the provisions of the 6th & 7th Wm. 4, c. 76; and then proposed to read a letter dated the 12th June, 1848, and in the newspaper of the 17th, to T. M. Halpin, Secretary to the Confederation, and signed "W. S. O'Brien," to which the letter of the prisoner referred.

Butt, Q.C., objected that the statute 6 & 7 W. 4, c. 76, did not entitle him to read the contents of the papers as facts—that the declaration was only evidence of the prisoner being the printer, proprietor, and publisher.

BALL, J.—Independently of the statute, I think that your objection is valid; but supposing it were proved that Mr. Duffy was sole conductor, the question would be, whether the contents were not *prima facie* evidence against Mr. Duffy, and the onus of shewing the contrary be not thrown upon him. You contend it is now sought, for the first time, to make a statement in a newspaper as evidence of a fact.

The letter was admitted in evidence *de bene esse*, subject to objections in fact; one of which was, that there was no evidence of its being written since the passing of the act.

The *Attorney-General* then proposed to read the *Nation* of the 29th July, 1848, and two manuscripts in the hand-writing of the prisoner, printed in it. The paper had been seized at the printing office before any copies had been circulated; a copy had been also found at the publishing office, with corrections on the margin. He contended that it was clearly admissible as a publication, and that the manuscripts were merely ancillary—that under the 6th & 7th Wm. 4. c. 74, the mere production of the newspaper made it evidence—that this paper corresponded in the heading and conclusion with the previous publications. Printing, or causing to be printed, was a publication, *Baldwin v. Elphinstone* (Sir W. Bl. 1037.) [*Ball, J.*—The decision in that case was, that "caused to be printed" shewed the employment of others.] [*Lefroy, B.*—Is this evidence admissible under the counts charging publication, or those charging that he "caused to be printed, with intent to publish?" If printing be a publication, it may be charged as a publication. There is evidence that the prisoner printed through the instrumentality of other persons. [*Ball, J.*—On the authority of *Baldwin v. Elphinstone*, the handing to others to print is a publication. In this case, we have in evidence that which there was only presumed.] The same view is adopted in *Watts v. Fraser* (7 Ad. & El. 223). [*Ball, J.*, cited *King v. Burdett* (4 B. & Al. 161).]

Butt, Q.C., contra.—*King v. Burdett* arose on a question of venue. There has been no publication of these manuscripts. [*Lefroy, B.*—There is no doubt that the evidence shews a publication of the

writings; they are in the prisoner's handwriting, and are found out of his possession. The question is, whether there has been a publication of the printing.]

BALL, J.—I think these documents are admissible in evidence. The question is, whether the publication of the printing has been proved sufficiently to admit it in evidence. It was shewn that a number of persons were engaged in printing, and a large number of the papers were struck off. The principle stated in *King v. Burdett* is, that wherever third parties had an opportunity of reading, whether the matter be read or not, that is a publication as perfectly as if ten thousand read it. There is no distinction in civil and criminal cases between the rules of law; as to publication, the rule of evidence is the same.

LEFROY, B.—If there were evidence to shew that it could not have left the prisoner's control, it would make a different question. Here there is evidence of an intention to put the paper in a position to be out of his control, and to place it in that position as would bring it within the rule in civil cases. I think the facts of this case amount to a publication.

Butt, Q.C., in his address to the jury on behalf of the prisoner, proposed to read some passages from speeches of the prisoner delivered some years previously.

The *Attorney-General* having objected, on the ground of irrelevancy, after some discussion,

BALL, J., said, that on full consideration of the question, the court had come to the conclusion, that the speeches proposed to be read, strictly speaking, were not relevant, and could not, therefore, be properly admitted to the jury; but as it appeared from the cases referred to, that a large discretion had, in modern times, been given to counsel defending a prisoner, and that the practice had been adopted at the late Special Commission at Clonmel, the court did not feel itself justified in refusing the prisoner's counsel the same latitude in the present instance, though they were quite of opinion they were wholly irrelevant.

The Rev. Mr. Matthew was asked by *Butt, Q.C.*, whether a printed document in his hand was a correct copy of a speech delivered by the prisoner at Newry, in 1841.

Objected to by the *Attorney-General*.

Butt, Q.C.—The object is to shew that at that period the prisoner had a legitimate purpose then in view, and that it was continued down to the formation of the clubs in 1847, and that they were created with the same object. The same course had been allowed in *Horne Tooke's case*. In the case of the *Queen v. O'Connell*, in 1846, speeches delivered in 1810 were given in evidence, and the same course was adopted in the *Queen v. Martin*.

BALL, J.—If evidence to give a construction to his writings were admitted in *Horne Tooke's case*, I think it is here admissible to shew the meaning of the publications.

LEFROY, B.—The cases seem to be anomalous; but they have settled a rule of law contrary to the general rule of evidence.

The jury, not being able to agree to a verdict, were discharged.

COURT OF CHANCERY.

REEVES v. COX.—March 6.

IRWIN, Petitioner—COX, Respondent.

Sequestration—Judgment.

The court, on the petition of a prior judgment creditor, on the creditor proving his interest, will oust sequestrators appointed under a decree.

This was an appeal from the order of his Honour, the Master of the Rolls. The facts of this case, so far as they are material, are sufficiently stated, *supra*, p. 169.

Kane, Q.C. (with him Mr. Norman), appeared for the appellant, the petitioner in the matter, *Simmonds v. Ld. Kinnaird*, (4 Ves. 739; 2 How. Ex. 784); *Walker v. Bell* (2 Mod. 31).

Hughes, Q.C., and Mr. J. F. Walker, for the plaintiff, in support of the Rolls order, cited *Angell v. Smith* (9 Ves. 336); *Burne v. Robinson* (7 I. E. R. 188); *Burdett v. Rockey* (1 Vern. 58).

LORD CHANCELLOR.—The only question before me is, whether I am to give the creditor his remedy, or oblige him to sue out an *elegit*. I apprehend the court will not force a party to file an *elegit* bill to get rid of a sequestration. It occurs to me that the best course might be, that the judgment creditor should be examined in the office, *pro interesse suo*, and that if he appeared to have an interest, he should be let into possession by a receiver. The order, then, must follow that in *Hamblyn v. Ley* (3 Swan. 301, n; S.C. 1 Dick. 94.) I will not remove the sequestration till the receiver be appointed.

“Refer it to the Master of this court in rotation to appoint a fit and proper person to be receiver over the lands and real estate in the petition mentioned and described, situate, &c., on his entering into security, &c.; and, upon the receiver being so appointed, let the sequestrators be discharged from such lands, and let the deposit made by the petitioner, with the registrar, be returned to him.”

Lib. 4. fo. 227.

ROLLS COURT.—Jan. 20.

THE LIMERICK AND WATERFORD RAILWAY COMPANY, Petitioners—O'FERRALL, Respondent.

Solicitors' Lien on Documents.

Though a solicitor discharge himself, the court will not direct him to deliver up to his former client documents on which he claims a lien, unless a case of pressing necessity, or danger of loss, be made out. A Court of Equity will order a taxation of costs, though all the costs be for conveyancing.

This was an application to have the bills of costs of the respondent referred to one of the Taxing Masters, and that the respondent might be restrained from proceeding in an action at law for the recovery of same, and that he should be directed to furnish, on oath, a list of all credits to which the petitioners were entitled, and that it should be referred to the Master to take an account of all moneys received by the respondent on account of said costs, and that he should be

directed to lodge in the office of the said Master all the title deeds, papers, and other documents belonging to the petitioner.

The petition stated, that John O'Ferrall had been the solicitor of the company—that in the month of October last, he declined to act any longer as such—that he had furnished, on the 5th of October last, his costs, consisting of more than 750 separate bills, amounting to the sum of £26,022 14s. 8d.—that the respondent had received large sums of money, amounting to £7,000, and upwards—that he had also received money from adverse claimants, against whom costs had been awarded, in favour of the company—that, until the costs had been furnished, the company believed that the several sums so paid had nearly discharged the costs due to the respondent—that there were gross over-charges in said bills of costs—that the respondent had applied to his own use, moneys intrusted to him to pay claimants—that, in consequence, some of the claimants had taken law proceedings against the company—that the respondent was in possession of all the deeds, agreements, contracts, receipts, and vouchers, relating to the portion of the line extending from Limerick to Tipperary, and that he had refused to hand over, or permit the company to have any access to the same, until paid his demand—that the taxation of said costs must, of necessity, take much time, and that the company would be subject to much inconvenience, if not positive loss, by reason of the withholding of their deeds and papers.

The respondent, by his answering affidavit, stated, that he had not dismissed himself; but the company, by reason of their not supplying him with money to pay costs out of pocket, had obliged him to decline to act. It also denied the charge of misapplying the funds intrusted to him.

Hughes, Q.C., for the petitioners, contended that a solicitor who discharges himself cannot retain documents in his possession; and cited *Rutledge v. Rutledge* (2 I. E. R. 290). The court has jurisdiction to make the order, though there is no cause in court, in *re Usbridge* (6 Ves. 425); in *re Murray* (1 Russ. 519); *Heslop v. Metcalf* (3 M. and Cr. 183).

J. D. Fitzgerald, Sir Colman O'Loughlin, and Mr. Michael O'Ferrall, for the respondent, contended, that to deprive a solicitor of his lien, it was necessary to make a special case, and that no such case had been made on this motion. *Heslop v. Metcalf* shows this necessity, and *Colgrave v. Manly* (1 Tur. & Russ. 400) shews that it is only in a cause that such an order will be made, *Boxon v. Bolland* (4 M. & Cr. 354). As to the nature of the solicitor's lien, *Richards v. Platel* (Cr. & Phil. 79), and as to the order the court makes on such applications, *Cane v. Martin* (2 Beav. 584), and in *re Smith* (4 Bea. 309), only shews that such an order will be made in a case of gross misconduct; and a passage in the judgment in that case (page 316) shews that a deed not appearing to be required in any cause, was directed to be retained by the solicitor. If the order be made in a cause, the solicitor has a lien on the funds realized in the cause, but in this case the lien will be destroyed if the order give the company liberty to

inspect the documents. There is a distinction between a solicitor discharging himself and being obliged to discharge himself.

Mr. Lawson in reply.—It is clear that the respondent has discharged himself, within the meaning of the cases of *Rutledge v. Rutledge* and *Heslop v. Metcalf*. The principle on which all the cases have been decided is the inconvenience and loss that would result from the court not making the order; and the principle is well established, that a solicitor who discharges himself cannot preserve his lien on documents, when his so doing must cause loss to his former client.

MASTER OF THE ROLLS.—In this case there is no difficulty as to the first part of the order which is sought. I have absolute jurisdiction, on decided cases, to make an order for taxation, even though there be no taxable item from the beginning to the end of the bills of costs. *In re Rice* (2 Keen. 181) is an authority for such a reference. Though the courts of law in England have felt some difficulty in respect to jurisdiction, the Court of Common Pleas deciding in one case that there was no jurisdiction for such an order, yet Courts of Equity have always directed even the costs of conveyancing to be taxed. There being no doubt that I have jurisdiction to make that part of the order which relates to taxation, the question arises, on the other branch of the motion, what is the general right of a solicitor to retain documents, on the ground of his lien upon them, when the claim of the former client arises out of a pressing necessity for the documents retained? The case of *Hutton v. Harden* (1 Turner & Russ. 304) decided, that on lodging the money in court the order will be made. There is another instance in which this order will be made, and that is where the withholding of the documents must occasion loss; this instance has been illustrated by the example of a policy of insurance; and, in such a case, the court will order the solicitor to hand over the policy, but, at the same time, will direct the company to preserve his lien. Now, in this case, neither a pressing necessity, or a danger of loss, has been shewn to exist. But cases have been cited for the purpose of shewing that where a solicitor discharges himself he cannot retain documents. [His Honour referred to the early decisions on this point, and to the case of *Heslop v. Metcalf*, as having first extended the principle laid down in the earlier cases.] I do not think there is any distinction between inspection and production. I think, on the affidavit in this case, I am bound to hold that the solicitor has discharged himself; but I think there is a distinction between this case and the case of *Heslop v. Metcalf*, for here no pressing necessity has been made out. A question may arise between a client and a solicitor who has acted for a great number of years, and then declines to act without advances; and I think it would be pressing the principle of the case of *Heslop v. Metcalf* too far to say, that an order to deliver up documents would be made, without there was a case of very pressing necessity shewn. I do not think, on the case which has been made, I ought to exercise the jurisdiction the court possesses; but I shall make an order which will meet the justice of the case, directing the taxation

and a list of the documents to be furnished, but refusing that part of the motion which seeks for the production or inspection of the documents, without prejudice to the company making an application for their production, on shewing a pressing necessity, or danger of loss.

Jan. 25.—"Refer it to one of the Taxing Masters of this court to tax the several bills of costs furnished by the said J. O'Ferrall to the said Waterford and Limerick Railway Company, and let the said J. O'Ferrall furnish, on oath, to the solicitor for said company, a list of all credits to which petitioners are entitled against the said costs, petitioners undertaking to pay the amount, if any, which shall appear due on such taxation, after all credits; and let the said Taxing Master, on taxing and ascertaining said costs, take an account of all such credits, and strike a balance; and let a plea of confession be lodged with the Registrar of this court, to be filled up with the balance, if any, certified to be due; and, upon payment of what will be found due upon such taxation, let the said J. O'Ferrall deliver up to the petitioners all deeds, documents, and papers in his possession, or power, belonging to the petitioners; and no rule on said petition, so far as it seeks that said Mr. J. O'Ferrall should lodge the papers, deeds, and documents in the Taxing Masters' office, or that petitioners should be at liberty to inspect said papers, deeds, and documents, without prejudice to any application which may be made by petitioners, in respect of any particular documents, &c., if it should appear that there is a pressing necessity that same should be inspected by, or delivered over to, the petitioners; and let the said Mr. J. O'Ferrall furnish a list, verified on oath, of all deeds, &c., in his custody, power, or possession, the property of the petitioners, and the said Mr. J. O'Ferrall's bills of costs, amounting to £26,022 14s. 8d., and Mr. J. O'Ferrall insisting that the entire credit to which the petitioners are entitled amount to but £8,160, and no more, reserve the question of costs of said petition and the proceedings on this order until the costs shall have been taxed, and the said accounts shall have been taken, and balance struck."

Lib. 27, fo. 126.

DARLEY, Petitioner—**HUNTER, Respondent**—
March 1.

Practice—*Receiver.*

The court will not make an order permitting a receiver to account but once every five years, although the property over which he is appointed produces but £10 per annum.

This was a petition for the appointment of a receiver, on foot of a judgment, over a property which amounted to only £10 per annum, and the petition prayed that the receiver might not be bound to account more than once in every five years, paying over the surplus rents to the peti-

tioner, and that said receiver might be at liberty, without further order, to manage and let, with the approbation of the Master, all the lands and premises over which he should be appointed.

Mr. Johns for the petitioner.—The property is so very small, that if the receiver accounts every year, the costs will amount to the entire profit rent, and there will not be anything for the discharge of the debt.

MASTER OF THE ROLLS.—I will make the order in the usual form. Refer it to the Master to appoint a receiver, who shall enter into recognizance for the due performance of his duties, and also to account once in every year.

SHERLOCK v. DISNEY.—March 7.

Practice—Demurrer—Amendment.

Where a demurrer not having been set down for argument, was allowed under the 64th General Order, the court will not permit the record to be amended, by re-introducing upon it the defendants against whom the bill was dismissed, a new defence having arisen since the filing of the original bill.

In this case, the facts of which are stated, *ante*, page 127, a demurrer had been taken to the bill, and same not having been set down for argument within the usual time, was deemed allowed, pursuant to the 64th General Order. On the 22nd of last December, the plaintiff moved for liberty to amend, and serve new subpoenas against the demurring parties, and the costs of the demurrer not having been paid, the motion was refused with costs.

Mr. F. Fitzgerald now moved, that the bill might be restored, notwithstanding the order dismissing same, and that the defendants against whom the bill had been dismissed, might be considered parties to the cause. The defendants have been guilty of irregularity; for the demurrer was taken without an attested copy of the bill having been taken out. Also, if the amendment is not allowed, the Statute of Limitations will prevent the filing of a new bill. When the former application was made, the costs of the defendants were not paid, but that objection is now removed.

Hughes, Q.C., and *Mr. Robert Warren*, contra.—This is an application to the discretion of the court. If this motion is necessary to get rid of the Statute of Limitations, the court should not interfere to destroy that defence, but should leave the plaintiff to his legal remedies. In the case of *Knight v. Majoribanks* (14 Sim. 198), it did not appear that any new defence arose out of the transaction. By the rule of the court, this bill stands dismissed. In the case of *Downing v. Hodder*,* the Lord Chancellor laid down the principles on which this court should act, in relaxing the General Orders, and this case does not come within them. If the Statute of Limitations applies, the order to amend will not save the plaintiff's rights, as the amendments would be of the day upon which the order is made.

* Reported, *ante*, p. 137.

Mr. Fitzgerald, in reply, cited *Walkins v. Bush* (2 Dick. 701, Dan. C. P. 553), and contended that if the plaintiff was compelled to file a new bill, the original defendants would be then enabled to take advantage of the Statute of Limitations as well as those who had demurred.

MASTER OF THE ROLLS.—So far as this motion seeks to restore the bill as to the defendants against whom it has been dismissed, that is calling on me to set aside the 64th General Order, and the case of *Knight v. Majoribanks* (14 Sim. 198) is an express authority against so doing; and it is plain the application is so far unsustainable. By the second part of the notice, I am called on to permit an amendment by re-introducing defendants against whom the bill stands dismissed, thus enabling the plaintiff to get rid of the Statute of Limitations, by making the bill bear date from the year 1847 instead of the present day. If the amendments are properly made, the order which is sought could not be of any advantage, as the amendments must set forth the circumstances under which they are made, that the bill standing dismissed, with costs, liberty was given to re-introduce the defendants upon the record, and that would have the same effect as if a new bill was filed. In the case of *Hornebrooke v. Weir*,† following the authority of *Cornwall v. Sperring*, before Sir M. O'Loughlen,‡ under the particular circumstances of the case, after a demurrer allowed under the 64th General Order, I permitted the bill to be taken *pro confesso* against the defendant who demurred, and I am inclined to grant such an order as is now sought, where it cannot be any advantage to the defendant to insist upon a new record; but that does not apply to a case like the present, where a defence has arisen which did not exist to the original bill. If I were to make this order, I should be depriving the party of his defence, for the only advantage to be derived from permitting this amendment would be, that the plaintiff might insist that his bill bore date of the year 1847, new rights have been acquired by the negligence with which the plaintiff's case has been conducted; and I must refuse this motion, with costs.

ROWLAND v. M'DONNELL.—March 12.

Practice—Replication, Amendment of.

Hughes, Q.C., moved, that the plaintiff's replication, filed on the 16th of February, be taken off the file and set aside for irregularity, on the ground that the plaintiff thereby purports to join issue with one Thomas V. Clendenning, as a defendant in the cause, there being no person of that name a defendant therein; and also that the bill stand dismissed, with costs, for want of prosecution. In this case on the day of an application had been made to set aside a former replication, as purporting to join issue with a defendant who had not appeared, and the plaintiff obtained liberty to amend, upon payment of costs; accordingly, the present replication was filed, by which issue was joined with T. V. Clendenning, who was not a party to the cause, having died in the year 1847.

† Reported, *ante*, p. 117.

‡ Vid. *ante*, p. 117, note.

Mr. Maley, contra, moved a cross notice for liberty to amend the replication, by striking out the name of T. V. Clendenning. From the affidavit of *Mr. Wetherell*, a solicitor, it appeared that the name of Clendenning was inserted by mistake, and was a mere clerical error.

MASTER OF THE ROLLS.—This appears to be a mistake, and I will give liberty to amend; and let the plaintiff pay the defendant, *M'Donnell*, £5 costs of this motion.

QUEEN'S BENCH.—HILARY TERM.

DALY v. ROONEY.—*Jan. 23.*

Right of Allottee of Shares in Railway Company to Recover back Deposit.

An allottee of shares in a railway company, provisionally registered, paid a deposit of £2 2s per share, and signed the subscriber's agreement, which gave the provisional directors power to carry on the undertaking, or any part of it, or to abandon the whole, or any part of it; and out of the money which should come to their hands, by way of deposit or otherwise, to make such deposits or investments as might be required by the Standing Orders of Parliament, and also to pay salaries, &c., and the costs of obtaining Acts of Parliament, &c., and generally to apply such moneys in paying and satisfying all other costs, expenses, or liabilities which they might incur, in relation to the undertaking. The project proved abortive; and, in an action of assumpsit to recover back the deposit, Held, that the plaintiff could not, in such action, impeach the validity of the subscribers' agreement, and that, by executing that deed, he had authorized the directors to dispose of the money, and therefore could not recover back any part of the deposit.

Assumpsit for money had and received for the use of the plaintiff, and for money due on an account stated. Plea, non assumpsit.

At a trial before *Richards, B.*, at the Spring Assizes for the County Wicklow, 1848, it appeared that the defendant was one of the provisional directors, and a member of the managing committee, of a company provisionally registered under the 7 & 8 Vic. c. 110, called the Dublin and Sandymount Atmospheric Railway Company, and that the action was brought to recover the sum of £31 10s., being the amount of a deposit of £2 2s. per share, paid by the plaintiff on the allotment to him of fifteen shares in the undertaking. The plaintiff received scrip certificates for his shares, and, on the 4th of November, 1845, executed the parliamentary contract and also the subscribers' agreement. The latter deed was made between the shareholders, of the one part, and two trustees, of the other; and, by it, the shareholders nominated certain persons, including the defendant, to be the managing committee, or directors of the undertaking, and conferred on them very extensive powers. Amongst others, this deed gave to the directors "full power to take such measures as they might deem expedient to carry the undertaking into effect; and, for that purpose, to cause

such surveys and estimates to be made as they might think advisable, besides such as had already been made, and to abandon the undertaking, or any part thereof, and to make application to Parliament at the then ensuing session, for an Act of Parliament for all or any of the purposes therein mentioned," &c. The directors were also to have "full power to determine how far, and to what extent, the undertaking was to be carried into effect, deferred, or abandoned, and generally to enter into and carry on all such negotiations, covenants, and agreements, and to do and execute all such acts, deeds, matters, and things, in relation to the said undertaking, and to the application to be made to Parliament, and for winding up the undertaking, and the affairs and concerns thereof, in case such Acts of Parliament should not be obtained, as they (the directors) should, from time to time, consider expedient." They were also to have "full power out of the money which should come to their hands, or be placed to their credit, by way of deposit or payment of calls, or otherwise, in relation to the same undertaking, to make such deposits or investments as might be required by the Standing Orders of Parliament; and also to pay and allow all such fees, salaries, and recompense to counsel and solicitors, clerks, servants, and other persons who might be employed in relation to the said undertaking, as they should think right, and generally to apply such moneys in and towards the fulfilment of any bargains, engagements, contracts, arrangements, or agreements, into which they might have entered, or into which they were, by that deed, empowered to, and should or might enter for the purposes aforesaid; and towards the costs of any works or proceedings connected therewith, and in and towards the soliciting, supporting, or opposing a bill or bills in Parliament, as therein mentioned, and in obtaining the necessary act, or acts, for carrying out the said undertaking, or any part or parts thereof, and generally in paying and satisfying all other costs, charges, expenses, and liabilities, which they might sustain or incur, or which might already have been sustained or incurred, in relation to the said undertaking, or otherwise, under and by virtue of these presents." It appeared from the evidence, that a bill for the incorporation of the company had been introduced into Parliament, and that, after having passed the House of Lords, it was rejected, on merits, in the House of Commons. It further appeared, that the provisional registration of the company was not renewed, and it was admitted by the defendant, that it was not intended that the project should be further prosecuted. He also admitted that the stock of the company, according to the last prospectus issued, was to have consisted of 6,000 shares of £20 each, on which a deposit of £2 2s. per share was to have been paid up, and that deposits were only paid on 3,200 shares. The solicitor for the company was called for the plaintiff, and he proved that, according to the original prospectus issued by the promoters of the undertaking, the capital was to consist of only £54,000, in 3,600 shares of £15 each, deposit £1 5s. per share, and that the alteration in the capital of the company was made by the directors on the 23rd of

October, 1845, after the applications for shares, but before any were allotted. The plaintiff was then proceeding to give in evidence the particulars of a meeting of the company held on the 5th of January, 1846, when, on the part of the defendant, it was objected that any evidence should be received of the conduct or management of the company after the time of the execution of the deeds by the plaintiff. The learned Judge, however, overruled the objection, and admitted the evidence. It appeared that the meeting of the 5th of January was called in consequence of some of the shareholders being dissatisfied with the manner in which the affairs of the company were managed by the directors. The causes of disapprobation were, that some of the directors had not paid the deposit on their shares—that others of them, though named in the prospectus, had never acted—that one of them had never executed the deed—and that three of them had not taken any shares in the undertaking. Another cause of disapprobation was, that the son of one of the directors had been substituted in his father's place, as director, and that the substitution was not authorized by any act of the directors. It further appeared from the evidence, that previous to going before Parliament, a considerable reduction was made, by the engineer of the company, in the estimate of the probable expense of the undertaking, and that the capital was thereupon reduced from £120,000 to £83,332.

At the close of the plaintiff's case, counsel for the defendant called for a non-suit, upon the following grounds:—1st. Because the contract upon which the sum of £31 10s. was paid by the plaintiff, was a contract under seal, and that money so paid could not be recovered in an action for money had and received. 2ndly. Because there was a partnership created by said deeds, existing between the plaintiff and defendant, and that by reason of such partnership, the present action was not sustainable. 3rdly. Because there was no evidence of fraud to vitiate the deeds, or to discharge the plaintiff from his contract; and, lastly, because there was no evidence of any money having been received by the defendant for the use of the plaintiff. The learned Judge refused to non-suit, and the defendant then went into evidence to show the *bona fide* character of the proceedings; that the conduct of the directors was approved at a meeting of shareholders held on the 11th of May, 1846, at which meeting plaintiff's scrip was presented, and that the full number of 6,000 shares were allotted in the said undertaking. At the close of the defendant's case, counsel for the plaintiff submitted that the plaintiff executed the deeds upon the understanding, that the capital of the proposed company was to consist of £120,000, to be subscribed in 6,000 shares of £20 each, whereas no more than 3,000 shares were actually subscribed for, and called upon the learned Judge to direct the jury to find a verdict for the plaintiff, inasmuch as the undertaking for the purpose of which the plaintiff had subscribed, and paid his deposit, was altogether abandoned before the present action was commenced, and it was not shewn that any of the money paid by the subscribers on their shares was expended in any manner authorized by the

subscribers' agreement, which the learned Judge refused to do, whereupon counsel for the plaintiff excepted. The defendant's counsel then called on the Judge to direct the jury—1st, that if they believed the proposed undertaking was entertained and carried out, *bona fide*, up to the time when the plaintiff executed the subscribers' agreement, they should find for the defendant; 2ndly, that unless they believed the plaintiff was induced to execute the said deed by fraud or misrepresentation practised by the defendant, or some person in his behalf, they should find for the defendant, which the learned Judge refused to do, whereupon counsel for the defendant excepted. The learned Judge left two questions to the jury—1st, whether the project or undertaking was up to, and at time of the plaintiff's joining therein, and executing the said deeds, and payment of his deposit, a bona fide project and undertaking; and 2ndly—whether the plaintiff was induced by any untrue or fraudulent representation of the committee of management, to take part in the undertaking, and execute the deeds. Upon this second question, the learned Judge told the jury, that in considering the question of fraud, or misrepresentation, they should take into their consideration, as evidence on the said question, the facts, that four of the persons named as directors, in the prospectus of the said company, did not afterwards act therein; or execute the deed thereof, and that three of the directors did not take any shares therein; whereupon defendant's counsel objected, and insisted that the said facts and matters were not admissible upon any issue in the present action against the defendant; and that the jury should have been directed to exclude them, and all facts and circumstances occurring after the time of the execution of the said deed by the plaintiff, from their consideration, but the learned Judge ruled that all such facts and circumstances were so admissible in evidence, and thereupon the defendant's counsel excepted. The jury found in the affirmative upon both issues, and the defendant's counsel then called for a direction, in favour of the defendant, but the learned Judge directed the jury to find a verdict for the plaintiff—whereupon counsel for the defendant excepted.

Lynch and Lawless were now heard in support of the exceptions.—This money was never had and received by the defendant for the use of the plaintiff. The defendant was not one of the trustees in whom the money was vested, and there is no evidence, that it ever came to his hands. The shareholders committed the management of the affairs of the company to the provisional directors, and the "subscribers' agreement," gave them power to apply the deposits, in payment of *any charges and expenses*. The plaintiff, by executing the deed, became associated with the defendant in a common adventure, a partnership was created between them. The present case is distinguishable from *Walstab v. Spottiswoode*, (15 M. & W. 501), for there, the plaintiff, not having executed any deed, was never jointly interested with the defendant in the undertaking, and the purpose for which the money was paid, wholly failed. The proceedings, in the case now before the court, were carried on bona fide up to the time when the

plaintiff executed the "subscribers agreement," and the circumstances which took place, after the execution of that deed by the plaintiff, were not admissible in evidence, in the present action.—[They cited *Garwood v. Ede*, (1 Ex. Rep. 264); *Cobb v. Becke*, (6 Q. B. Rep. 930); *Hervey v. Archbold*, (3 B. & C. 626); (2 Stark on Evid. 64); *Howard v. Shaw*, (9 Ir. L. Rep. 335); *Lessee Blackwood v. Gregg*, (Hayes' Rep. 277); *Clements v. Todd*, (1 Ex. Rep. 268); *Mookler v. Sharpe*, (4 Railw. Ca. 52, S. C. 11 Jur. 573).]

Coates and O'Callaghan, contra:—The deeds are out of this case, as they were executed by the plaintiff, by means of a fraudulent representation. We have in this case more evidence of fraud, than existed in *Mookler v. Sharpe*, for we have persons appointed to be directors, who never executed the deeds, or took any part in the proceedings; and the son of one director, put in the place of his father; further, there were 6,000 shares allotted, and deposits paid only on 3,200. In *Garwood v. Ede*, there was no fraud found by the jury. The action for money had and received is an equitable one, and the plaintiff is entitled to get back his money, the object for which he subscribed not being carried out. [*Moore, J.* when once a party executes a deed, authorizing certain expenditures, it is under that deed he must look for redress]. There was no expenditure within the power of the deed. The prospectus of the company depended upon the full amount of capital being realized, and £62,500 was all that was subscribed for. The estimates had to be altered, and the directors by varying the nature of the undertaking in this respect, released from their contract, the parties who had executed the deeds on the 4th November. The promoters never had a hope of realizing the capital, and the plaintiff was induced by misrepresentations, to take a part in the undertaking. [*Moore, J.* I do not think, fraud at one time is proof of fraud at another]. [They cited *Maguire v. Goddard*, (2 Jebb & Sym. 455); — *v. Crosbie*, (3 B. & C. 814).]

PER CURIAM.—The great difficulty the court feels, is, in applying these facts to defeat a deed in a court of law; and as we are not able to see upon what legal grounds the jury could have acted, we think in this case, there must be a

Venire de novo.

MIDDLETON v. MAXWELL.—Jan. 27.

Priority between Sequestrations—Costs and Expenses—Liability of Sequestrator for Arrears—Apportionment of Rent-charge—5 Geo. 4, c. 91; 1 & 2 Vict. c. 106.

A judgment creditor issued a sequestration against an incumbent, and thereupon went into the possession of his benefices. The bishop of the diocese subsequently issued a sequestration for non-residence against the same incumbent. Held, (Crampton, J., dissentiente) that the sequestration for non-residence had the effect of suspending the creditor's sequestration, and that the bishop was entitled to apply the proceeds of the benefices, in the first instance, in defraying the necessary expenses of serving the cure, and in paying the

costs which he had incurred in relation to his sequestration.

A sequestrator is liable to account for an arrear of rent-charge which became due while he was in possession.

Where the possession of the sequestrator ended on the 5th March, 1844, no apportionment of the rent-charge which accrued between the 1st of November, 1843, and that date, could be made, so as to charge the sequestrator.

A sequestrator is not liable for the gale which became due previous to his appointment.

The plaintiff in this case had, in Easter Term, 1841, obtained a judgment for £500 against the defendant, who was then vicar of the prebendary of Balla, and rector of the parishes of Minolla and Roslee, in the diocese of Tuam. A writ of *levari* issued on that judgment, and on the 3rd of June, 1841, the benefices of the defendant were sequestered, and T. Lancaster appointed sequestrator. When this sequestration issued, the defendant did not reside in any of his parishes; and, on the 20th of July, 1841, the Lord Bishop of Tuam issued a monition to reside, which was served on the defendant, and, being disregarded by him, a sequestration for non-residence issued on the 5th of March, 1842, and the said T. Lancaster was appointed sequestrator. On the 5th of March, 1844, the benefices of the defendant became void, from non-residence, and on that day another clergyman was inducted into them. On the 15th of June, 1848, the plaintiff obtained, from this court, an order of reference to the Master, to take an account of the revenues of the benefices of the defendant, from the 3rd of June, 1841, the time when the first sequestration issued, to the 7th of March, 1844, when the benefices were avoided—to report how said revenues were applied, and what sum was due to the plaintiff, after giving all just credits and allowances. The proceedings upon this reference were by charge and discharge; and, on the 3rd of January, 1849, the Master made his report, in which he certified (among other things) that counsel for the plaintiff objected to allow the bishop several sums which he claimed credit for in his discharge, and submitted that the bishop should be charged with the receipt of certain moneys, the particulars of which the Master set out in his report, and referred back to the court, as involving questions of law. The case now came before the court upon motion on behalf of the plaintiff to confirm the report.

Sir T. Staples, Q.C. (with him *Dr. Wiley*) for the plaintiff.—The officer has referred six questions to the court. 1st. Whether the bishop, or his sequestrator, is liable to account for an arrear of £63 which became due while the sequestrator was in actual possession. 2ndly. Whether the sequestrator is liable for the gale which became due on the 1st of May, 1841, amounting to £143. [*Bluckburne, C.J.*—You cannot claim that.] 3dly. Whether there should be an apportionment of the rent-charge which became due between the 1st of November, 1843, and the 5th of March, 1844. [*Crampton, J.*—The sequestrator could not bring any action until after the 1st of May

when the gale became due.] [*Moore, J.*—It is only in the name of the sequestrator you can bring an action.] The fourth question has reference to certain sums that the sequestrator paid, which, we submit, he was not authorized to pay; first, £2 10s. paid in October, 1841, to the chapter of the cathedral for preaching—[*Blackburne, C.J.*—It is a necessary outgoing for the special duties of the parish, and the bishop has a power to appropriate a sum out of the proceeds for such purposes. The parochial duties are performed by the curate, but there are charges for which the prebendary of the cathedral is liable]; and, secondly, £90 9s., the costs of the sequestration which issued in 1842, after the creditor's sequestration, for the purpose of enforcing the residence of the incumbent. [*Perrin, J.*—It is a subsequent demand for a paramount title.] A subsequent right of action ought not to interfere with the prior title of the judgment creditor. [*Blackburne, C.J.*—The question is, whether the bishop can interfere with the prior sequestration, so as to enforce the performance of the duties of the parish upon which the property is held.] [*Moore, J.*—Whether this is not an exercise of a paramount title by the bishop.] The fifth question is, whether the bishop was empowered, after one sequestration issued, to increase the salary of the curate to £75. [*Moore, J.*—Must not the sequestrator take the rents and profits, subject to the right of the bishop to provide for the due administration of the duties of the parish?] The last question is, whether we are entitled to interest, as against the sequestrator. [*Blackburne, C.J.*—We will not argue this question until we see if there is a fund in the hands of the sequestrator.]

Dr. Radcliffe and *R. B. McCausland* for the Lord Bishop of Tuam.—The title of the sequestrator ceased in March, 1844, and the arrear of £63 is part of the rent-charge which became due on the 1st November, 1843. [*Blackburne, C.J.*—He must be charged with that arrear, for the succeeding incumbent has no right to receive any part of the rent-charge which became due before his appointment.] The 5 Geo. 4, c. 91, s. 25, gives the power to the bishop to sequester the living, and to pay the charges incidental thereto. [*Crampton, J.*—The only difficulty is with respect to the costs of the second sequestration.] They referred to *Waite v. Bishop* (5 Tyrw. 90; S. C., 1 Cr. M. & R. 507); and *Egan v. Heenan* (3 Ir. E. R. 50).

Dr. Wiley, in reply.—The court decided, upon the former motion, that the sequestration of the bishop was puisne to the sequestration of the creditor. I admit that the English statute (the 1st and 2nd Vict. c. 106, s. 110) which gives power to the bishop to sequester for non-residence, gives a priority to his sequestration, except in the case of a sequestration upon a judgment duly redocketed; but my argument is, that it required express legislation to postpone the creditor's sequestration.

BLACKBURNE, C. J.—The only matter remaining to be disposed of is, as to the costs of the sequestration which issued in 1842. That sequestration issued in consequence of the non-residence of the

incumbent, and ended in the avoidance of his benefices. It is perfectly plain, that the right of the sequestration creditor to attach the income arising from these benefices, was, in its nature, puisne to the sequestration of the bishop. The bishop issued his sequestration to compel the incumbent to perform one of the paramount duties connected with his benefices, namely, to reside in his parish; and it suspended the right of his creditor while that duty remained unperformed, the creditor being in no better condition than the incumbent. The bishop was acting in the discharge of a public duty, and having nominated the same sequestrator who had been appointed the year before, the proceeds of the benefices, after the taxes were defrayed and the necessary expenses of serving the cure deducted, were to be applied in the payment of such reasonable expenses as might be incurred in relation to the sequestration. These are the expenses which the plaintiff now objects to allow the bishop; but, in my judgment, the bishop's right to those credits is paramount to any title which the creditor has to the income of these benefices. It is plain, that the bishop might have effectually put the creditor's sequestrator out of possession, and thereby have treated his sequestration as a perfect nullity. I may further observe, that these costs were incurred in a proceeding for the benefit of the creditor, the object being to enforce the residence of the incumbent, upon which the estate was to depend.

CRAMPTON, J.—I am not able to take the same view of the question before the court. That question has reference to the priority between two sequestrations. In May, 1841, the plaintiff obtained a sequestration against the benefices of which the defendant was then the incumbent. That sequestration issued in the ordinary form, and, under its authority, the rents of the benefices became legally vested in the sequestrator; it was duly published, possession taken under it, sums received, but the creditor was not paid the entire amount of his judgment, for £200 yet remained due to him. In March, 1842—nearly a year after—the bishop issues a sequestration for non-residence. I see no conflict between these two sequestrations. The bishop exercises his power, as ordinary of the diocese, by penalties, and one of them is to compel a forfeiture of the living; that power has been exercised, the incumbent is put out of the living, but the title of the creditor cannot be divested by the bishop. From the period of the sequestration under the *levari*, the rents remained undivested, and were the property of the creditor. The second sequestration cannot have effect until the first sequestration is completely answered; the law *prior tempore prior jure* applies, and renders the second sequestration inoperative until the first is discharged. If this question were raised in England, it would be decided in favour of the bishop, the difference being created by legislative enactment. The object of the bishop's sequestration was the enforcement of a penalty against the incumbent for non-residence; it was to punish him for personal misconduct, and was not to deprive the creditor, in the meantime, of his right. The two sequestra-

tions cannot be in operation at the same time; the sequestration of the bishop is in the way of penalty, and, ultimately, of avoidance of the living. The course of proceeding, up to this moment, shews this, for the bishop's sequestration has never been in operation for sequestering the rents and profits, whereas the creditor's sequestration has always been in full force. The sequestration of the bishop, though published, has never been laid on; if it were, the surplus would have been paid to the Ecclesiastical Commissioners, and would not have gone to the creditor. The direction to the Master was founded on the principle, that the creditor's sequestration was not superseded, or interfered with, by the sequestration of the bishop. The law of Ireland on this subject has never been the same as the law of England. The sums may be small, but, in my judgment, a principle is involved in the matter. The bishop is an innocent party, so is the creditor; and where two parties are innocent, the one who has a prior right, a right in law, ought to succeed.

PERRIN, J.—I concur in the view taken by my Lord Chief Justice, and think the creditor has a right to receive all the profits of these benefices, so long as the incumbent has, but no longer; he is the creditor of the incumbent, and when the title of the incumbent ceases, his must also cease. An Act of Parliament enables the bishop to enforce the residence of the incumbent, and it never was intended that the incumbent should have the ability to set that law at defiance, because his benefice happened to be under sequestration to a creditor. When the incumbent refuses to comply with the requirements of the monition, the bishop is commanded to sequester the profits of the benefice from thenceforward. The Act of Parliament makes provision for the performance of the spiritual duties of the parish, provides for the costs attending the monition and sequestration, and gives the surplus to the Ecclesiastical Commissioners, clearly treating the case of an incumbent who defies his bishop, as of a person who is in contempt, and sequesters the profits of his living, from the beginning, unless he purges himself. The creditor has no reason to complain, for he was only entitled to the income as long as it belonged to his debtor. This is the law in Ireland—it is different in England; for there a provision is made in favour of a judgment creditor which he does not possess in this country. The Irish act, however, does not leave the case unprovided for, but directs how the profits are to be applied. It is like the case where a person under an *elegit* gets into possession of a tenant's interest, and the head landlord brings an ejectment, the *elegit* will drop when the title of the tenant is evicted. We are not interfering with the rule which regulates the priorities of creditors. It is said by my brother Crampton, that the sequestration of the bishop has never been laid on; but the answer to that is, that the same person was appointed sequestrator in both cases, and, from the time the bishop's sequestration was published, it was the duty of the sequestrator to apply the proceeds under the Act of Parliament.

MOORE, J.—I concur in the opinions which have

been expressed by the Lord Chief Justice and my brother Perrin. It appears to me that the creditor cannot place himself in a better situation than the incumbent, and that he took the emoluments, and subject to all the remedies which the bishop had, to compel the incumbent to perform his duties, of those duties being to reside in his parish. The costs were incurred by the bishop while enforcing those remedies, and as they would have fallen on the incumbent if he had been in the receipt of his income, I think they ought to be borne by the creditor who derives under him.

The Court confirmed the Master's report; directed the sequestrator to pay over to the plaintiff the balance remaining in his hands, and gave no order to either side.*

COUNTY DOWN SPRING ASSIZES—CROWN COURT.

BEFORE FIGOTT, C.B.

REGINA v. SIMPSON.†

A prisoner having been brought before a magistrate and being about to make a confession of guilt was cautioned by the magistrate in the following words:—"Take care what you say; for whatever you say will be written down and used for or against you." Held, that such a caution was insufficient, and that the examination of the prisoner was not admissible in evidence.

The prisoner was indicted for arson, under the 1st Vic. c. 89, s. 3. On the trial, the Clerk of the Petty Sessions in Belfast was called to prove that the prisoner had made a confession before the Mayor of Belfast.

On being cross-examined by Mr. Gernon, (for the prisoner,) as to the caution given to the prisoner by the Mayor, before taking down his confession, he swore that he used the following words:—"Take care what you say; for whatever you say will be written down and used for or against you."

Mr. Gernon submitted, that those words constituted an insufficient caution. The word "for" having been used, held out an inducement to the prisoner to confess his guilt, which the absence of that word would not have done, *Queen v. Drew* (8 C. & P. 140). In that case, the same words had been used, by way of caution, and the examination of the prisoner was rejected.

Mr. Staples, for the Crown, admitted that the present case came within the rule of the *Queen v. Drew*, and added, that without the examination of the prisoner, there was not sufficient evidence to convict him.

FIGOTT, C.B.—The case of the *Queen v. Drew* entirely governs the present, and I think the principle upon which that case was decided is a sound one, and should be upheld.

Mr. Gernon called on the court to direct an acquittal for the prisoner.

Verdict of acquittal accordingly.

* The question, whether the plaintiff was entitled to interest, as against the sequestrator, was not argued.

† Reported by W. Gernon, Esq., Barrister-at-Law.

ROLLS COURT.

DONEGAL v. GREGG.—Feb. 24.

Practice—Notice.

Hughes, Q. C., on behalf of the plaintiffs, moved that the several documents in the notice mentioned, now in the Master's office, might be read at the hearing of this cause, and that the defendant, T. Gregg, may deposit the several books and documents, in said notice mentioned, with the Registrar, to be read in evidence at said hearing.

MASTER OF THE ROLLS.—This notice is quite irregular. I will refuse this motion, with costs, without prejudice to the service of a proper notice, specifying the documents in a schedule thereto.

HAMILTON v. SYNGE.—SIMPSON v. SYNGE.—

March 3.

Practice—Motion to Stay Proceedings.

Where two suits are instituted to raise charges upon an estate, and a decree pronounced in one, if important questions are raised by the defendant in the second suit, the court will not stay proceedings in it, and deprive the plaintiff of the benefit of obtaining the Lord Chancellor's opinion at the hearing.

By indenture of the 17th of April, 1818, Francis Syngé assigned to trustees certain lands and premises therein mentioned, upon trust, out of the rents and profits to pay the interest of the debts and incumbrances then affecting the estates, and such other debts due by the said Francis Syngé as were specified in a schedule thereto annexed, then upon trust for Francis Syngé, for life, with remainder to John Syngé, in fee; and it was thereby provided, that the said estates should be liable to the payment of all the scheduled debts of Francis Syngé, in exoneration of certain other estates therein mentioned.

By indenture of the 7th July, 1824, the life estate of Francis Syngé in said lands and premises was conveyed to John Syngé, his eldest son, subject to the scheduled debts.

In the year 1831 Francis Syngé died, having, by his will, bequeathed all his property to his eldest son, John, and appointed him executor hereof.

In the year 1845 John Syngé died, having, by his will, demised certain parts of his estates to trustees, upon trust, for payment of his mortgage, judgment, and bond debts, and the residue of his estates, subject to the payment of the surplus of his debts (if any) and some legacies, he demised to his eldest son, Francis Syngé, whom he appointed his executor.

The bill in the first cause was filed by C. Hamilton, on foot of a judgment of Hilary Term, 1843, obtained against John Syngé, for the sum of £4,000, and prayed that an account might be taken of the personal estate of John Syngé, of his debts, &c., of his real and freehold estate, and that, if necessary, an account might be taken of the real, freehold, and personal estate of Francis Syngé, the father of John, and of his debts and legacies,

and that same might be paid in a due course of administration.

On the 23rd of January, 1849, a decree was pronounced in the cause of *Hamilton v. Syngé*, whereby an account was directed of the personal estate of John Syngé, of his debts, legacies, &c., and of his real and freehold estate, and also an account of the personal estate of Francis Syngé (the elder) and of his debts, &c., and of his real and freehold estate, and of all charges, &c., affecting same.

The bill in the second cause was filed by the Rev. John Simpson, on foot of two bonds—one for £500, bearing date, the year 1799, the other for £1,700, and dated in the year 1817—which were executed by Francis Syngé; and, after stating, amongst other matters, that both said bonds were included in the schedules annexed to the deeds of 1818 and 1824, and that John Syngé paid interest thereon up to the time of his death, prayed an account of the real and personal estates of Francis Syngé and John Syngé deceased, and of all charges, &c., affecting said lands and premises so charged by the indenture of 1818, with payment of said bond debts, and that the trusts of the will of John Syngé might be carried into execution, and that it might be declared that said bonds formed part of those directed by said will to be paid, and that Francis Syngé (the younger) might be directed to pay the sum due, or, in default, that said lands might be sold.

The defendant, Francis Syngé, by his answer, submitted, that by the indenture of 1818, the lands and premises therein mentioned were not charged with said bond debts, and that plaintiff was not entitled to have the amount raised out of the rents and profits, or by a sale thereof.

Martley, Q. C., on behalf of Francis Syngé, the principal defendant, moved, that all further proceedings in the second cause should be stayed, and that the plaintiff in the second cause be directed to prove his demand under the decree in the first cause, and relied on the cases of *Phillips v. Phillips* (6 I. E. R. 509), *Wright v. Hamilton* (9 I. E. R. 119), *Brown v. Cavendish* (1 Jones & L. 606, S. C., 7 I. E. R. 369), *Jackson v. Welsh* (Ll. & G. Temp. P. 346.)

Hughes, Q. C. and *Mr. McCreedy*, contra, contended that the question raised by the answer of F. Syngé was most important—that the plaintiff in the second cause was entitled to have the decision of the Lord Chancellor as to whether his demand was a charge upon the estates included in the deed of 1818, and cited the remarks of Sir Edward Sugden in *Brown v. Cavendish* (7 I. E. R. 388-9), upon the cases of *Garrard v. Lord Lauderdale* (2 R. & M. 451), and *Walwyn v. Couitts* (3 Sim. 14; 3 Mer. 707).

Mr. Norman, in reply, as to the effect of a schedule setting out incumbrances, cited *Law v. Bagwell* (4 Dr. & W. 398), *Dryden v. Foster* (6 Beav. 146).

MASTER OF THE ROLLS.—I do not think I would be justified in staying proceedings in the second suit, and substituting the Master for the Lord Chancellor. The plaintiff in the first cause is a

judgment creditor of John Synge; the object of that suit is to administer his will, and also the will of Francis Synge, the elder. In order to sell the estate, some of which had been the property of Francis, the elder, it became necessary to ascertain the incumbrances affecting it generally, including those created by F. Synge, the elder, and which became charges upon that part of the estate of which he was not tenant for life; and the decree directs an account of the personal estate of F. Synge, of his debts and legacies, and also of his real and freehold estate, and of all charges and incumbrances affecting same. The second suit which I am called upon to stay is by a bond creditor of F. Synge, and it is said that the plaintiff has nothing to do but file a charge under the decree which directs an account of the debts of F. Synge, the elder. If this was a simple case, and if the estates descended from F. Synge, in fee simple, it would be a case of ordinary occurrence, and the suit ought to be stayed; but there are very important questions and equities raised by it. In the year 1818, a settlement was executed upon the marriage of John Synge, and provision was made for payment of certain debts, which were scheduled, including the bonds of Simpson, the plaintiff, in the second cause. The defence set up is, that the deed of 1818 came within the principle laid down in the case of *Garrard v. Lord Lauderdale*, and, being voluntary, no trust was created which could be enforced against the representatives of John Synge; that was the case made by the answer. By the deed of 1824, executed between the father and son, and which recited the deed of 1818, and contained a schedule confined, I believe, to the same debts, as were mentioned in the former deed. The father assigned to his son, who thereby became possessed of the life estate, and owner of his father's interest. It has been said that this was a voluntary deed. I think it was for valuable consideration; covenants were entered into, by which the property was not to be liable to any debts except those mentioned in the schedule, subject to the payment of which it was conveyed; and it was for that consideration, amongst others, the deed was executed. The father was bound as to every debt, except those mentioned in the schedule, which the son became liable to pay; and, so far, it was for valuable consideration. If, after the execution of that deed, Mr. Simpson attempted to sue F. Synge, the elder, in consequence of John declining to pay interest upon the bonds, if any became due, F. Synge would have a plain equity against his son to indemnify him. In *Kyme v. Dignam* (4 I. E. R. 562) it is laid down, that where a party is bound by covenant, and sells subject to the incumbrance, the purchaser is bound to indemnify the vendor; and, in order to prevent circuity of action, the court will not permit a party to say, I am only liable to six years' interest, while the person whom he is bound to indemnify is liable to more than six years. In the present case there is an equity, if John was bound to indemnify his father, and a question may arise upon which I do not now offer any opinion. This dealing between F. Synge and John has been acted on for twenty or thirty years, and Simpson

was induced to forbear on the faith of the arrangement between father and son. The will of John Synge is in terms calculated to raise a serious question, but which I am not bound to decide, and which may have the effect of operating the estate not only with his own debts, but also those debts which he took upon himself to pay. Also the prayer of the bill in the second suit does not bear any resemblance to that in the first cause. I am now called on to stay proceedings, all these equities appearing in the case, upon the statement that a charge can be filed in the office by the plaintiff in the second cause, under the decree in the first. I do not remember any case where a party has been deprived of his right to take the Lord Chancellor's opinion on an important question, and I very much doubt whether there would be any costs thereon, even though the Master could determine these questions. This is not so much a debt of John as a liability, and it is a very serious question, whether the Master could carry out the equities between them. I have no doubt that, in point of law, I am not called on to stay the proceedings in this suit; for, by so doing, I would be deciding the rights of the parties on a summary application; and, where there is a *bona fide* opposition on the part of Mr. Simpson, it would be going a greater length than any case I am aware of, to stay this suit. In the case of *Rigby v. Strangways* (2 Phillips, 175), Lord Cottenham refused to stay a second suit, but directed both causes to be sent before the same Master. The only expense which will be incurred by refusing this motion, is the hearing of the cause before the Lord Chancellor; and, having regard to the very important observations in the case before Lord Chancellor Sugden, which have been read by counsel at the bar, I cannot, in justice, deprive the plaintiff in the second cause of the benefit of the Chancellor's decision. If these questions were submitted to the Master in the first instance, can there be any doubt that there would be exceptions to his report, and the case would thus ultimately come before the Chancellor for his decision. I will, therefore, refuse this application.

"No rule on said motion; and let the plaintiff in the second cause have his costs of appearing on this motion as costs in said second cause, without prejudice to the defendant, F. Synge, at the hearing of said second cause, seeking that the reference in said second cause should be to the same Master to whom the reference in the first cause has been made, and that one report should be made in both causes, and that the second suit should be stayed in the event of the rights of the plaintiff in the second cause being declared upon said first hearing, or the Master directed to report on his claim in proceeding under the decree in the first cause."

Lit. 283, fo. 21.

QUEEN'S BENCH.

GOGARTY v. THE QUEEN (IN ERROR).—Jan. 23, 24.

Indictment—Pleading—Unlawful Drilling—
60 Geo. 3, and 1 Geo. 4, c. 1.

In an indictment under the provisions of the 60 Geo. 3, and 1 Geo. 4, c. 1, the first count stated, that the prisoner "unlawfully was present and did attend a certain meeting dangerous to the peace, &c., for the purpose of training and drilling, and without lawful authority." The second count charged the prisoner with "assisting to train and drill;" and the third count charged him with unlawfully training and drilling certain persons "then and there unlawfully assembled, and without lawful authority."

Held, that the indictment was bad—first, for not stating that "the meeting was assembled for the purpose of training themselves and drilling, or being trained or drilled, or for the purpose of practising military exercises without lawful authority; and, secondly, because it was not averred that the meeting in the indictment mentioned was a meeting for the purposes therein mentioned, without lawful authority."

The prisoner in this case had been tried at a Commission of Oyer and Terminer, held at Green Street, on the 20th of May, 1848, before Blackburne, C. J., and Doherty, C. J., under the provisions of the 60 Geo. 3, and 1 Geo. 4, c. 1, s. 1, for unlawfully training and drilling to the use of arms. The prisoner was found guilty, and now brought his writ of error in the Queen's Bench.

The indictment contained three counts, as follows:—

The jurors for our said lady the Queen upon their oath do say and present, that Patrick Gogarty, on, &c. unlawfully was present, and did then and there attend a certain meeting and assembly dangerous to the peace and security of her Majesty's liege subjects, and of her government, and then and there prohibited by law, for the purpose of training and drilling to the practise of military exercises movements and evolutions, divers persons, to wit, [naming them] and then and there did train and drill to the practice of military exercises, movements, and evolutions, the said, &c., without any lawful authority from her Majesty, or the lieutenant or two justices of the peace of the said county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing, against the peace of our said lady the Queen, her crown and dignity, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said Patrick Gogarty, on, &c., unlawfully was present at, and did then and there attend a certain meeting and assembly dangerous to the peace and security of her Majesty's liege subjects, and of her government, and then and there prohibited by law, for the purpose of training and drilling to the practice of military exercises, movements, and evolutions, the said persons [naming them], and then and there did assist in training and drilling, to the

practise of military exercises, movements, and evolutions, the said [naming them], without any lawful authority from her Majesty, or the lieutenant or two justices of the peace of the said county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing, against the peace of our said lady the Queen, her crown and dignity, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said Patrick Gogarty, on, &c., unlawfully did train and drill to the practice of military exercises, movements, and evolutions, the said, &c. [naming them], being then and there unlawfully assembled, without any lawful authority from her Majesty, or the lieutenant or two justices of the peace of the county of the city of Dublin, or of any county or riding, or of any stewardry, by commission or otherwise, for so doing, against the peace of our said lady the Queen, her crown and dignity, and contrary to the form of the statutes in such case made and provided.

The following causes of error were, among others, assigned:—

There is error in this, to wit, that the said indictment as to each and every count thereof, in the record aforesaid specified, is insufficient in law, for that there is no averment in said indictment, nor in any of the counts thereof, on the record aforesaid, nor in any suggestion thereon, that the meeting and assembly in said record mentioned was a meeting or assembly of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions without any lawful authority from her Majesty or the Lieutenant, or two justices of the peace of any county or riding, or of any stewardry by commission or otherwise, for so doing; therefore, in that there is manifest error. That there is no averment in any of the counts of the said indictment, nor in the record aforesaid, nor in any suggestion therein, that the meeting and assembling in said indictment, or in the record aforesaid mentioned, was a meeting and assembling of persons for the purposes therein mentioned, without any lawful authority from her Majesty, or the lieutenant or two justices of the peace of any county or riding, or of any stewardry, by commission or otherwise, for so doing; and, therefore, in that there is manifest error.

Fitzgibbon, Q.C. and *Stitch*, for the plaintiff in error.—The indictment is bad for two reasons, 1st, because it contains no averment that the meeting was for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms; and, 2ndly, because it does not aver that the meeting was without any lawful authority. The general rule with regard to all indictments is, that every fact and circumstance must be stated with certainty and precision; and this rule is more stringent where the proceeding is on a penal statute. The pleader has not described the meeting in the words of the act; merely averring that the meeting

was unlawful is not sufficient. The purpose for which the meeting was held, should have been stated, and the existence of authority should have been negatived. [They cited *Lee v. Clarke* (2 East. 383; 2 Hale, 170; Foster App. 423; 2 Hawk. P.C. 249, s. 77; 3 Bac. Ab. 113, tit. Indictment); *Rex v. Cox*, (2 Bulstr. 258); *Reg. v. Moore*, (2 Ld. Raym. 791; — v. — (3 Dyer. 363); *Rex v. Ryan*, (2 Moo. Cr. Ca. 15); *Rex v. Compton*, (7 Car. & P. 139.)]

Baldwin, Q. C., and *Smyly*, for the Crown.—It is distinctly stated in the indictment that the prisoner trained these persons at an unlawful meeting, that meeting having no authority to be trained. [*Moore, J.*—It was the purpose of the prisoner that is stated, not the purpose of the meeting.] [*Perrin, J.*—If the purpose is given to the prisoner you leave the meeting without a purpose.] There is an offence clearly stated in the 3rd count, for we have alleged that the meeting was unlawful. Bearing in mind that this was a charge of training others, we have stated what is the result of a meeting so held, and have described the assembly as dangerous to the peace and security of her Majesty's subjects. It is averred that the prisoner attended the meeting, and he thereby became incorporated with it. The word assembled could not apply to the prisoner, and must be referred to the meeting.

Cur. ad. ult.

Jan. 24.—BLACKBURNE, C. J., now delivered the judgment of the court.—The indictment in this case is founded on the 60 George III. Two errors have been assigned by the plaintiff. The first is, that none of the counts contain an averment that the meeting or assembly was such as that act prohibited; and the second is, that it is not averred that the meeting was without any lawful authority. The first and second counts were in the same terms, except that the offence in the first was that of training and drilling to the practice of military exercises, while the second was for aiding and assisting in such training and drilling; and the third count was for having drilled certain persons unlawfully assembled. The statute commenced with an enactment that all meetings or assemblies for the purpose of training and drilling themselves, or of being trained or drilled to the use of arms, and for the purposes of practising military exercises, movements, and evolutions, without lawful authority, should be prohibited. Had the act closed there, an indictment for violating its provisions must have distinctly averred that the meeting was for one of the purposes stated in the act—namely, of training and drilling themselves, or of being trained and drilled to the use of arms, or for the purpose of practising military exercises, movements, and evolutions. It must also have negatived the existence of any authority conferred on the meeting; so that the course was perfectly plain, according to the established rules of pleading. The statute proceeded, in the next place, not to enact any new offence, but merely to prescribe the punishment of those who violate it, the offence being, the attending and acting at a meeting so prohibited. So that the first allegation to be made was, that the purpose of the meeting brought it within the prohibition, and made

it illegal. It was of the very essence of the crime, that the meeting should be illegal within the meaning of the act, for not until then can any of the enumerated acts come within its penal consequences. The act says, that every person who shall be present at a meeting so prohibited, shall, &c. This makes it a violation of the act to attend such a meeting even for the purpose of training and drilling, manifestly meaning such an illegal meeting as was already described. If, then, it was necessary to aver that the meeting was for a purpose specified in the prohibitory part of the statute, it is plain that all the counts are bad, for none of them aver that the assembly was for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions. For these reasons, we are of opinion that the causes of error assigned by the plaintiff should be allowed.

Errors allowed.

WILLIAM RICHARDSON IN REPLEVIN, v. GEORGE NEWENHAM.—April 17.

Pleading—Demurrer.

A plea to an avowry in replevin, framed under the 10th section of the 9 & 10 Vict. c. 111, ought distinctly to apprise the defendant of the precise default complained of by the plaintiff; and therefore, where the language of the plea was so ambiguous as to leave it doubtful, whether the plaintiff complained of a non-delivery of the particulars of distress to a person in possession, there having been such a person, or of the defendant's having omitted to put the same on a conspicuous part of the premises, being vacant at the time, the plea held bad for uncertainty.

Semble—The plea might have been in the alternative, provided that neither allegation was worded, as to leave the materiality of the other, for the purposes of the pleading in question doubtful.

Semble—Per Perrin, J., that the plea was likewise bad, having been pleaded to two avowries, differing in respect of the statement of rent days, and nevertheless referring to a single particular.

THIS was an action of Replevin. The declaration contained one count, wherein the plaintiff complained of the taking &c. by the defendant, on the 18th day of August, 1847, of four cows of his property, on the lands of Summer-hill, in the county of Cork. To this the defendant filed two avowries justifying the taking as for a distress for rent. In the first avowry, the rent was alleged to have been payable on the 6th of February, and the 6th of August, and in the second avowry, the gale days were laid on the 20th of February and 20th of August respectively. *Third plea to both avowries*—"that the said distress in each of the said avowries mentioned, was the same distress, and that the said distress was made after the passing of an act of Parliament, &c.. (9 & 10 Vic. c. 111,*) to wit,

*Section 10.—And be it enacted, that in all cases of distress for rent, cognizable in any court, whether superior or inferior, the person making any such distress, shall at the

on the day in said avowries mentioned, and that the said G. N. did not, nor did the person making said distress, at the time of making the said distress, deliver to the person in possession of the premises, for the rent of which the said distress was made, or affix on a conspicuous part of the said premises, a particular, in writing, of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the name and place of abode of the persons of whose authority said distress was made," *modo et forma*, verification.

Special demurrer to said third plea assigning, *inter alia*, for causes, that the plea was *uncertain* for want of shewing who was in possession, or in fact that *any one* was in possession, and should have shewn and stated, that no particular in writing corresponding in the amount of the rent demanded in each avowry, and the times when said rent accrued due was delivered or posted, or required by said act of parliament, and that the said plea offered immaterial issues.

Joinder in demurrer; of the points noted by the defendant for argument, *two* were as follows:—

That the plea should have stated, that no particular corresponding with the rent claimed, in each avowry was delivered or posted, as the case might be, and should not have been in the alternative.

That the plea offers immaterial issues; posting the particulars not being valid, if any one be found in possession of the premises.

Longfield, Q. C., for the demurrer.—The plea is bad for uncertainty. It is founded on the 10th sec. of the 9 & 10 Vic., c. 111, the plea negatives merely the delivery of the particulars of rent, to the person in possession without naming him. The name of the party distraining should likewise have been stated, *Rouse v. Roach*, (1 Maule & Selwyn, 804). The plea negatives in the alternative the delivery and the posting on a conspicuous part of the premises—posting is proper only where *no one* is in possession, and that there was a person in possession is not averred with sufficient certainty. The form of the plea is calculated to embarrass the plaintiff, it is impossible to say on which branch of the plea to take issue upon, and is consequently bad.

Deasy, Q. C., and *O'Loughlen*, contra.—The question here merely arises with respect to the *certainly* of the plea, as no objection has been raised

time of making such distress, deliver to the person in possession of the premises, for the rent of which such distress shall be made, or in case there shall not be any person found in possession, shall affix to some conspicuous part of the premises, a particular in writing of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the name and place of abode of the person by whom and (if the person who acts in the making of the distress be not the party claiming to be entitled to the rent for which such distress is made,) the name of the person by whose authority such distress is made, or otherwise, such distress shall be unlawful and void. Provided always, &c., &c. Provided also, that if any such distress shall be in other respects sustainable and well founded, the same shall not be unlawful or void, by reason, that the amount of rent demanded by such notice, shall not be the exact amount due, if the misstatement of such rent in such notice shall have been made by mistake, and without fraud or malice or want of reasonable care.

by the demurrer on the ground of duplicity. Here the words of the statute have been literally followed. In fact the position of the defendant has been improved by the form of the plea, as a traverse might have been taken simultaneously on both branches. [*Blackburne, C. J.*—The act contemplates two different states of things, and prescribes accordingly.] [*Perrin, J.*—Here is a difficulty. If there had been no person in possession, posting the particulars would suffice—but on the contrary, if there had been a party in possession, such a traverse would be immaterial]. The defendant might have replied, that he delivered the particulars to the person in possession. It is a general rule that a plea may be framed in the very words of the statute. [*Perrin, J.*—You do not say in this plea, that the particulars were not delivered to a person in possession, or affixed to the premises; but you speak of the person in possession. This seems to admit that there was a person in possession, in which case this branch of the plea would tender a material issue]. [*Crompton, J.*—Could any human being tell with certainty, as your plea is framed, on what defence you intended relying?] The names of persons need not be set forth in a plea like the present, seeing that it is not to be intended that such lay within the knowledge of the plaintiff who might have been a mere stranger, whose goods had been casually deposited on the premises of the tenant at the time of the distress. *Sale v. Read*, (8 East. 80,) non constat, but that a party may have been in possession, and that the landlord may not have discovered him therein, and have accordingly posted the particular. This would satisfy the statute. [*Perrin, J.*—Another objection arises in my mind to this plea—the dates of the accruing of the gales of rent differ in their respective avowries, whereas the plea is common to both, as to the delivery of one particular. Here is an inconsistency. Each avowry ought to have been separately pleaded to.] One object of the second proviso to the 10 sec. is to exonerate the party pleading from stringency of proof. [*Perrin, J.*—Is not proviso confined to the amount of rent, without interfering with the question of dates, the plea is pointed at two inconsistent avowries.] The plea has been adopted for the sake of brevity. If the plaintiff had pleaded separate pleas, the very same words would have been employed in either. The defendant might, if he pleaded, have replied severally.

Longfield, Q. C., in reply was stopped by the court

BLACKBURNE, C. J., (after saying that he felt some difficulty as to the last objection)—A landlord would be materially embarrassed by a plea in this form. The act provides for two distinct alternatives. The plea, by alleging a delivery to the person in possession, assumes that there was a party in possession, and should, therefore, have merely negated the fact of the defendants having complied with the requisitions of the statute, with reference to this state of things. Instead thereof, the one branch of the plea assumes a person to have in possession, and the other the reverse. This uncertainty must embarrass the defendant.

CRAMPTON, J.—No objection has been taken here on the ground of *duplicity*, but merely from *uncertainty*. The plea is clearly uncertain. The statute was not passed to embarrass the landlord, or to enable a litigious tenant to baffle his landlord. The legislature has provided differently for the two cases, of a person being in possession of premises distrained, or the contrary. In one case, service is necessary; in the other, posting is sufficient. If there be a default by the landlord in complying with the terms provided by the act, according to the state of facts, the distress, though valid at common law, is rendered void by statute. Here the pleader, having an opportunity of relying on either ground of defence, set up both, but in such a manner as to render it impossible for any man reading the plea to say whether the default relied upon is the non-service, or the omission of posting. If the defendant had taken issue on the whole, then it would have been said that the traverse was irregular. The defendant certainly might have aided this objection by his replication, but no pleading is so bad as to be incapable of being so aided.

PERRIN, J.—I consider that this pleading is not only bad in form, on the ground before adverted to, but also that it tenders an issue incapable of being sustained by evidence, involving, as it does, the necessity of proving two distinct particulars, although contemplating one merely.

Demurrer allowed.

Moore, J., was absent.

Another objection was started to this plea, on the ground of the *qua est eadem* being improperly averred, it having been pleaded to several avowries, which are in the nature of counts of a declaration containing distinct causes of action. *Edmund v. Walter* (3 Chitty, Rep. 291), and *Walsh v. Shaw* (Al. & Nap. 9), were cited hereon. This objection was, however, disposed of in the course of argument, the court being of opinion that the *taking itself*, which was single, was the subject of the averment.

EXCHEQUER OF PLEAS.—EASTER TERM.

CORAM PIGOT, C. B.

GOVERNOR OF BANK OF IRELAND v. ORPEN.

Roll—Practice—Amendment—Judgment—
Insertion of Costs.

T. Galwey, applied for liberty to amend the judgment roll, by inserting in the blank left for that purpose the amount of taxed costs, which amounted only to £11. The judgment had been entered in March, 1848. In *Farrell v. Russell*, (3 Ir. L. Rep. 40); the court allowed the judgment to be amended in this respect, the amount sought to be inserted being small; and the Court of Common Pleas, in the case of the *Irish Society v. The Bishop of Derry*, (5 Ir. Law Rep. 236), permitted a similar amendment.

PIGOT, C. B.—Since those cases were decided, the court has settled its practice. You must have an affidavit of the judgment not having been registered in pursuance of the provisions, 7 & 8 Vic. c. 90.

CIRCUIT CASES—CIVIL BILL COURT.

CARRICKFERGUS SPRING ASSIZES.

BEFORE THE LORD CHIEF BARON.

THE CORPORATION OF BELFAST v. TIDBALL.

Where a corporation purchased houses, pursuant to powers given them by certain Town Improvement Acts of Parliament, which did not directly authorise a letting by will from year to year, and which houses, at the time of the purchase, were in the possession of yearly tenants, whose interests had not been purchased, nor had they been remunerated for damages done by the works of the corporation. Held, that the corporation might sue them in use and occupation for rent accruing after the purchase.

It appeared that the Appellants had purchased the premises occupied by the respondent, under the powers contained in the Lands' Clauses Act, 1845, and three local acts obtained by them in 1845-46-47—that the Respondent, before the purchase, was a tenant from year to year, under a Mr. Dunbar, and had not received any compensation from the corporation for injury sustained by him under said acts, nor had his interest been purchased—that he remained in possession from the time of purchase until service of civil bill, which was for rent for use and occupation, due to the appellants. The Assistant Barrister dismissed the case.

W. Macartney, for respondent, contended that the appellants had purchased for the purposes mentioned in their acts, and could not let from year to year, or sue for rent for use and occupation; and that no act could be done by them which was not expressly authorised by those acts. The Mortmain Acts prohibited the holding or letting of lands by corporations (Com. Dig. Tit. Capacity, b. 2; 2 Inst. 75; Viner. Ab. Tit. Mortmain, A. 2). These acts were extended to Ireland by 10 Hen. 7, c. 22, *Incorporated Society v. Richards* (1 Dru. and Warren, 258). The appellants, therefore, must look to their local Acts of Parliament to see what they were authorised by them to do (*Dwarris on Stat.* 564, 583, 604); *Haworth v. Ormerod* (6 Q. B. 307); *Stourbridge Canal Company v. Wheeler* (2 B. & A. 792); *Webb v. Manchester and Leeds Railway Company* (1 Q. C. 576); *Blakemore v. Glarmorganshire Canal Company* (1 M. & K. 162); *R. v. Inhabitants of Edgelane* (4 A. & E. 723); *Lee v. Milner* (2 Y. & Col. 618); *Kemp v. London and Brighton Railway Company* (1 R. C. 508). These cases shew that a private Act of Parliament must be construed strictly, and that these companies must do all that their acts direct, and "nothing else." Acts like those in the present case are private, *Dawson v. Power* (5 Han. 494); *Fellowes v. Clay*, referred to in *Dwarris on Stat.* 506. The acts of the appellants do not authorise lettings from year to year, but, on the contrary, they seem, by implication, to prohibit any letting at all except in the way their acts direct. It is true they are authorised to grant leases of superfluous lands, but these must be by deed, and there are many requisites to render them valid; and the appellants are bound to sell their reversion within

ten years from the making of the lease. Where the legislature contemplated a power to let from year to year, they expressed it, as in the case of shops, &c., in the markets, which the appellants were expressly authorised to let from year to year. The principle *expressio unius est exclusio alterius*, therefore, applies against the appellant's claim. The object of the legislature was apparent by preventing the appellant from letting in any way except that authorised, to compel them quickly to sell, and thus pay off the money raised for making the improvements in the town. If they wanted the house occupied by the respondent, they could easily get it by the 121st section of the Lands Clauses Consolidation Act, but were not authorised to get it indirectly in the present way.

Moode and *W. C. Dobbs*, for the appellants, contended, that as purchasers of the reversion, they had a right to all its incidents.

The CHIEF BARON said, he thought that the respondent could not object to pay rent for use and occupation, certainly the legislature could not have intended that tenements should be idle and valueless during the progress of improvements—that if the appellants did not perform their duties, a *mandamus*, or bill in Chancery, would lie against them; but he did not consider that the respondent could refuse to pay rent because they might not possibly perform their duty.

Dismiss reversed.

DROGHEDA SPRING ASSIZES.

BEFORE MR. JUSTICE CRAMPTON.

REGINA v. DARCY.—*Feb. 28.*

Manslaughter—Intoxication.

J. D., was indicted for the manslaughter of J. M., under the following circumstances. The prisoner, who was a carpenter by trade, was brought down from Dublin to execute certain work, in consequence of a strike, or combination for higher wages among the carpenters who had been originally employed by the contractor to do it. On the night of the 16th of December 1848, the prisoner, who had been a few days at work, was returning from Drogheda, at 10 o'clock, in company with J. C., another carpenter, who had been brought down with him. Both the prisoner and J. C., had been drinking to an extent to affect them, though not to the degree of drunkenness. At the outskirts of the town, the prisoner and J. C., were violently assaulted by four men, (supposed to be the parties discharged from employment), the prisoner was knocked down, and assaulted in a manner to endanger his life. J. C., who was a witness for the prosecution, swore that to the best of his belief, if the prisoner had remained longer under the attack, his life would have been forfeited. R. P., a surgeon, also swore, that the prisoner had received severe contusions. J. M., the deceased, who lived near the spot where the occurrence took place; having heard the noise, went out for the purpose of ascertaining the cause, the assailing parties then fled, and the deceased proceeded to the spot where he found the prisoner lying on the ground, almost insensible. He was in the act of raising him up, when the prisoner sup-

posing him to be one of his assailants returning to the attack, drew from his pocket a chisel, and with it, inflicted a wound on the left thigh of J. M., which caused his death. It appeared in evidence, that J. C., seeing J. M., coming to the assistance of the prisoner, said to him, "Here is a friend come to your aid," but it was proved that this observation had not been addressed to the prisoner, till after the fatal wound had been inflicted by him. This was held to be manslaughter.

Sir Thomas Staples, Q. C., and *Hanna*, who conducted the prosecution, having elicited the foregoing facts in evidence.

William Gernon on behalf of the prisoner, submitted that the case made by the crown, was clearly one of homicide by mistake. Had the prisoner been right in supposing that J. M. the deceased was one of the assailing parties returning to the attack, the evidence for the prosecution had disclosed a case of sufficient provocation to justify the prisoner in repelling a renewal of it, by inflicting the wound which had caused death. From the abuse he had received, the effects of the liquor, and the darkness of the night, it was impossible for him to have recognised a friend from a foe. He cited *Levitt's Case*, (Cr. Car. 538), and read in evidence the dying declaration of J. M., in which he had expressed his conviction that the prisoner had inflicted the wound upon him, under the impression that he was one of the assailing parties.

CRAMPTON, J. charged the jury, telling them that, inasmuch as the prisoner, by the act of drinking immoderately, had helped to deprive himself of the power of recognising J. M., as his friend, which but for that act, he would most probably have been capable of doing; he should be held responsible for the consequence that had ensued, and he was therefore of opinion, that a case of manslaughter had been established against the prisoner.

Verdict of guilty accordingly.

COUNTY ANTRIM SPRING ASSIZES— CROWN COURT.

BEFORE MR. JUSTICE CRAMPTON.

REGINA v. THOMPSON.—*March 22.*

In an indictment against A. B., for the murder of C. D., by having administered to her a potion containing poison; E. F., who had tasted a portion of the same draught as the deceased, was called as a witness, to describe her symptoms, G. H., a medical witness, who had attended the witness E. F., and the deceased, was asked as to the symptoms of E. F. Held that such evidence was admissible. Held also, that the medical witness having heard the witness E. F., give her evidence as to her symptoms, might be asked whether in his opinion as a medical man, such symptoms were those of a person under the influence of poison.

The prisoner was indicted for the wilful murder of his wife Jane Thompson, by having administered to her in a draught of gruel, a quantity of arsenic. A witness of the name of Sarah Thompson was called and deposed, (among other things), that she

had tasted the gruel, before giving it to deceased, that she had become ill from it, and she described the symptoms she had laboured under. A medical man was then called and asked as to the symptoms which the last witness had presented.

Joy, Q. C., (with whom was *Ross Moore*), for the prisoner, objected to this question—the prisoner was not on trial for poisoning Sarah Thompson, but for the murder of Jane Thompson. [*Crampton, J.*—I think the evidence quite admissible.]

The medical man was then asked whether he had heard the witness Sarah Thompson give her evidence, and describe her symptoms; and whether in his opinion as a medical man, the symptoms she had described were those of a person under the influence of poison.

Joy, Q. C., objected to that evidence being received: first, upon the grounds of objection to the former question: and secondly, because a medical man, should give his evidence from what he had himself observed, and not from what he had heard detailed by another witness.

CRAMPTON, J.—I think the evidence quite admissible as a part of the *res gestæ*.

ROSCOMMON SPRING ASSIZES.

CORAM, MOORE, J.

KANE v. LLOYD.

Action against Magistrates—Insufficient Notice—43 Geo. 3, c. 143.

A notice of action under the provisions of 43 Geo. 3, c. 143, must follow accurately its provisions.—When a notice omitted to specify the place where the transaction complained of occurred, the plaintiff was non-suited.

This was an action of trespass against a magistrate of the County Roscommon, for assault and false imprisonment. The declaration contained two counts. Plea, Not Guilty—the case was tried at last Spring Assizes at Roscommon, before Mr. Justice Moore. The facts of the case were, In the month of February, 1848, a Mr. Waldron, a magistrate of the County Roscommon lost his life, and a policeman was severely wounded, in an affray caused by an attempt of the coroner of that County to levy an execution in the house of the deceased, when a number of Mr. Waldron's workmen, &c., resisted the attempt.

Informations having been sworn against several persons for being engaged in the occurrence, and amongst others, against three persons of the name of Patrick Kane—the defendant caused the plaintiff with two others of his name, to be arrested and held them in custody for a period of seven days, during which time, they were once brought up for examination. At the end of that period two of the said Kanes, having been identified as being engaged in the affray, were committed for trial.—There being no evidence, sufficient to identify the plaintiff, he was discharged.

Some time after a fourth Patrick Kane, was arrested, who was identified as the third person of the

name of Kane who had really been present at the riot, and against whom the informations had been sworn. Upon these facts the plaintiff brought this prosecution. The statute of 43 Geo. 3, cap. 143, regulating actions brought against magistrates for acts done in the discharge of their duty, provides that no writ shall be sued out against any justice of the peace, &c., for things done in the execution of his office, until after one month's notice thereof in writing shall have been delivered to him, or left at his usual place of abode; which notice shall contain the cause of action clearly and explicitly stated, and on the back of which shall be endorsed the name of the attorney, and his place of abode.

The following notice was served in this case:—
“To William Lloyd, Esq., one of her Majesty's Justices of the Peace in and for the County of Roscommon.

“Sir,—I do hereby, as the attorney of and for Patrick Kane, of Clooncoose, in the County of Roscommon, according to the form of the statute in such case made and provided, give you notice, that the said Patrick Kane will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of *capias ad respondendum* to be sued out of her Majesty's Court of Queen's Bench in Ireland against you, at the suit of him the said Patrick Kane, and proceed thereupon according to law, for that you, the said William Lloyd, on the 28th day of January in the year 1848, arrested, or caused to be arrested, the said Patrick Kane, and him the said Patrick Kane unjustly, unlawfully, and illegally did imprison and detain, or cause to be imprisoned and detained for a long space of time, to wit for a period of seven days, contrary to the laws and customs of this realm, and other wrongs to the said Patrick Kane did to his great damage of £100, and against the peace of our lady the now Queen.

“Dated the 6th day of March, 1848. Michael Waldron, Attorney for the within named Patrick Kane, 59, Great Brunswick Street, Dublin.”

Messrs. Blakeney and Keogh having closed their case for the plaintiff,

Messrs. R. P. Lloyd, C. Andrews, and Roper, for the defendant, called on the learned judge to non-suit the plaintiff, on the ground that the notice did not specify the place where the said transaction occurred, and cited *Martins v. Upcher and Gay*, (32 B. R. 662); *Jacklin v. Fytche*, (14 Mees. & M. 381.)

After considerable argument on both sides, Mr. Justice Moore, feeling he was pressed by the authority adduced by the defendant, but entertaining some doubts on the subject, retired to consult Baron Lefroy, then presiding in the Criminal Court, and in a short time returned and stated that Baron Lefroy conceived the court bound by the authority, and accordingly non-suited the plaintiff.*

* The plaintiffs have not since taken any steps to set aside the non-suit.

COURT OF CHANCERY.

DOONER v. DOONER.—April 19.

Accounts—Maintenance.

The defendant, a brother of the plaintiffs, having, for thirteen years, maintained them, and received the rents of their freehold, which were very small, under the special circumstances of the case, the plaintiffs were refused an account of the rents during the time they were so maintained.

Patrick Dooner, the father of the plaintiffs, Charlotte and Jane Dooner, and of the defendant, John Dooner, having devised some freehold estates upon trust for the benefit of the plaintiffs, and bequeathed to them the residue of his personal property, and appointed the defendant and the plaintiff, Charlotte Dooner, executors, died in July, 1830, when the defendant alone proved his will, and possessed himself of the testator's personalty. The trustees having refused to act, the legal estate in the freehold descended on the defendant. The rents were either actually received by him, or, on being received by the plaintiffs, were, for the most part, handed over to the defendant. The plaintiffs resided with their brother, the defendant, from their father's death, in 1830, down to 1843. The defendant occasionally paid small sums of money to the plaintiffs during that period, but never accounted with them, either for the personalty of their father, or for the rents of the freeholds. The defendant having married. In 1843, the plaintiffs ceased to reside with him, when, in addition to letting them into receipt of the rents of the freeholds, he, as they alleged, undertook to pay them a sum of £30 per annum, on account of their claims. The plaintiffs having pressed for an account, the defendant furnished one in June, 1847, debiting them with the annual sums of £50 each, for board and lodging, and £20 for dress, during the time they had so resided with him, in addition to sums mentioned to have been occasionally paid to them, and which they alleged to have been the fund from which they provided their dress.

The bill stated to the above effect, and prayed accounts of the personalty of Patrick Dooner, and of the rents and profits of the freehold estates. The defendant, by his answer, claimed credit for the sums of £50 and £20 per annum, and alleged that the annuity of £30 had been merely a bounty on his part. It appeared that the rents of the freeholds were small, not exceeding £80 per annum, and some times much less, were the sole property of the plaintiffs, who had been respectably maintained by the defendant while they resided with him.

Mr. F. Walsh, for the plaintiffs (*Mr. H. P. Jellett* with him).—The only question here is, whether the defendant is entitled to charge for maintenance. On this point, we have the authority of *Arundel v. Lowe* (1 Vern. 19), *Davies v. Davies* (9 Car. & P. 87), showing, that under similar circumstances, an agreement to pay cannot be implied.

Berwick, Q.C. for defendant (with him *Mr. Hickey* & *Mr. Dundas*). [*Lord Chancellor*.—I cannot understand that those ladies, out of £100 a-year, agreed to pay £140.] We never intended to charge

them with the surplus. [*Lord Chancellor*.—It seems strange to make a charge which was not intended to be enforced, but I think I should not do justice to either party by sending them out of court. With regard to the rents up to 1843, I should feel great difficulty in giving an account, when the parties had been all living together as they were in this case. If the plaintiffs insist on sending this case to the office for an account of the personal property, it must go. This is very like the case of parties living together till the filing of the bill, when I should not direct an account prior to the filing of the bill. Here they lived together till four years before the commencement of this suit. I do not think I can direct the account before those four years.]

Mr. Hickey with *Berwick*.

Mr. Jellett in reply.

LORD CHANCELLOR.—The defendant has complicated this cause against himself by the accounts which he furnished, and has raised almost the only difficulty in the way of his case. There is no evidence of an agreement one way or the other. These ladies, having small and fluctuating incomes, resided with their brother, the defendant, for a period of thirteen years; during all that time, there never appears to have been an account settled, or asked for, between them. They must have known that their brother received some of these rents; to a certain extent, they constituted him their agent. They all lived together during that time—they were supported and clothed by him—they had not any means, save that small property; the defendant had no means except his professional gains. Thus they lived together, the rents going in support of the establishment, and being treated as part of a common fund for that purpose; and it is clear, that they went but a small way in the maintenance of these ladies. There is no evidence of an express agreement, but is there not much evidence that they did not consider each other as standing in the position of accounting parties, and that their brother received the money in that way? If that state of facts had continued down to the filing of the bill, I should not direct an account, save from the filing of the bill. I have said that the defendant has thrown the only doubt on the case by his accounts. It is clear that no specific sum for maintenance was agreed on, but he makes this claim as if there had been. However, on the whole, I will not decree that a man cannot create a claim for maintenance against his brothers or sisters; in other words, I will not decree that they can make money by quarrelling with their relation. Each case must be governed by its own circumstances. Here we have parties living together for thirteen years without taking an account; and I do not think, by refusing to give an account of those rents, I shall set a bad precedent, where, if the state of facts had continued to the present time, I should only have given it from the filing of the bill.

MEREDYTH v. CREED.—April 20.

Appointment of Trustees—Costs of overpaid Creditor.

There is no objection to two trustees being appointed in the place of a sole trustee.

An overpaid creditor, puisne to the plaintiff, has no right to his costs, though he was not paid off at the time of putting in his answer.

This case came on, on further directions.

Deasy, Q.C., for the plaintiff, amongst other matters, asked that it might be referred to the Master to appoint a new trustee of a fund in the cause, in the room of the former trustee, who had been discharged as an insolvent debtor. [*Lord Chancellor.*—Was there ever more than one trustee of this fund?] There were two. [*Lord Chancellor.*—I do not see any objection to putting two trustees in the place of one; take an order to appoint two trustees.]

Mr. R. Warren, for one of the defendants.—An overpaid mortgagee in possession applied for his costs; at the time of putting in his answer, a small sum was still due to him, so that he was then a necessary party, but had since been overpaid.

Deasy, Q.C., contra.—This party is an incumbrancer puisne to the plaintiff, and is not entitled to costs as against him, and he cannot have them out of the fund.

LORD CHANCELLOR.—How can I give this demand against the plaintiff? He had a right to get this party out of his way; as a trustee, he may be entitled to his costs against his *cestui que trusts*, but I do not see how I can give them here.

ROLLS COURT.

O'KEEFE v. LANIGAN.—March 2.

Production of Documents.

In a suit instituted to set aside an assignment of a mortgage, the court refused to order production of an alleged mesne assignment to the assignor stated to have been made by endorsement on the mortgage, and not mentioned in the bill.

The bill in this cause was filed by the plaintiff, as personal representative of his brother, Charles O'Keefe, and stated, that on the 1st of March, 1834, a certain mortgage was executed to Charles O'Keefe, senior, to secure payment of the sum of £5,000 advanced by him—that C. O'Keefe, senior, having died intestate, administration was granted to his widow, Alicia O'Keefe; and, on the 9th of September, 1841, said mortgage was assigned to Charles O'Keefe, junior, as part of his distributive share in his father's assets. The bill then stated, that C. O'Keefe was a person of weak intellect—that he went to reside with the defendant, who obtained possession of the deeds by which said mortgage debt was secured, and obtained from C. O'Keefe his signature to some deed purporting to assign said mortgage to the defendant. In December, 1843, C. O'Keefe died, and the plaintiff obtained administration to him, and the bill prayed that the defendant might be declared agent of C. O'Keefe, and liable to account to the plaintiff, and that the assignment of the said

mortgage to the defendant might be declared fraudulent and void.

The defendant, by his answer, admitted possession of the deed of 1st of March, 1834, and 9th of September, 1841, and stated, that by indenture of the 23rd of June, 1843, C. O'Keefe assigned the mortgage to the defendant, who secured to O'Keefe an annuity of £200. The defendant denied fraud.

By order bearing date the 20th of July, 1843, the defendant had been directed to produce the assignment of the 23rd of June, 1843. The plaintiff now moved for production of the mortgage of the 1st of March, 1834, and a certain endorsement thereon, signed "Alicia O'Keefe," by which the plaintiff stated, he believed the said mortgage was assigned to C. O'Keefe, junior.

Christian, Q.C., for the motion.—This deed constitutes a material part of the plaintiff's case; he is personal representative of C. O'Keefe, and this endorsement is a material part of the plaintiff's case. The statement in the bill is, that the assignment was made while he resided with his own family. This is denied by the answer, and it becomes necessary to ascertain the fact from the assignment itself.

Hughes, Q.C., and *Mr. Wm. Smith*, contra.—It is admitted that there is no statement in the bill concerning the endorsement; the first allusion to it is in the affidavit made to support the motion. Possession of the endorsement by the defendant should be shewn. Wigram on Discovery, 210, and cases there cited. This suit seeks to set aside the assignment made to the defendant. The mortgage is to be considered as the estate, and, until the plaintiff shall establish his right to set aside the assignment to the defendant, he has no right to inspect the title deeds. The mortgage is fully admitted. The circumstance, that a mesne assignment may have been made by endorsement, cannot give a better right to production than if it had been done by a separate deed; and if by a separate deed not stated in the bill, it is plain the plaintiff could not insist on its production.

MASTER OF THE ROLLS.—In this case an order has been made for the production of the deed of assignment, and the plaintiff now applies for the mortgage—admitted by the defendant to be in his possession—for the purpose of inspecting an alleged endorsement. As there is no allegation concerning the endorsement in the bill, I do not think the plaintiff would have any right to call for the mortgage, which relates exclusively to the title of the defendant. I must treat this endorsement in the same manner as if it was on a different paper from the mortgage; and, to justify an order for its production, there must be a distinct admission by the defendant of its being in his possession: for an application such as the present, is in the nature of an exception for insufficiency, and the defendant is entitled to call upon the plaintiff to read the admission in his answer; but there is no statement in the bill, nor any admission in the answer, concerning it. The plaintiff may be justly entitled to the information he seeks, but he must put it in issue in the bill. I will make no rule on this motion, without prejudice to the plaintiff

amending his bill, by putting in issue the endorsement, and applying for its production if the defendant admits possession by his answer. My present impression is, that the plaintiff is not entitled to the production of the mortgage, which is unimpeached; the document which is impeached is the assignment.

NUGENT v. PEIRS.—*Murch 2.*

Married Woman—Conveyance—Execution of Deed by the Master.

The 28 Geo. 3, c. 35, which provides that in certain cases the court may direct the execution of conveyances by the Master, does not apply to the case of a married woman, resident out of the jurisdiction.

In this case a decree for a sale had been pronounced, at which time the defendant, Sir J. B. Peirs, was seized in fee of certain lands in the Queen's County, by deed of the 20th of January, 1841, and made after said decree, and pending proceedings in the cause, said lands were settled upon Sir J. B. Peirs, for life, remainder to his daughters Louisa and Florence, in fee. After the execution of this deed Florence married Count Kerrignen, and by marriage settlement all her property was conveyed to J. E. Piers and H. M. Tuite, trustees upon certain trusts for the issue of the marriage. The Count and Countess Kerrignen and their family, resided at Sardinia; and J. E. Peirs resided at St. Omer's. The lands included in the deed of 1841 having been sold under the decree.

Mr. F. Fitzgerald now moved, on behalf of the plaintiff, that the Master in the cause might be at liberty to execute the deed of conveyance to the purchaser, for and in the name of the defendants, the Count and Countess Kerrignen, and their children, and of Louisa and John Edward Peirs. This case comes within the provisions of the 28 Geo. 3, c. 35, s. 8; and even if it does not, the 1 W. 4, c. 60, would authorize such an order as we seek. A married woman is as much bound by a decree as a *femme sole*. *Mallack v. Galton*, (3 P. W. 352, and the case referred to in the notes.) The ground on which an infant is not bound, is that a day is given to shew cause. In *Burke v. Crosbie*, (1 B. & B. 489, page 501), the Lord Chancellor says, "I am satisfied that a person giving full value for an estate sold under a decree, cannot be disturbed," &c., "a married woman is as much bound by the decree of the court as a *femme sole*," &c. A married woman is capable of binding herself by a conveyance, by matter of record. In the case of *Jordan v. Jones*, (2 Phil. 170), before the Lord Chancellor, it was decided that the court had no jurisdiction to make an order upon a married woman to convey. That case was decided on the English act, and the statute 28 Geo. 3, does not apply to England; and if that statute had not passed, the court could not, of its own jurisdiction, have compelled a married woman to execute a conveyance. If a married woman is bound by a decree, and refuse to execute the conveyance, the statute gives the very jurisdiction which the Lord Chancellor considered the court had not before; also under the 1 W. 4, c. 60, we are en-

titled to carry this motion. Counsel referred to *McGahan v. Rankin*, (T. T. 1848.)

Mr. B. Lloyd, contra, for the purchaser.—The notice in this case is framed with a view to bring the case under the 28 Geo. 3. The words of that act shew that it applies only to cases where the party is *sui juris*, and (if in this country,) could be compelled to execute the deed of conveyance, but by reason of his absence from the country, the Court is unable to enforce the execution by him. In such cases, the act provides that the trustee may sign, seal, and deliver the deed. The fallacy of the argument used on the other side consists in presuming that the mere execution of a deed by a married woman will pass the estate—that the execution of a deed by a married woman is a mere nullity; the only way by which she could convey was by a fine at common law, or by an acknowledgment under the recent act; and it is essential to the validity of these acts, that they should be voluntary. It was for this reason that Lord Cottenham held, in *Jones v. Jordan*, that a Court of Equity could not compel a married woman to execute a deed, under the statute, 1 W. 4, c. 60, s. 8, between which and the former act there is this difference—namely, that by the latter act the Master does not execute the deed in the name of the married woman; he executes it in his own name; and it would be necessary, if the application were under that act, that there should be a petition. The last act is the Irish Chancery Act, of the 4 & 5 W. 4, c. 78; but previous to proceeding under this act, there should be a tender of the instrument and a refusal to execute the conveyance; and it is not pretended that that preliminary step has been taken. Therefore, this case does not come within it. *King v. Leach*, (2 Hare, 57,) *Jackson v. Medfield*, (5 Hare, 538,) and on appeal, 2 Phil. 254; *Fowler v. Ward*, (8 Beav. 488,) *Billing v. Webb*, (12 Jurist, 427.) If the case is meant to be brought within the 1 W. 4, there should be a petition; if within the 4 & 5 W. 4, there should be a previous tender.

April 1.—His Honor, in giving judgment, said that he was not aware of any such case in which a married woman had been compelled to execute a deed; and in England, the Lord Chancellor lately held, that the court had no authority to make such an order. His Honor then referred to the 28 Geo. 3, and said he considered it only applied to those parties who, if within the jurisdiction, could be compelled to execute the conveyance, but signing, sealing, and delivery of a deed, (which was what the Master was empowered to do) by a married woman was a nullity; as previous to the late statute, it was only by matter of record a married woman could convey, such as by fine; and since the 4 & 5 Wm. 4, by complying with the provisions of that act. His Honour then referred to the 3 & 4 Wm. 4, c. 78, which provided that if any person directed to execute a conveyance, refuse to do so, the court might, after service of the order and tender of the conveyance or instrument, direct the Master to execute same, and said it was not contended that this act applied to the present case, as the provisions of it had not been complied

with. His Honour then referred to the 1 Wm. 4, c. 60, and *Billing v. Webb* (12 Jur. 427), and said he did not think it necessary to give any opinion, as to whether that statute applied; for if the case was meant to be brought within it, there should have been a petition; and, as he did not think that the 28 Geo. 3 applied to the present case, he would make no rule on the motion as to the Count and Countess de Kerrignen and their children.

IN RE DARCY AND THE INCUMBERED ESTATES ACT—April 18.

Petition—Incumbered Estates Act—Fee to Counsel.

This was a petition under the Incumbered Estates Act.

Mr. Darley applied, that the solicitor who prepared the petition might, on account of its great length, be allowed more than £1 4s. 6d., the ordinary fee.

The MASTER OF THE ROLLS refused to give any direction; but stated that Master O'Dwyer was of opinion a fee for counsel should be allowed on petitions under this act, as they were in the nature of pleadings, and his Honour concurred in that opinion.

QUEEN'S BENCH.

LESSEE OF HENRY BROWNRIGG v. REV. ARTHUR A. CRUIKSHANK, CLK., AND ROBERT SYMES.—April 21.

Ejectment—Adverse Possession—Devise.

T. B. tenant for life of freehold estate under the limitations of a will, levied a fine with proclamations to the use of himself in fee, and devised the lands to H. J. B. for life, with remainder to H. B. in fee. H. J. B. having survived the testator, T. B. for upwards of twenty years, died, having devised the same property to trustees in fee for the benefit of his widow and children. Ejectment having been brought by H. B. for the recovery of the lands,—Held, that whatever might be the legal effect of the fine, H. J. B. having assumed to take under T. B.'s will, and his life estate being referrible solely thereto, his possession could not be considered an adverse one, within 3 & 4 Wm. 4, c. 27.

This was an action of ejectment on the title, tried at the last Wexford Spring Assizes, before Mr. Justice Perrin. The declaration in ejectment contained one demise in the name of H. Brownrigg, and was brought for the recovery of the lands of Coolnahorna, in the county of Wexford. The facts of the case were as follows:—H. Brownrigg, the elder, father of the lessor of the plaintiff, by his will, dated May, 31, 1796, devised the estate in question, after the death of his wife, to his eldest son, Thomas Brownrigg, for life, with remainder to his first and other sons, in tail male, and, for want of such issue male, or if such should die under twenty-one, unmarried, and without issue, then to his second son, John Brownrigg, and his issue male, according to seniority, and, for want of

such issue male, or in case such should die under twenty-one, and without issue, then to Henry, the present lessor of the plaintiff in fee. The testator died in September, 1797, having survived his son John, who died in the early part of that year. Thomas Brownrigg came into possession of the estate, under the limitations in his father's will, on the decease of his mother in 1810, and in Trinity Term, 1814, levied a fine thereof, with proclamations, to the use of himself in fee. T. Brownrigg never had issue, and remained in possession of the lands till his death in 1826. No entry had been made during his lifetime, or within the time allowed by law after his decease, by any party to avoid the fine. By his will, dated the 23rd of August, 1823, Thomas Brownrigg devised the Coolnahorna estate to his nephew, Henry John Brownrigg, for life, with remainder to the use of the lessor of the plaintiff in fee. After the death of Thomas, Henry John entered into and continued in possession of the estate up to the time of his own death, in January, 1847, having enjoyed the property for upwards of twenty years. By his will, dated the 13th of April, 1844, he devised the estate in question to the present defendants, upon certain trusts, for the benefit of his widow and children. The lessor of the plaintiff having filed his bill in Chancery on the 4th of June, 1847, against the present defendants, together with the widow and children of H. J. B., praying that the will of H. B. the elder, of the 31st of May, 1796, might be established, and its limitations ascertained and carried into effect, the Lord Chancellor, in the progress of the suit, directed the present ejectment to be brought, for the purpose of ascertaining the title of H. B., the present lessor of the plaintiff, to the premises. A verdict was had at the trial for the lessor of the plaintiff, and leave was reserved for the defendants to apply to have the verdict changed into one for them, in case the court should be of opinion that H. J. B. had acquired a title to the estate, by such an adverse possession thereof, as satisfied the Statute of Limitations (3 & 4 W. 4, c. 27).

A rule nisi having been obtained to set aside the verdict for the lessor of the plaintiff, and enter one for the defendant, pursuant to leave reserved, cause was this day shewn by

George, Q.C., for the lessor of the plaintiff.—We contend that John, who died before his father, would, in case he had survived, have taken an estate tail in remainder in the premises, and was not tenant for life, with remainder to his issue as purchasers. The *University of Oxford v. Clifton* (1 Eden, 473). The estate tail in John having thus failed by his dying in the lifetime of the testator, the devise to him must be looked on as expunged from the will, and consequently H. B., the lessor of the plaintiff, was the party entitled thereunder to the estate in fee or remainder, on the death of Thomas. *Hodgeon et al. v. Ambrose* (Doug. 336-40); *Doe den Turner et al. v. Holt* (4 T. R. 601). With respect to the fine, if levied by a tenant for life, a fine divests the estate in remainder, and merely leaves a right of entry. The remainder man, or reversioner, may enter presently, but is not bound to do so. The law gives

him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate, *Earl Pomfret v. Lord Windsor* (2 Ves. sen. 482; Sheppard's Touchstone, by Atherley, 23-36, *passim*). There is no dispute here about the validity of the fine, or of the several wills which have been admitted by consent. We submit that the lessor of the plaintiff acquired a new title by the said fine, and that, at all events, the party under whom the present defendants derive, *professed* to claim under the same, and his possession was, therefore, not an adverse one.

R. W. Greene, Q.C., and Wall, Q.C., contra.—The effect of the Statute of Limitations (3 & 4 Wm. 4, c. 27, is to operate as a conveyance of real property, *Scott v. Nison* (3 Dr. & War. 388). Possession for twenty years gives an absolute title; that title was acquired by H. J. B. If a possession has an inception by wrong, the statute begins to run in favour of the possessor. It is of no consequence as to what may be the pretensions of the lessor of the plaintiff, provided we establish an *adverse* title in H. J. B. We admit, that at the death of the original testator, Henry, the elder, the estate stood limited to Thomas for life, with remainder to the lessor of the plaintiff in fee, the intermediate estate tail in remainder to John having lapsed by his decease in the testator's lifetime. It must be remembered, that H. J. B. was the heir-at-law both of Henry, the elder, and of Thomas. We disclaim having taken under the will; that would have been to elect to take a *bad* title in place of a *good* one. In the events which have happened, the lessor of the plaintiff has no title except under the will of Thomas, but the latter had, in fact, *no right* to make a will at all, because *his* estate might have been *avoided* by entry, by Henry, the party entitled in remainder under the will of 1796, within five years after his decease. This the lessor of the plaintiff omitted doing, and has thus established the fine. [*Perrin, J.*—You had, at all events, a *colourable* title under Thomas, and *no title* under any other.] The possession of H. J. B. was, however, clearly adverse to the lessor of the plaintiff, on the death of Thomas, in 1826, it having commenced by wrong. The court ought, moreover, refer the claim of the lessor of the plaintiff to his elder title under his father, the former testator, rather than to his *puisse* one under his brother. The question, in fact, turns on the effect to be given to the will of the conuzor of the fine. [*Blackburne, C.J.*—According to your argument, H. J. B. must have entered adversely to his own title as tenant for life.] Take it *quâcunque vid*, the possession is *adversæ*; if he entered as heir, he entered adversely to the will; if he did not enter as heir, he entered without right.

Lynch, Q.C., in reply, was stopped by the Court.

BLACKBURNE, C.J.—This case is too plain to admit of any doubt. Thomas, being seized for life, with remainder to Henry, the lessor of the plaintiff, levied a fine with proclamations, in 1814, and afterwards devised the estate to Henry John for life, with remainder to the lessor of the plaintiff. There were two limitations in the favour of

the latter—one under the will of Henry and the other under that of Thomas. There was no entry to avoid the fine within five years from the time of its being levied, or the death of Thomas. Therefore, by the non-claim and want of entry, the estate of Thomas became an absolute estate of fee simple; and, being so seized, in 1825 he made his will, in which he limited the estate to H. J. for life, with remainder to lessee of plaintiff. Henry John could only have entered as devisee for life; he had no title by descent; his only title was that of tenant for life. He could not possibly have acquired the estate as heir-at-law, neither could he have entered as heir-at-law, when nothing descended; and he cannot here refer his possession, either to a title which did not exist, or to one which, if it did exist, at all events was tortious. When he entered in 1826, he entered as tenant for life, and that not only for his own benefit, but for the benefit of the remainder-man; and, accordingly, when he died in 1846, the remainder-man, being the lessor of the plaintiff, was entitled to the possession of the estate.

Cause shewn allowed.

Note.—The 4 Hen. 7, c. 24, intitled, "How often a fine levied in the Common Pleas shall be read and proclaimed, and who then shall be bound thereby," enacts, That after the engrossing of every fine to be levied after the feast of Easter, A. D. 1490, in the King's Court, afore his justices of the Common Place of any lands, &c., the same fine to be openly and solemnly read and proclaimed in the same court, the same Term, and in three Terms then next following the same engrossing in the same court, at four several days in every Term, and in the same time that it be so read and proclaimed, all pleas to cease; and the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women covert, (others than had been parties to the said fine,) and every person then being within age of twenty-one years, &c., and saving to every person or persons, or to their heirs, other than the parties in the said fine such right, &c., as they have to or in the same lands, &c., the time of such fine engrossed, so that they preserve their title, claim, or interest, by way of action or lawful entry within five years next after the said proclamation had and made, and *also* saving to all such other persons such action, right, &c., in or to the said lands, &c., as first shall grow, remain, descend, or come to them after the said fine engrossed and proclamation made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied; so that they take their action, or pursue their said right and title according to the law, within five years next after such action, right, title, claim, or interest, to them accrued, descended, remained, fallen, or come.

COMMON PLEAS.—EASTER TERM.

LESSEE PARSONS v. PURCELL.—19th April.

Ejectment—Evidence—Notice to quit signed by Receiver—Bill and Answer.

Where a bill and answer have been put in evidence by the plaintiff solely for the purpose of shewing the pendency of a cause, and to establish the authority of the receiver in that cause, to sign a notice to quit—the contents of such bill and answer cannot be given in evidence for the defendant.

Semble, that even were it otherwise, admissions con-

tained therein could not be made evidence of a written instrument not produced. The case of Trimbletown v. Kemmis (9 Clarke & Fin.) commented on.

Michael Barry moved "that the verdict had for the plaintiff at the last Assizes for the County of Limerick, before the Right Hon. Baron Richards, be set aside, and that a verdict or a non-suit be entered up for the defendant, upon the grounds that the said verdict was bad on the misdirection of the learned judge who tried the case, and his rejection of legal and admissible evidence given on said trial by plaintiff and defendant."

This was an action of ejectment on the title, tried before Baron Richards at the last Limerick Assizes, for the recovery of certain lands in the possession of the defendant. On behalf of the lessors of the plaintiff, there was produced in evidence at the trial an attested copy of an original bill, filed in the Court of Chancery on the 18th May, 1843, in which Henry Watson was plaintiff, and Richard Parsons (father of the lessor of the plaintiff) was defendant; also an attested copy of Parsons' answer, filed 24th May 1843; an attested copy of an order made in the cause of *Watson v. Parsons*, referring it to the Master to appoint a receiver; and an attested copy of the Master's report thereunder, approving of Robert Hunt, Esq. as a fit and proper person to be appointed receiver in said cause. A notice to quit on the 1st of May, 1848, was then given in evidence, signed by the said Robert Hunt, as such receiver; and after some further evidence the plaintiff closed his case.

Counsel on behalf of the defendant then proposed to read in evidence a statement contained in the bill, and admitted by the answer, by which it appeared that the legal estate in these lands was vested in the plaintiff Watson; and submitted that as no demise had been laid in Watson's name, the plaintiff ought to be non-suited. His Lordship, however, declined to receive the statement of the bill and answer as evidence, upon the ground that the bill and answer had been given in evidence merely to prove the pendency of the cause, and that their contents were not further in evidence.

Counsel for the defendant further produced a statement of facts laid before the Master in said cause of *Watson v. Parsons*, on the 26th January, 1849, and in which the defendant was described as tenant of the lands at that time, and debited with the rent which accrued due on the 1st November, 1848. This statement counsel relied upon as a recognition of the tenancy, subsequent to the expiration of the notice to quit, and a waiver of such notice; and called upon the judge to direct a verdict for the defendant. This the learned judge declined to do, and directed the jury to find for the plaintiff, unless they should be of opinion that there had been a waiver of the notice to quit.

Barry now, in support of his application, contended that the statements in the bill, and admissions in the answer of Richard Parsons, (the father of the lessor of the plaintiff, and the person through whom he derived his title,) were evidence against the plaintiff, and dispensed with the necessity for the production of the instrument by which the legal

estate became vested in Watson. *Slatterie v. Pooley*, (6 M. & W. 684,) *Newhall v. Holt*, (6 M. & W. 662,) *Earle v. Picken*, (5 C. & P. 542.) [Bell, J.—How could the statements in the bill or answer dispense with the production of the written instrument? The case of *Slatterie v. Pooley*, and the other cases before Baron Parke, have been subsequently departed from in England; and in Ireland the whole question has been fully reviewed in the case of *Lawless v. Quasle*, (8 Ir. L.R. 382,) and the dicta of Baron Parke overruled.] In *Lawless v. Quasle*, Crompton, J., lays down the proposition, that "a man's admissions are always evidence against himself." [Bell, J.—Perhaps some of the isolated passages of Mr. Justice Crompton's judgment in that case may appear to be in your favour; but, taken in connection with the circumstances of the case, his judgment is strongly against you. The cases on this subject are collected in Taylor on Evidence.] The grounds upon which Baron Richards ruled that the evidence was inadmissible, were, that the contents of the bill and answer were not in evidence. In *Lord Trimbletown v. Kemmis*, (9 Clarke and Finnelly, 777,) Tindal, C. J., says—"The fifth exception on the part of the plaintiff relates to the bill in Chancery, filed by the lessor of the plaintiff against the said Thomas Kemmis, on the 14th of October, 1816, which bill the defendant produced for the purpose of showing the subject-matter of the suit, and that the lessor of the plaintiff claimed as heir-at-law of his father, the Lord Nicholas, and offered to read those allegations therein; but the plaintiff objected to the production of this evidence; and we think it is a sufficient answer against the allowance of the exception, that the bill in Chancery, the production and reading of which is now excepted against, had in an earlier stage of the cause been put in evidence by the plaintiff himself; for the bill having formed part of the evidence, the whole was in evidence, and the defendant might have insisted, at the time of its production by the plaintiff, that the whole should be read, and in consideration and contemplation of law, the whole was read." [Torrens, J.—But the contents of the bill were not in evidence in this case at all. The bill was put in evidence for the simple purpose of proving the pendency of the suit, and the jurisdiction of the Court to appoint Mr. Hunt as receiver. Not a word, either of the bill or answer, need have been read for the plaintiff here; nor was there a word read in point of fact.] [Bell, J.—You will find that the case of *Trimbletown v. Kemmis* has not the least application to the present. I remember that case perfectly, and the facts there were, that the bill was given in evidence for the express and specific purpose of reading parts of the defendant's answer; and this Court held, (as was afterwards affirmed by the House of Lords,) that the whole answer was in evidence, inasmuch as part had been read by the plaintiff. Here there was not a word of the bill in evidence; it was put in merely to show the jurisdiction of the Court to appoint the receiver. The ruling of the learned judge was, in my opinion, perfectly correct.] We

er produced a statement of facts laid before Master by Mr. Hunt, the receiver, in which stated the defendant as a tenant, on the 1st of March, 1848, the notice being to quit on the 1st of May previous. [*Jackson, J.*—That appears more untenable as evidence, than the former.] his branch of the argument was not relied

No rule on the motion.

Absente, Doherty, C. J.

EXCHEQUER OF PLEAS.

BENNETT v. SANDHEIM.—April 20.

Demurrer—Ambiguity in Pleading.

Declaration commencing in the ordinary form of action of debt, and concluding thus, "yet the defendant hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof." Held bad on special demurrer, it being doubtful whether it was a declaration in debt or assumpsit.

queritur in the commencement of a declaration debt is not material, and therefore the sum claimed in it not covering the sum claimed in the counts, is not a good ground of special demurrer.

declaration contained the money counts, and as follows:—"H. B. a debtor, &c., comes before the Barons, &c., and complains against J. S. defendant, &c., of a plea that he render unto the plaintiff the sum of £49, which he owes to and justly detains from him." Then followed the money counts, and concluded thus—"Therefore defendant afterwards, to wit (venue), in contravention of the premises respectively, then and he promised the plaintiff to pay him the said several moneys respectively on request, yet he hath disregarded his said promise, and hath not paid any of the said moneys, or any part thereof, to the plaintiff, &c." Special demurrer on the ground that by its commencement the declaration purported to be in debt, yet in the conclusion adopted the form of assumpsit; also on the ground that the sum demanded in the counts exceeded the sum demanded in the queritur, and other grounds, on which, however, the judgment of the court did not

rely. *hillips* for the demurrer.—It would be impossible for the pleader to decide whether his plea should be in debt or non assumpsit. If this be treated as a plea in debt, then there is no breach assigned; but if it deviates from the forms prescribed by the rules, (Gen. R. E. T. 1832,) which is one of the grounds of demurrer assigned. *Knox v. Irwin*, (6 M. & W. 250); *Roiling v. Mugeridge*, (16 M. & W. 181).

Wiggin, Q. C., with him *Fenton*, contra.—Words having reference to the promise may be struck out as surplusage, and the breach remains intact. It is laid down in *Gilbert on Debt*, p. 10, that the per quod is not essential in all cases. As to its deviating from the forms, the question is always the same, is there a substantial deviation. A declaration states the cause of action correctly from the commencement, then in the conclusion the promise may be struck out as surplusage, and

this being a *debitum in presentis* the per quod is unnecessary. *Lord v. Houston*, (11 East. 62,) decides that the queritur is superfluous, and therefore the objection that the sum demanded in the counts exceeds that specified in the queritur falls to the ground. Counsel also relied on *Compton v. Taylor*, (4 M. & W. 138); *Cloves v. Williams*, (3 Bing. N. C. 868; 2 Chitty, 384.)

LEFROY, B.—The object of the new rules was to prevent expense. They supply forms for both debt and assumpsit; you follow neither.

PIGOT, C. B.—That part of the commencement, "that he render to the plaintiff the sum of £49, which he owes to, and unjustly detains from," is unnecessary, and the sum may therefore be struck out, on the authority of *Lord v. Houston*.

PENNEFATHER, B.—It is ambiguous whether this is a count in debt or assumpsit, and this ambiguity is calculated to embarrass the pleader on the opposite side, and the court ought not to be called upon to spell out a pleading in this way, when there are forms prescribed by the rules.

PIGOT, C. B.—We are all of opinion that this declaration is vicious upon one of the grounds assigned as a special cause of demurrer, and noted for argument, namely, that it is doubtful whether the declaration is framed in debt or assumpsit. If this were a mere departure from the ordinary form of pleading—not such a one as would be calculated to mislead the pleader—the court would endeavour to make an intendment to uphold the pleading; but coupling the commencement of this declaration with the part preceding the laying of the damages, it is evident that it is likely to mislead the pleader, and leave him in doubt as to the frame of his defence. *Lord v. Houston* is an authority that the "render" in the commencement is superfluous, and may be omitted. If so, the rest constitutes a good declaration in assumpsit; but the argument of the plaintiff is, that the promise may be struck out from the conclusion, and thus it may be treated as a count in debt. Now this is the very thing which constitutes the ambiguity, and makes the pleading vicious. In the case of *Cloves v. Williams* no doubt could exist as to what was the nature of the count. In *Compton v. Taylor* the demurrer was taken for misjoinder, and the point raised here was not argued—the demurrer taken having been too large. If a great difficulty did not exist here, I would not be disposed to allow the demurrer; but as it is, we are of opinion that the declaration is vicious.

Allow the demurrer, but liberty to plaintiff to amend.

BALDWIN v. IRVINE.—April 21–23.

Trespass for Mesne Rates—Agreement for stay of Execution in Ejectment—Judgment in Ejectment conclusive Evidence of Possession.

Where the defendant in ejectment, pending the proceedings, entered into an agreement, subsequent to the service of ejectment, with the agent of the lessor of the plaintiff, to give a consent for judgment, with a stay of execution, and that he should have the crops, in an action of trespass for mesne rates—Held that this agreement did not preclude

the plaintiff from recovering nominal damages for the trespass, antecedent to the date of the agreement.

This was an action of trespass for mesne rates, and had been tried before Mr. Justice Ball, at the Spring Assizes for Limerick, 1848. The declaration contained one count. Pleas; the general issue, and leave and license of the plaintiff. The plaintiff, to prove possession, gave in evidence, amongst other things, the ejectment process, by which the date of the demise appeared to be the 12th of May, 1845, the judgment in ejectment, with stay of execution till the 1st of December, 1845, and the execution of the *habere* on the 5th of December in the same year.

On the part of the defendant, a person named Langford, who was in possession of the evicted premises, proved a parol agreement on the 20th of August, 1845, between him and a person named Sheehy, the agent of the plaintiff, to the effect, that the witness was to have the crops, and the plaintiff to give a stay of execution till the 1st of December following. The learned Judge told the jury to find the value of the mesne profits from the 19th of May to the time of the execution of the *habere*, on the 5th of December, 1845; and also the value from the 19th of May to the date of the agreement in August, and reserved leave for the plaintiff to move to enter a verdict for either of said amounts. To this direction the plaintiff objected.

Verdict for the defendant.

O'Brien, Sergeant, J. D. Fitzgerald, Q.C., and *Synan*, now moved to make absolute the conditional order obtained on a former occasion, pursuant to the leave reserved. They contended, that this agreement was inadmissible under the plea of the general issue, *Bird v. Randall* (3 Burr. 1345; 1 Sid. 293; Chit. Pl. 5 ed. 539, 545)—that the judgment in ejectment was conclusive to prove the possession of the plaintiff, and that the defendant could not be admitted to disprove the title of the plaintiff, *Askin v. Porbin* (2 Burr. 665); *Armstrong v. Norton* (2 Ir. L. Rep. 96); and that even if the agreement was admissible in this case, that it would not preclude the plaintiff from recovery in trespass, as the right of possession was in him from the date of the demise, *Nugent v. Phillips* (8 I. L. Rep. 17); and that, supposing this agreement amounted to leave and license, it could only be so from the date of the agreement, and, not having been specially pleaded, left the trespass between the date of the demise in the lease to the date of the agreement unanswered, (Bac. A. tit. Rel. letter A. Pl. 1); *Barnes v. Hunt* (11 East. 451). [They also cited *Doe v. Harvey*, (8 Bing. 242); *Jones v. Gibbs*, (2 Hud. & Bro. 587); *Doe v. Hill and Lee* (4 Taunt. 458); *Dodwell v. McDonnell* (2 Car. & P.); *Doe d. Morgan v. Blick*, (3 Camp. 447).]

Henn, Q.C., (Leahy with him) contra, contended that the defendant could not be treated as a trespasser—that by the terms of the agreement, the defendant had yielded his right on the faith of not being treated as such. In *Nugent v. Phillips*, there was no mention of the crops, which clearly distinguishes it from this case. No objection to the form of the pleading was made at the trial.

J. D. Fitzgerald, Q.C., was heard in reply.

*PENNEFATHER, B.,** delivered the judgment of the court.—The court feels some difficulty, both on the law and the merits of this case. Considering the whole case, and attending to the state of the pleadings, we are of opinion that the plaintiff should have judgment for £10. I feel great difficulty in saying that this agreement could be given in evidence under the general issue; and there is also some difficulty in adopting the view taken, that the agreement was intended to include more than the crops.

April 23.—*PENNEFATHER, B.*—On further consideration of this case, we find ourselves coerced by the authorities cited on the part of the plaintiff, and are of opinion that the verdict should be changed to a verdict for the plaintiff with nominal damages.

HARRIS v. GOOD.—*April 21.*

Practice—Costs of Commission—3 & 4 Vic. c. 105, s. 69.

Walker, Q.C., moved in this case for a commission under the provisions of the 3 & 4 Vic. c. 105, s. 69, to examine Lady Bradford, a witness in the cause, and that, in the mean while, all proceedings be stayed.

The affidavit of the defendant's attorney stated, that the action was brought against the defendant as the drawer of a certain bill of exchange—that he believed he was a minor at the time of the making of the bill in question—that he believed Anne Elizabeth Lady Bradford resided in London, and was a material witness to prove the infancy of the said defendant, and that he believed that she was unable to come to Dublin to attend the trial.

J. D. Fitzgerald, Q.C., with *Simple*, contra, admitted the plaintiff's right to the commission, but contended the costs should be borne by the defendant, the proceeding being entirely for his benefit. [*Lefroy, B.*—If the lady was brought here as a witness, and you failed in your action, you should pay her expenses. Before the statute was passed, the party who required the testimony of a witness abroad, filed his bill in Equity for a commission to examine him, and the cause was stayed till the suit in Equity was ended.] That was the ground on which the court proceeded in the case of *Brydges v. Fisher* (1 Bing. N. C. 513). The statement in this affidavit is only on belief as to the material facts. There is no statement as to what length of time they require; the notice seeks indefinitely to stay our proceedings.

LEFROY, B.—The plaintiff is entitled to come here to see that the commission is not used for the purposes of delay; besides, the affidavit on which the defendant relies is only on belief. I will give the plaintiff the costs of the motion; the costs of the commission to be costs in the cause. The officer reports, there is no instance of the costs of a commission to examine witnesses being otherwise than costs in the cause. *Rule accordingly.*

* Before Pennefather, Richards, and Lefroy, B.B. The Lord Chief Baron was at Nisi Prius.

COURT OF CHANCERY.

ORE V. MILLIKEN.—April 26.

Administrator—Costs.

An administrator, by his answer, put forward accounts which were completely falsified; he was charged with the costs of the suit.

This case came before the Court on report and merits. The bill had been filed by the next of kin of Mary Orr, for an account of her personal estate, against her administrator, John Milliken. It appeared that the property of the intestate comprised her interest in a public-house, which the defendant had continued to manage after her decease, but had kept no accounts of the trade of it. The bill was not filed till after several applications for an account. In the account furnished in answer to the bill, the defendant had claimed credit for the maintenance of the plaintiffs, against the general personal estate of the intestate, and stated that the profits of the public-house, above the cost of stock, amounted to only £150, during the period of his management. He claimed, for shopman's wages and head-rent, a sum which more than absorbed that £150, and a sum of £642 12s. for maintenance, clothing, and education of the plaintiffs; but the Master reported that there was due from the defendant the sum of £677 6s. 8d., after all credits. He did not find the value of profits of the public-house, no accounts having been kept; but he found specially that the plaintiffs and the shopman were maintained out of the profits of it, and that the stock, license, and incidental expenses of the public-house were defrayed out of those profits, and that it was for the benefit of the plaintiffs that those matters of expenditure should be set off as against the profits of the establishment, the defendant having consented to that set-off; and further found that the defendant drew out of the Savings' Bank, at different times, the sum of £540 8s. 8d., the money of the intestate, and retained it in his own hands, a portion till he lodged it in Court, and the residue till the date of the report.

Mr. Molynaux, Mr. R. Moore, and Mr. Macartney, for the plaintiffs.—We seek to deprive the defendant of his costs, and to charge him with ours, in this suit, which he has occasioned by his misconduct and falsified accounts. *Vaughan v. Thurston*, (Collis, Appeal Ca. 177;) *Ashburnham v. Thompson*, (13 Ves. 402;) *Flanagan v. Nolan*, (1 Moll. 84;) *Caffrey v. Darby*, (6 Ves. 488;) *Anon.* (4 Mod. 273;) *Jebbs v. Carpenter*, (1 Mod. 290;)

Mr. McDonnell and Mr. T. K. Lowry, contra.—*Travers v. Townsend*, (1 Roll. 495;) *Flanagan v. Nolan*, (1 Roll. 84;) *Heighington v. Grant*, (1 Phil. 600.)

THE LORD CHANCELLOR.—The real question here is, with respect to the costs of this suit, by whom they should be borne. The defendant is an administrator—a volunteer; he has not been appointed as an executor. With respect to his administration, nothing like default has been shown. The money of the intestate and her fixed property are all forthcoming. The question is not about that, but by whom, or why, the expense of this suit has been occasioned. It was brought against the administrator, to compel him to account. Before

the bill was filed, he had been applied to for an account; that which he gave corresponded with that in his answer, admitting the moneys which he had received, but making charges which swallow up the whole fund. One allegation is, that he bore the whole expense of maintaining of the plaintiffs, and that in effect they are not entitled to receive any money, but that they would have been by this time in his debt, not he in theirs. The answer alleges that he carried on the business of the public-house, and advanced money for that purpose and for their support. Now, that answer and that account have been falsified in every particular. One witness swears that all those expenses were borne out of the profits of the establishment. What is the meaning of "PROFITS?" It clearly means the net proceeds, after paying the outgoings. In the common import of words, profits must mean that the establishment paid its own expenses, and produced a fund out of which he maintained the children. I never have seen the account of an administrator more falsified; his only equity is, that he kept no books; but it was his duty to keep them; he ought to be able to produce regular accounts. It is manifest, that before the bill was filed he made a similar claim. I should hold out a terrible example to executors, if I decided that the miserable fund of these infants should be swallowed up by the costs of falsifying this account. This court is slow to charge executors, but it is not to allow them to put forth what accounts they please. I do not think I ever saw a case call more for its interference. The defendant must pay the entire costs of this suit.

ROLLS COURT.

BELMORE V. BELMORE.—SAME V. AUCHINLECK.

Jan. 17.

Judgment Creditor proceeding at Law—Order to restrain—Decree to account.

A judgment creditor, with notice of a decree to account in a suit to administer the assets of his debtor, will be restrained from proceeding at law on foot of a judgment, and it appearing that the judgment creditor proceeded at law after notice of the decree, he was directed to pay the costs of the motion.

On the 15th of February, 1848, a decree was pronounced in the first cause, whereby it was referred to the Master to take an account of the personal estate of Somerset, late Earl of Belmore, and of Armar, late Earl of Belmore, (executor of Somerset) into whose hands same came, and how applied and disposed of, and also an account of their respective debts, legacies, and funeral and testamentary expenses of their real estate, and the debts, &c. affecting same, and to appoint a receiver. In April following a receiver was appointed, and several creditors filed charges under said decree. G. H. Stack having, in 1839, obtained a judgment against Somerset, Earl of Belmore, in the penal sum of £4000 in 1846, assigned same to the defendant Auchinleck, who, on the 13th of March, 1848, attended in the Master's office, upon a summons under the decree in the first cause. On the 16th of May following, Mr. Auchinleck revived said judgment

against H. T. Lowry Corry, as executor of Armar, Earl of Belmore. The defendant Auchinleck not having proved his demands under the decree in the first cause, on the 30th of October, 1848, a supplemental bill was filed, by which he was made a notice party under the fifteenth general order, and was served with notice, and not having entered an appearance, a memorandum was entered, pursuant to the sixteenth general order. Notwithstanding these proceedings, Mr. Auchinleck issued a writ of *fi fa de bonis testatoris* directed to the sheriff of Dublin, and on the 18th of December, caused notice of speeding an enquiry before said sheriff to be served on H. T. Lowry Corry, to ascertain whether goods and chattels which were of said Somerset, Earl of Belmore, sufficient for the purposes of said writ of *fi fa* came to the hands of said H. T. L. Corry. From the affidavit of Mr. Lowry Corry's solicitor, it appeared that there were judgment and other debts outstanding against Somerset, Earl of Belmore, to the amount of more than £100,000, and that several of said judgments were prior to that vested in the defendant Auchinleck. Mr. Auchinleck by his affidavit stated that he was a creditor by judgment of Somerset and Armar, late Earls of Belmore, to the amount of between £40,000 and £50,000.

Mr. Lloyd, on behalf of the defendant, H. T. L. Corry, moved that the defendant, D. Auchinleck might be restrained from further proceedings at law, on the writ of *fi fa* sued out by him against the goods of Somerset, late Earl of Belmore, and that he might be directed to come in and prove under the decree in this cause, the several judgment debts due to him; and relied upon the cases of *Vernon v. Thelsson*, (1 Phil. 466); *Kirby v. Barton*, (8 Beav. 45); *Dyer v. Kearaly*, (2 Mer. 482); *Clarke v. Lord Ormonde*, (Jac. 108); *Rouse v. Jones*, (1 Phil. 462.)

Mr. Shiel, Q.C. and *Mr. Deasy, Q.C.* for defendant Auchinleck, contended that the court should not deprive the defendant of his legal advantage, *Price v. Evans*, (4 Sim. 514); *Kent v. Pickering*, (5 Sim. 569); *Leigh v. Parke*, (1 Keene, 714); and contended in the cases cited there was no judgment, except in the cases in Beavan.

Mr. C. Henderson in reply.—The judgment is *de bonis testatoris*, and the enquiry is as to the assets of the testator. *Dyer v. Kearaly*, (2 Mer. 482.) In *Clarke v. Lord Ormonde*, Lord Eldon said if the judgment was *de bonis testatoris* it would be a clear case for an injunction.

Jan. 18.—*Mr. B. Lloyd*.—The statute law in this country, 5 G. 2, c. 4, puts the case of judgments against executors on a different footing from what they are in England; for such judgments in this country are in fact only initiatory, until an inquiry is held under that statute before the sheriff, and no execution can be taken out against the executor until the sheriff returns a *devastavit*, which he cannot do if there are any assets, whereas in England the plaintiff himself merely suggests a *devastavit*; so that this Court, by stopping that inquiry of which notice has been given, but has not yet commenced, can prevent the judgment from being rendered final against the executor. *Egan v. Baldwin*, (1 Hog. 195, Yeo. & B. Ex. Pr. 394.)

April 17.—In this case, his Honour, after referring to the cases of *Clarke v. Lord Ormonde*, *Rouse v. Jones*, (1 Ph. 462, and also 1 Ph. 466;) and the statute, 5 Geo. 2, c. 5, s. 8, said he considered he was justified, on the authority of *Clarke v. Lord Ormonde*, in granting the injunction, and made the following order:—"Be it so as to the restraining part of said notice, and the said D. Auchinleck having had notice on the 18th of March, 1848, of the decree to account in this cause, bearing date the 15th of February, 1846, and having taken proceedings against the defendant, the Right Hon. H. P. L. Corry, and marked judgment by default, and issued the *fi fa* against the goods of Somerset, Earl of Belmore, deceased, after notice of said decree let said Daniel Auchinleck, pay to said defendant the costs of this motion, when taxed, &c."

MURPHY v. BALFE.—Feb. 27.

Practice.—Production of documents.

The bill in this cause was filed to raise the amount of a judgment, obtained, as of Michaelmas Term, 1832, against Michael Balfe the elder, and Michael Balfe the younger, and for an administration of their real and personal estates respectively.

Mr. Hughes, Q.C. with him *Mr. Deasy, Q.C.* moved for the production of various title deeds and family settlements, admitted by the answer of the defendant James Balfe to be in the possession of his solicitor.—No objection was made in the answer to their production.

Mr. Lawless resisted the motion as to some of the deeds, on the ground that the defendant was only expectant tenant for life, and that John Breen a minor, the party in whom was the first vested estate of inheritance, was not before the Court; and cited *Glover v. Hall*, (2 Phi. 484.)

MASTER of the ROLLS.—This point occurred in *Dundas v. Blake*, (9 Ir. Eq. 640, R.; S. C. 10 Ir. Eq. 260, C.) where I decided, in a suit affecting the inheritance, that in the absence of the minor tenant in tail, I could not, on the admission of the tenant for life, order the production of a family settlement. The case subsequently went before the Chancellor, and he ordered its production. Sitting here, I am bound by that decision, although I adhere to the view I expressed in my judgment in that case, which, I think, is in accordance with English decisions and plain principles of justice.

LINDSAY v. LINDSAY.—March 12.

Bill stated, that in 1838, J. W. made a will, that in 1845 he made another will, by which the former was revoked—that in 1846 the second will was destroyed, by the direction of said J. W., and in 1848, J. W. died intestate, and plaintiff, as heir-at-law, entered into possession of all his real estates, and prayed that the evidence of the witnesses to the will of 1845, and of the person who destroyed same, might be perpetuated. Plea, that there were tenants in possession of some of the real estate who had not paid rent to, or acknowledged plaintiff, and the matters in dispute could be immediately tried by action at law against same. Held, that the plea should be allowed.

The bill in this case stated, that John Lindsay being, in the year 1838 and until his death, seized in fee of the house and demesne of Laughry, the manor of Lindsay, and other estates in the county Tyrone, on the 3rd day of April, 1838, made his will, and thereby, after some specific legacies, devised to his wife and her heirs all the lands of which he should die possessed, subject to the payment of his just debts, and he appointed his said wife executrix thereof—that on the 5th of December, 1845, said John Lindsay made another will, whereby he demised to his uncle, F. Lindsay, all his estates, remainder to his son, subject to certain legacies, and, amongst others, £700 per annum to his wife, as already provided for her jointure, and appointed a person named John White executor thereof. The bill then stated, that said last-mentioned will was all in the hand-writing of the said John Lindsay, and was read by him before its execution, and his signature thereto was acknowledged by him in the presence of two witnesses, John Church, of, &c., and William Macan, who attested same, by the desire of the said John Lindsay—that some time after said will was executed, it was delivered by said J. Lindsay to said John White, the executor named therein, to be kept by him, who several times read same, and which remained in his sole possession—that said J. Lindsay, on the 1st of April, 1846, came into the room of the said John White, and, after some conversation about some of the bequests in said will, in which said John Lindsay expressed an intention of altering same, or making a new will, said John White, in the presence of the said J. Lindsay, and by his direction, destroyed said will in the fire—that this was done with the intention of revoking same—that after the destruction of said will, said J. White expressed a wish to see J. Little, a solicitor, for the purpose of preparing another will, but said Little did not attend—that J. Lindsay died on the 7th of August, 1848, seized in fee of said manor, lands, &c., without having made any other will, and without having re-executed said will of the 3rd of April, 1838, whereby he died intestate—that said J. Lindsay had no issue, and his father died in the lifetime of said J. Lindsay, and plaintiff, as eldest brother of his father, was heir-at-law of said J. Lindsay, and entitled to all the estates of which he died seized—that shortly after the death of said J. Lindsay, plaintiff entered into possession of said house and demesne, and of the other real estates of which J. Lindsay died seized, and was then in possession thereof—that Harriet H. Lindsay, the widow of said J. Lindsay, claimed said estate, under the said will of the 3rd of April, 1838. The bill—after alleging several pretences by said H. H. Lindsay, and that she refused to try whether said will of 3rd of April, 1838, had been revoked until after the death of the witnesses to the will of December, 1845, or of the said John White, who could alone prove the contents of said will, and its destruction—prayed, that plaintiff might be at liberty to examine the witnesses, with respect to the execution and attestation of said will of December, 1845, and the sanity of the said J. Lindsay at the time of making same, and with respect to the contents of the said

will, and its subsequent destruction—that their testimony might be perpetuated and preserved.

To this bill, the defendant (H. H. Lindsay) pleaded.—That on the death of the said J. Lindsay, on or about the 17th of August, 1848, she went into possession of the said mansion-house and demesne, under the will of said J. Lindsay, bearing date the 3rd of April, 1838—that she obtained possession of the title deeds relating to said estates, and remained in possession of said house and demesne, and title deeds, &c., until the 27th of October, 1848—that on said day, plaintiff came, with several persons, and took forcible possession of said house and title deeds, and since remained in possession thereof—that the remainder of the real estate of which said J. Lindsay died seized, were in the possession of several tenants, some of whom held their lands by lease, and others as tenants from year to year—that all said tenants paid rent—that said tenants have not paid to plaintiff the rents which accrued due since the death of said J. Lindsay, nor have they acknowledged plaintiff, by attornment or otherwise, as entitled to receive same, and therefore plaintiff is not in possession of all the real estate of which the said J. Lindsay died seized. The plea then specified the names of some of the said tenants, and the rents payable by them who refused to acknowledge plaintiff, and proceeded to state, that plaintiff could, by action at law against said tenants, forthwith try the truth of the several matters in bill stated, with respect to which plaintiff alleged that the subscribing witnesses to the will in bill mentioned, and John White, were the only witnesses, and could thereby immediately assert the right of plaintiff to the real estates of which J. Lindsay died seized, and that the court ought not to perpetuate the testimony of the said witnesses, and the plea concluded with the usual averment.

Mr. Longfield, Q.C., and Mr. Dobbs, for the plea.—In order to maintain this bill, the plaintiff must shew that he cannot try the validity of the will by any proceeding at law; but it is admitted that there are several tenants who have not paid rent to, or acknowledged the plaintiff; therefore, by action for rent against them, this question may be immediately tried, and testimony should only be perpetuated in those cases where the plaintiff cannot, by any means, assert his rights, *Dow v. Clarke* (1 Sim. & St. 108). The testimony cannot be used till after the death of the witness, and if he swear falsely, he must go unpunished, *Angell v. Angell* (1 Sim. & St. 89).

Counsel also relied on *Bechinall v. Arnold* (1 Vern. 354), *Parry v. Rogers* (ib. 441), *Brandlyn v. Ord*, (1 Atk. 571), *Butcher v. Butcher* (1 Man. and Ry. 221), *Kirkman v. Andrews* (4 Beav. 558).

March 13.—Mr. F. Fitzgerald, Q.C. and Mr. A. Henderson for the bill.—The preservation of the plaintiff's right depends on the testimony of a single witness; and the objections made on the other side would apply, with equal force, to every bill to perpetuate testimony. By not demurring the defendant admits there is a proper case made by the will, and the facts stated in the plea are not sufficient to disentitle the plaintiff to relief; for, as to the lands in the possession of the plaintiff, no

action can be brought; besides, the plea does not state that the tenants refuse to pay rent, on the ground that the plaintiff's title is invalid, or that they acknowledge the title of the defendant; and even by such an action, the question in dispute could not be decided. Counsel referred to *Beckinall v. Arnold* (1 Ven. 354, and Mitf. E. P., last ed. 324).

Mr. Longfield, Q.C., in reply, contended that the question in dispute could be tried by an action of trespass for mesne rates, and relied on *Butcher v. Butcher*, (1 Man. & Ry. 221.)

April 17.—The MASTER OF THE ROLLS, after alluding to the form of the pleas, upon which his Honour gave no opinion, as the question was not argued, and also to the alteration of the law as to the revocation of wills effected by the late statute, upon which there was not any point raised, said—The point in this case is, whether part of the lands, being in the hands of the tenants, who have not attorned or paid rent, the question can be decided at law; or whether plaintiff can sustain a bill to perpetuate testimony. His Honour then alluded to the case of *Angell v. Angell* (1 Sim. and St. p. 89), where the Vice-Chancellor says, "The jurisdiction which Courts of Equity exercise to perpetuate testimony is open to great objection; first, it leads to a trial on written depositions, which is much less favourable to the cause of truth than the *visa voce* examination of witnesses, but, what is still more important, inasmuch as those written depositions can never be used till after the death of the witnesses—and are not, indeed, published till after the death of the witnesses—it follows, whatever perjury may have been committed in those depositions, it must necessarily go unpunished, and this testimony has, therefore, this infirmity, that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that Courts of Equity do not entertain bills to perpetuate testimony generally, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice. If it be possible that the matter in question can be made the subject of immediate judicial investigation, no such suit is entertained." His Honour said, that if judgment were obtained in an action against the tenant, it would still be questionable whether it would be binding on the defendant, and alluded to the case of *Dew v. Clarke* (1 Sim. & Stu. 108), in which it was argued, on the part of the plaintiff, that there were outstanding terms which prevented actions of ejectment from being brought; and on the judgment in that case, Sir J. Leach says, (page 114), "It appears to me that this bill makes out no case to perpetuate testimony. Although it were true that the validity of the will could not, by reason of the lease, be immediately tried by the devisees in trust, yet it may be immediately tried by an action for rent against the tenant. Testimony can be perpetuated only where by no means the plaintiff can presently assert his title to the property. I must, therefore, reject altogether the prayer to perpetuate testimony, and consider the bill as if it were not inserted, and not, therefore, multifarious on that

account." His Honour also referred to Phillips on Evidence, 8 ed. 514, and Hard. 472, and expressed some doubts, as to whether the judgment against the tenant would be evidence against the defendant. He then said, there was another ground in support of the plea stated by Mr. Longfield, which was of some importance. After the death of J. Lindsay, the defendant entered into possession of the house and demesne, and remained until the 27th of October; and during that interval the plaintiff could have brought an ejectment against the defendant, and tried the question in this manner; but, instead of doing so, the plaintiff took forcible possession of the premises. His Honour said he considered that a party should not be permitted to take advantage of his own wrong; and, as after the 1st of May ejectments could be brought against the tenants, and the question tried at the next Assizes, he was of opinion the plea should be allowed.

EQUITY EXCHEQUER.

DORCUS AND ANOTHER v. DOHERTY.—*April 23.*
Construction of Will—Words sufficient to pass legal estate in Mortgaged Property.

A testatrix, who died possessed of a mortgage in freehold lands, after reciting that she was possessed of several sums of money lent and advanced to several persons, and charged upon freehold and other lands, gave and devised the same unto S. D., and G. H. O., upon the several trusts therein mentioned, and after giving several pecuniary and specific legacies, proceeded thus "I leave all the rest, residue, and remainder of my property, of what nature or kind soever, I may die possessed of, to the said G. H. O., in trust for the children of Wm. O." Held, that the legal estate in these mortgaged premises passed to S. D. and G. H. O.

By bill filed to foreclose, &c. a mortgage of certain lands held for lives renewable for ever. The bill stated a mortgage bearing date the 14th of February, 1838, whereby one Arthbutnot Emerson conveyed, by way of mortgage, certain freehold lands in the county of Donegal, to Anne Cunningham. Anne Cunningham made her will, bearing date the 4th of February, 1847, in the following terms—
"Whereas I am possessed of several sums of money lent and advanced to several persons, and charged upon freehold and other lands. I give and devise the same unto Solomon Dorcus, and G. H. O'Neill, upon the several trusts therein mentioned; and after giving several specific and pecuniary legacies, proceeded thus—"I leave all the rest, residue, and remainder of my property, of what nature and kind soever, I may die possessed of, to the said G. H. O'Neill, in trust for the children of W. N. O'Neill," and S. Dorcus and G. H. O'Neill were appointed executors, and proved the will accordingly. The only question in the cause was whether the legal estate in the mortgaged premises was vested under the will in Dorcus and O'Neill, or whether the heir-at-law of the mortgagee was a necessary party to the suit.

Tombs, Q.C., & Mr. T. K. Lowry, for the plaintiff, contended that the legal estate in the mortgaged premises, passed under the will to Dorcus and O'Neill.

The rule governing this case is correctly stated in 1st Jarman on Wills, p. 638. By a devise in general terms a trust estate will pass, unless a contrary intention can be collected from the terms of the will, *Braybrooke v. Inskip*, (8 Vesey, 417,) so where a testator devised and bequeathed all his messuages, chattels real, ready money, securities for money, &c. &c., to A. and B., their heirs, executors and assigns, it was held that the legal estate in premises mortgaged to the testator, in fee passed to A. and B., *Mather v. Thomas*, (6 Sim, 115.) To the same effect is *Renvoise v. Cooper*, (6 Mad. 371.) Since the late Wills act no words of limitation are necessary to pass the fee, and therefore no distinction between this case and those cited can be based on the use or omission of the term "heirs."

Brooke, Q. C. and *Mr. Johns*, contra.—The cases cited, only go to this extent where money and securities for money are bequeathed, the estate in the mortgaged premises pass. Now here it is merely a gift of the money. [*Pennefather, B.*—There is a manifest intention to vest the money in the trustees for the payment of the legacies, and why should the court presume that the testatrix made an imperfect disposition, as this would be, if we are to hold that the legal estate did not pass?] [*Lefroy, B.*—If I recollect aright, there is a case of *Martin v. Mowlin*, (2 Bur. Rep. 969), where a devise mortgage was held to pass the estate in the land mortgaged.] Counsel relied on *Roe dem. Helling v. Yeard*, (2 Bos. & P., N. C. 214); *Timewell v. Perkins*, (1 Atk. 102); *Tilly v. Simpson*, (2 T. R. 659); *Ex parte Morgan*, (8 Vesey, 948); *Roe v. Read*, (8 T. R. Rep. 118); *Galliers v. Moss*, (9 B. & C., 267.)

Pigot, C. B.—The court should endeavour to construe the will with reference to what was present to the mind of the testatrix at the time she made it. It was passing in her mind that she had some freehold estates, as may be inferred from this that she couples the statement of the money itself with that of the land on which it was charged. Looking at the whole will, and having reference to the authorities, I think it may be reasonably intended, that she devised as well her estates in the mortgaged premises, as the mortgage itself.

Decree for plaintiff.

STANNARD v. LODGE.—April 25, 26.

Will—Construction—Devise in Will clear, not cut down by ambiguous codicil.

The bill was filed amongst other purposes to carry into effect the trusts of the will of the late Robert Lannigan. Having devised an increased jointure to his wife, out of certain portions of his unsettled property, he likewise left her for life two houses in Harcourt Street; after her death to his nieces, subject to certain directions and restrictions, not material to the principal question; and after other specific devises devised to Lodge, the trustee, as follows:—"And as to my said lands, not otherwise disposed of by this my will, but subject to the aforesaid increased jointure in trust, that the rents and profits thereof shall be divided by my said trustee into nine equal parts or shares, and one

share to be given to my sister Mrs. Mary Lane, upon her sole and separate receipt, free from the control of her husband; one other share to her eldest son the Rev. Ambrose Lane, and one other share to her second son Hampden Lane; but it is my will that said shares shall only continue to said Mary Lane, and her sons, if then alive, to the 1st day of May or November, which shall first happen after the death of Robert Lane, Esq., the husband of said Mary; but that the share to said Hampden is in nowise to be payable to him, unless said Robert Lane, his father, shall by deed grant to him, said Hampden, an annuity or rent-charge during the life of him said Robert, payable out of that part of Gaulstown demised to Lalor, said annuity to be for the full sum of £100 a-year, as at present paid to him by his said father, and if not so secured and paid, this bequest as to his share to be null and void; two other shares to my nieces Mrs. Watts, and her sister Abigail Hobart, the widow of my late friend Brigade Major Hobart, during their respective natural lives; and from and after their deaths respectively, the share of each so dying, upon trust to the use of their respective son or sons, for his and their lives; four other shares, that is to say, one each to the four daughters, (Martha, Rebecca, Elizabeth, and Charlotte) of my said brother John Lannigan Stannard, and their assigns, during their several and respective lives only, and subject to said respective life uses to said respective persons, and to said increased jointure." The testator devised the lands so divided into nine parts to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over with power to the plaintiff, when in possession of the lands, of jointuring and leasing. The testator gave his personal property to his said four nieces, and Mary Watts, and Abigail Hobart, in such shares as his wife should appoint. The will was without date. The material parts of the codicil were as follows:—"I further revoke the division into nine parts of the profits of my lands commencing in page 3, so far as Mary Lane, Mary Watts, and Abigail Hobart, and their respective sons are to take any parts or shares, either in possession or reversion under said devise after my death, or the deaths of any other person, and order said division to stand as to the four remaining shares to the daughters of my brother John as therein mentioned and to their brother Henry also for said profit rents during the life of my said wife, with survivorship to the longest liver of said five persons, during my said wife's life; and I further revoke the intermediate devise as to Ladyman's part of Gaulstown, after a failure of issue in R. R. Stannard, and direct that after such failure, said part of Gaulstown should go to Valentine Lannigan, as in said will mentioned. I direct the residue of my personal property to be divided amongst my six nieces, the four daughters of my brother John, and to Mrs. Watts, and to Mrs. Hobart, as in my will mentioned, with the restrictions herein contained, first, that no part of the three sums which, on the 29th September, 1832, I gave as a donation to said M. Watts and Mrs. Hobart, is now or since any part of my said property." After the death of the testator, the trustee settled an account with the plaintiff and the

four nieces, and divided the surplus after the widow's jointure, in fifths, to each a fifth—on every future occasion the plaintiff refused to accept of this distribution—and claimed to be entitled during the life of the widow to 5-9ths, and to one-fifth of 4-9ths, and after her death to the entire. The nieces, during life of widow, claimed 8-9ths, and after her death 4-9ths.

Green, Q.C., F. Fitzgerald, Q.C., Mr. Burroughs, and Mr. Odell, for the plaintiff.—We submit, that by the codicil the revoked five-ninths go to the plaintiff, whose estate is thus accelerated, and that the previous gift to the nieces is modified, the estate for their own lives given by the will being cut down to an estate *pour autre vie*, that of the widow. It was the intention of the testator, that the plaintiff, who was the object of his bounty, should have his estate brought into possession immediately on the death of the widow, and not postponed until after the deaths of the co-devisees; otherwise, he might never be able to exercise the powers of jointuring and leasing given by the will to him, only when in possession of the estate. Admitting the general principle, that a clear gift in a will is not to be cut down by doubtful words in a codicil, that principle is controlled by another, that the intention of the testator should be effectuated; and where the gift in the will is inconsistent with the codicil, and an entirely new disposition by the latter, it shall prevail. *Lord Hardwick v. Douglas*, (7 Cl. & Fin. 794;) *Sandford v. Sandford*, (1 De Gex & Small. 67.) [*Pennefather, B.*—Yes, where the two instruments are perfectly inconsistent and irreconcilable, as where an estate in fee is given by the will, and for life by the codicil.] There is an inconsistency in a devise to A. for life by will, and to A. *pour autre vie* by codicil. The testator had two objects by the codicil; first, that the division of his property should be altered, and, secondly, that it should stand only for the life of the widow—that upon her death the residuary devisees should enter into possession of the property, with all its rights and incidents.

Longfield, Q.C., Wall, Q.C., Mr. Hickey, and Mr. Newton, for the nieces. It is conceded on the other side that the will admits of no doubt, and that the codicil is obscure. The case, then, rests on the settled rule of construction,—where the will contains a clear gift, it is not to be revoked by doubtful expressions in a codicil. (1 Jar. 165.) The testator knew how to use legal terms; when he wished to revoke, he expressed the intention distinctly; but when he comes to speak of the share to the four nieces, he orders that to “*stand* as in his will mentioned.” When he associates the plaintiff with the nieces, he is only dealing with the revoked five-ninths; they were equally his objects as the plaintiff. During the widow's life, there was the same motive of increased bounty for both; the provision for both was suspended during her life; at her death, the nieces got the houses, the plaintiff the entire five-ninths. In the codicil, a new sentence should begin at the word, “*also*,” “*for*” should be read “*as to*,” “*as regards*,” and it then clearly appears that the gift in the codicil is of other property, and if so, the case comes within another settled rule of construction, that the gift in the codicil was cumulative, not substitutional.

Brewster, Q.C., Gayer, Q.C., and Mr. Flood, for the trustee.

George, Q.C., and Mr. J. T. Bagot, for the heir-at-law.

PENNEFATHER, B.—This case stood over for the purpose of considering the construction to be put upon the codicil. No one who has heard the case argued, and read the documents, but must feel that it is a case of difficulty and uncertainty. We have given it the best attention in our power, without, however, being able to overcome the difficulty; and the members of the Court have not been able to arrive at the same conclusion as to the construction of this codicil, my brother Richards and I differing in opinion from my brother Lafroy. The will was evidently prepared with attention; and the testator, after different specific devises, directed the rest of his property to be divided into nine parts or shares, referring to the persons by name; four to go to his nieces, the daughters of his brother John, for their lives respectively, as tenants in common; the remaining five to five different individuals. Nothing material arises as to these five shares, for it is beyond doubt they were revoked, and that after the death of the different tenants for life, all the testator's property was given to his nephew, Henry, for life, remainder to his first and other sons in tail male, giving him a power, when in possession, of leasing and jointuring. I mention this power as it was pressed in argument, and it has some influence on the mind of my brother Lafroy. There is no preamble to this codicil—no recital to explain the views or intention of the testator. We must, therefore, collect from the words themselves its true construction. In construing it, we are bound not to reject nor introduce words without an absolute necessity, and yet we are bound to put a construction upon the instrument, if not altogether insensible. We are all agreed that the first portion of this codicil is free from doubt. [His lordship here read the portion of the codicil alluded to, revoking the five shares.] This is a clear revocation of the five shares; the question then arises, is anything else revoked? I think there is nothing else revoked. It is remarkable, that the word “*only*,” which was perfectly legible, has been partially erased. The codicil formerly read thus:—“*I order the said division to stand only.*” If this word, *only*, had remained, it might have struck the testator that the shares in remainder to his nephew, Henry, might be revoked also. If they were only to stand as to the shares to his nieces, the inference might be, that the five shares might be revoked to Henry also. The testator might have struck out the word *only*, as shewing he intended the word *stand* to apply, not only to his nieces, but to Henry also. The meaning I put on the codicil is, that the four shares remain unaffected, and that the revoked five-ninths should stand for Henry and his sisters during the life of his wife, with benefit of survivorship as to those five-ninths amongst them during that period; after the death of the widow, the five shares to fall in to Henry. I cannot say this opinion is free from doubt, but it is the best I have been able to form. I would farther say, that if it had been the testator's intention to revoke the shares given to his nieces by the will, nothing would have been more

easy than to have expressed his meaning. He appears to have been perfectly apprized of the meaning of words of revocation.

RICHARDS, B.—I have arrived at a similar conclusion with that of my brother Pennefather, though not, perhaps, by the same train of reasoning. It is clear, there is first a revocation of five shares, but the testator limits the general character of revocation, by directing that four of the divisions should "stand." The codicil, as it was originally, directed that they should "stand only." If that were so, the word "only" would be inconsistent with what follows, as to the remaining five-ninths. If it were the intention of the testator to give the daughters of his brother John a share in the remaining five-ninths, the word "only" would undoubtedly be inconsistent with the intention to give more than four-ninths, it is also inconsistent with the intention that Henry should take "as therein mentioned," that expression evidently applying only to the four-ninths. It is important to consider, that where the devise to his nieces is clear by the will, it should not be cut down by a codicil, without a clear evidence of such an intention. It would require clear and manifest evidence of intention, to justify us in withdrawing the testator's bounty. The balance of evidence in the instrument is quite the other way. The difficult part to construe is, that with reference to the five-ninths. "Also for said profits" I understand to be used to avoid repetition, and to refer to the revoked profit rents the nephew would take, if the five-ninths were revoked; but the nieces were associated with him during the life of the widow, with benefit of survivorship during that period.

LEMOY, B.—The principle on which the Court is bound to act, is, not to declare an instrument void for uncertainty, if we can come to a conclusion as to the meaning of the testator without insertion, transposition, or omission of words. All the members of the Court are agreed in the principle; in the application of it they differ. Adopting stringently this rule, the conclusion I have finally arrived at is, that the codicil takes away five-ninths from the parties they were originally given to, without disturbing the remainder, but accelerating it; and as to the four-ninths, the codicil makes a modification of the bequest in the will, reducing the nieces' life interests, as tenants in common, to joint estates for the life of the widow, with benefit of survivorship during the life of the widow. The effect of that is, that at the death of the widow, Henry will be at once in the possession of the whole, and so capacitate himself to exercise those powers under the will he otherwise could not. It is true we have no clue in the codicil, as to what the testator meant; we must, therefore, construe it by the precise terms he has made use of, looking at the provisions of the will with a reasonable intentment that the codicil was made on further consideration. It is important to observe, that on the death of the widow his nieces took an increase of property; by the will, his nephew Henry could perform none of the powers given him, till after the cessation of all the previous lives. Was that a convenient disposition? We must recollect, that Henry was to have the means of providing for

his wife and children, and the testator made the codicil to remedy this inconvenience, of postponing the exercise of these powers until the several fragments of the estate came by ninths into possession. It is admitted, this codicil, in the first instance, is a revocation of five-ninths. The effect of the construction by my brothers is, to set up the devise of these shares during the life of the widow, and as to the four-ninths, during the lives of his nieces. That would be a strange state to leave his property in. I was drawn to these considerations by the observations of Mr. Burroughs, and when it was presented to my mind that the testator had a good reason for the variation in the disposition of his property, I changed from my first impressions. I cannot insert words, nor can I withdraw the connected word, "and-also," between the middle and latter portion of the clause. I think it much more reconcilable with the testator's intention, to sweep away the four-ninths, and to abridge the rights of the nieces, in order to reduce Henry's rights into possession. I have arrived at this conclusion with great doubt, in consequence of the obscurity of the instrument, and the doubts of my brothers Pennefather and Richards.*

* The Chief Baron was absent.

QUEEN'S BENCH.—HILARY TERM.

WRIXON v. WALKER—Jan. 19.

Demurrer—Covenant—Variance.

In covenant for rent by lessor against lessee, the declaration stated, that the lessor demised to the lessee certain premises, to hold from the 1st of May 1846, for seven years, "yielding, during the said term, the yearly rent of £80, to be paid on every 1st of November and 1st of May in each and every year." It then stated, that the lessee covenanted that he would "from time to time, during the term, pay the said rent on the said days and times aforesaid." The lessee set out the lease on oyer, and from the reddendum it appeared that the first half-year's rent was not to be payable until the 1st of November, 1847, "the lessee having already paid the year's rent to accrue due on the 1st of May, 1847." Held, (Perrin, J., dissentiente.) on demurrer to the declaration, that the lease was set out in the declaration according to its legal construction and operation, and that there was no variance.

This case came before the court on a demurrer to a declaration on an action of covenant. The declaration, which was filed on the 3rd of June, 1848, stated, that by an indenture dated the 11th of April, 1846, the plaintiff demised to the defendant certain premises, to hold the same from the 1st of May, 1846, for the term of seven years, "yielding and paying therefore and thereout, yearly and every year during the said term, unto the said plaintiff, &c., the yearly rent or sum of £80, to be paid by regular half-yearly payments, on every 1st of November and 1st of May in each and every year." The declaration then stated, that the defendant covenanted with the plaintiff that he would "from time to time, and at all times thereafter during the term thereby granted, well and truly pay to the plaintiff the said reserved yearly rent or

sum of £80, in regular half-yearly payments as aforesaid, *on the said days and times aforesaid.*" The declaration then averred, that the defendant went into possession, and that on the 1st of May, 1848, a sum of £40, being half a year's rent, was due and remained unpaid, contrary to his covenant. The defendant set out the deed on *oyer*, and the *reddendum* was in the following words—"Yielding and paying therefore and thereout, yearly and every year during the said term, unto the plaintiff, &c., the yearly rent or sum of £80, to be paid by regular half-yearly payments, on every 1st day of November and 1st day of May, in each and every year during the term hereby granted, *the first half-yearly payment thereof to be made on the 1st day of Nov. 1847, the said lessee having already paid the year's rent to accrue due on the 1st day of May, 1847.*"

The defendant then demurred specially, and (among other causes,) assigned, that the indenture was not set forth according to its legal effect and operation. To this there was a joinder in demurrer.

Butt, Q.C., and Mackey, for the demurrer.—There is a material variance between the covenant, as stated in the declaration, and the *reddendum* in the lease. The first half year's rent was not to be payable for eighteen months after the date of the lease, whereas, from the declaration, it would appear that it was payable in six months after. If the lease was not set out in *oyer*, the plaintiff could recover, in this declaration, a rent which the lease, when set out, shews he was not entitled to. The lease is not, therefore, set out according to its legal import and effect. They cited *Baden v. Flight*, (8 Bing. N. C. 685;) *S. C.* (4 Scott, 412;) *Paine v. Emery*, (2 Cr. M. & Ros. 306;) *S. C.* (5 Tyrw. 1097.)

J. Clarke and Barry contra.—Even if this were a variance, it should be assigned specially. [*Blackburne, C. J.*—It is a ground for general demurrer.] On the face of the lease, there is a reservation of the rent, as stated in the declaration. [*Moore, J.*—If the declaration had gone on to say, that the first year's rent was payable on the 1st of May, 1847, that would have been a variance.] The half-year's rent which we have declared for, became due on the 1st of May, 1848. It is unnecessary to aver what is not material.

BLACKBURN, C. J.—I see no variance in this case, and think the declaration sets out the lease according to its legal construction and operation. The lease was for a term of seven years, and the rent was to be payable for the entire of the term; but in consequence of an agreement to appropriate in advance a sum of money in payment of the first year's rent, the tenant would only have to pay six year's rent during the term. That was a distinct collateral agreement, and in no way controlled or qualified the terms of the lease. It was to the same effect, as if the landlord had said to the tenant, "You have deposited a sum of money in my hands, and I will apply it in discharge of your obligation."

CRAMPTON, J.—I am of the same opinion, and see no inconsistency which can amount to a variance. The declaration sets out the lease in the very terms of the instrument. It is true that there was to be no payment of rent, until the advance, which was

made by the tenant and deposited in the hands of the landlord, was first applied; but the tenant had expressly covenanted that he would pay on the days and years aforesaid, during the entire of the term. There was to be no qualification of the covenant, but in the mode of payment; the landlord being, as it were, the paymaster for the first year's rent, and the tenant having a receipt in advance. I see no inconsistency between the two things, and am of opinion, if the pleader had stated that the covenant was not to pay during the term, but after the end of the first year, a demurrer would be taken for a variance.

PERRIN, J.—I am of opinion that there is a variance between the covenant, as set out in the declaration, and the agreement upon which the money was lodged. I will confine myself to the words of the lease and the words of the covenant. The declaration charges that the defendant covenanted to pay a half year's rent on the 1st of November, 1846, and on the 1st of May, 1847. Now, if a man covenants to pay a sum of money, he enters into an obligation to pay it; but in the present case no money was to be paid until the 1st of November, 1847, the lessee having already paid the year's rent to accrue due on the 1st of May, 1847, as appears by the lease. Upon that instrument, therefore, it is plain that the lessee did not enter into an obligation to pay over again a sum of money he had already paid. It is said, however, that he covenanted, but did not mean to pay. That is to be the legal operation and effect of his covenant, but in my judgment the legal operation of a covenant is, that when a party enters into it, he becomes bound by it, and obliged to pay the money in pursuance of that covenant. The defendant, in the present case, says—Because I had already paid this money, I did not contract to pay it over again. Suppose the plaintiff had declared for the two half years' rent, which had been already paid, according to the argument for the plaintiff, that would be a proper declaration; and upon a plea of *non est factum*, it would be held that there was no variance, although, upon the lease being produced, no money would appear to be due; and the result would be, that a verdict for nominal damages would pass for the plaintiff, on the ground that the defendant must have contracted to pay these gales of rent.

MOORE, J.—When I read the pleading in this case, I thought there was a variance; that was my first impression; but upon examining it more minutely, I have come to the conclusion, that there is no variance. The lease contains what was the contract between the parties, and the declaration sets it out literally. The rent was to be payable in each and every year during the term, by regular half-yearly payments, and the defendant covenanted accordingly; that was the contract. A collateral arrangement was entered into, at the same time, by which a sum of money was advanced, to be applied in discharge of those gales that were to accrue due on the 1st of November, 1846, and the 1st of May, 1847. That was no variance of the contract, and I am therefore of opinion that the contract is legally set out in the declaration.

Demurrer overruled.

ROLLS COURT.

MORRISSEY v. FITZPATRICK.—April, 18.

Practice—Receiver—Replevin.

Where tenants have admitted that rent is due, and paid sums on account, the Court will make an order restraining them from proceedings in replevin. Semble, if the tenant plead non tenuit, the Court will not interfere.

Mr. W. Smith, on behalf of the receiver, moved that John Duggan and Patrick Duggan, tenants of part of the lands over which the receiver had been appointed, might be restrained from proceeding in replevin brought by them and returnable to the Quarter Sessions, for a distress made by the receiver for non-payment of rent. From the affidavit of the receiver, it appeared that both of the tenants admitted that the sums returned by the former receiver were due by them, and the sum of £13 was paid by one of them on account of the arrear, and £12 by the other. On the 15th of February, 1849, the receiver distrained for the balance, and on the 24th replevins were issued returnable to the Court of Quarter Sessions, and which were to be tried on the 21st of April. There was but one part of the leases, and they had been given to the tenants by the father of the inheritor, for the purpose of registering votes. The affidavits further stated, that the receiver believed these replevins were issued for the purpose of embarrassing him in the discharge of his duty, and without any just reason, and purposely to disqualify him to be examined as a witness; and under such circumstances, it would be difficult as well as expensive to succeed in the suit, and the receiver was likely to be defeated with costs upon technicalities. Also, that the success of the plaintiff would be injurious, and have a bad effect upon the other tenants, who appeared to combine against payment of rents to the receiver; and unless they were restrained from proceeding in this way, and by legal technicalities defeating the right of the receiver, he would be unable effectually to discharge his duty as receiver.

MASTER OF THE ROLLS.—In strictness, the notice given, which is but four days, is not sufficient. The late Master of the Rolls considered that the Court had power to make an order to stay such proceedings, and in the Court of Exchequer similar orders have been made. If the plea had been *non tenuit*, I do not think the Court ought to interfere, but where the tenants have paid rent, I will make the order.

LAWSON, Petitioner, GRIFFIN, Respondent.—April, 18.

Practice—Receiver—Poundage—Costs.

Mr. Harris moved that the receiver might be allowed his poundage, his account not having been passed within the time limited by 148th General Order.

MASTER OF THE ROLLS.—In this case, I will, under the circumstances, allow the receiver his poundage, but will not give the costs; it was not necessary to have presented a petition.

“Let the said Master be at liberty, if he shall

think fit in passing the petitioner's present account, to allow him his poundage, and no rule as to the costs of accounting; and let the receiver abide his own costs of this petition.”

Rolls Petition Book, Lib. 28, p. 270.

KIRKWOOD v. LLOYD.—April 20.

Practice—Suppression of Depositions.

The court will not make an order to suppress depositions, on the ground that some of the interrogatories which elicited the depositions were leading, unless it be shewn what part of the depositions is an answer to the leading interrogatory, and then only so much as is an answer to the leading interrogatory, will be suppressed. That a deposition is not evidence, is an objection for the hearing not to be taken by motion to suppress interrogatories.

In this case, a purchaser having made an objection to the title, on the ground that there had been no evidence of the payment of rent by any of the tenants of certain lands; and the plaintiff in the cause having got liberty to examine witnesses for the purpose of proving payment of rent by the tenants, a certain book was produced to a witness, and he was asked, first, were the entries in that book in his own, or in any other person's handwriting whom he knew, and if in any other person's, in whose? He was then asked, were the entries in that book correct?

Mr. Sergeant O'Brien moved, that the depositions in answer to the interrogatories before given should be suppressed. The question has been put in a leading form; whether the book was in the handwriting of the witness, was not sufficiently investigated before the question as to its correctness was put. The interrogatory is manifestly framed for the purpose of suggesting the desired answer to the witness, and to apprise him of the answer he ought to make.

Mr. Green, Q.C., contra.—The test of a leading interrogatory is given 1 Phil. on Evidence, 301; *Lincoln v. Wright* (4 Bea. 165), form of the interrogatory is given at page 168 of the same report.

Mr. A. Graydon cited *Aylward v. Kearney* (2 Ball & B. 463).

Mr. McMahon in reply.

MASTER OF THE ROLLS.—This is an application which is seldom made, and I do not recollect such an one since I sat in this court. According to the English cases, this motion is not regularly brought forward. The course in England is to refer it to the Master to report which or what part of the interrogatories is leading, and the depositions in answer to the leading interrogatories, or the part of the deposition which is in answer to the leading interrogatory is ordered to be suppressed. Here the application is to suppress the whole of several depositions; and counsel does not argue that more than one interrogatory is leading. I shall not entertain such an application, that because a few lines in an interrogatory are leading, the whole of several depositions is to be suppressed. The objection in this case is evidently mistaken, it

really being that some of the depositions are not evidence; and this is an objection which should be made at the hearing.

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KEOGH v. KEOGH.—April 20.

Practice—Bidding-solicitor.

Even though a solicitor, who has acted in a cause, discharge himself, the Court will not allow him to bid.

This was an application for an order to give liberty to the plaintiff's solicitor to bid for property to be sold under a decree in this cause. The solicitor had discharged himself for the purpose of bidding.

Mr. Deasy—Though the rule is laid down strictly that a solicitor should not bid without the permission of the Court, and that on grounds of public policy; yet it seems there is no objection that the Court should make an order in a proper case for it. The cases only go to shew that it is not permitted without the order of the Court.

April 23—MASTER of the ROLLS.—The fact of a solicitor discharging himself from the office, cannot justify the Court in permitting him to bid, unless upon the consent of all parties to the cause; for if, in general, he were permitted to purchase, he would then acquire an interest in depreciating the value of the property to be sold under the court; also, during the progress of the cause, a solicitor has an opportunity of becoming acquainted with any flaw in the title. My present impression is, that without a consent, I ought not to make this order. Lord Eldon considered that the fact of a solicitor discharging himself does not make any difference.

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KELSON AND WIFE v. LEWIS.—May 11.

Practice—Notice to Respite Publication.

Mr. Hobart applied to the court under the following circumstances. On the 4th instant, a notice of motion had been served in this cause to respite publication from the 7th to the 21st instant. The defendant offered to consent to appear without service of subpoena, so that the cause would be heard next Term, before the motion could be heard. The solicitor for the opposite party lodged with the Examiner the certificate of the rule having been served, and the Examiner stated he would pass publication. [*Master of the Rolls.*—Where a notice of motion to respite publication has been served, it is a very improper proceeding for any solicitor to pass publication.]

The Examiner having informed his Honor that publication had been passed,

MASTER of the ROLLS.—Publication should not have been passed, and I expect that such a proceeding will not, in future, be taken by any solicitor of this court. I will hear the motion to respite publication notwithstanding.

EQUITY EXCHEQUER.

REILLY v. SHIEL.—April 28, May 5.

Practice—Certificate of lis pendens under the 11 and 12 Vic. c. 120. s. 12.

Mr. Leach moved that the proper officers might be directed to issue a certificate of *lis pendens*, under the 11 & 12 Vic. c. 120, s. 12. There was a difficulty as to who was the proper officer, within the meaning of the act.

PER CURIAM.—For the purposes of the present application, we shall direct the Filacer to issue the certificate; and for future cases of a similar kind, we shall provide by a general order.

Note.—7 & 8 Vic. c. 90, s. 10, enacts, "that from and after the first day of November, one thousand, eight hundred, and forty-four, no *lis pendens* shall bind or affect a purchaser or mortgagee, without express notice thereof, unless and until a memorandum or minute containing the name and the usual or last-known place of abode, and the title, trade, or profession of the person whose estate shall be intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with such officer so to be appointed as aforesaid, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*, and which book is to be intitled "the Index to *Lis Pendens*;" and such officer shall be entitled for every such entry to the sum of two shillings and sixpence; and the provisions herein before contained in regard to the re-registering of judgments every twenty years, and the operation thereof, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be re-registered under the provisions of this act."

The 11 & 12 Vic. 120, s. 11 & 12, enact, "That from and after the passing of this Act, every Court, Judge, Commissioner, or other person by whom any decree, rule, or order has been or shall be pronounced or made, which, under the said Act of the third and fourth years of the reign of her Majesty, has the force and effect of a judgment, upon its being made to appear to them or him that such decree, rule, or order has been fully performed, complied with, or satisfied, shall direct the proper officer to give a certificate thereof, and record the same in his office; and in case said decree, rule, or order, shall have been or shall be registered under the provisions of the said Act of the third and fourth years of the reign of her Majesty, or under the provisions of the said recited Act of the seventh and eighth years of the reign of her Majesty, the Registrar of judgments shall, upon the lodgment with him of such certificate, cause a memorandum thereof to be annexed or subscribed to the entry of the Registry of such decree, rule, or order, specifying therein the date of such certificate, and shall sign such memorandum, and shall, if required, cause a minute of the entry of such memorandum to be endorsed upon a duplicate of such certificate; and in every search made in said judgment office after the entry of such memorandum, whereon such decree, rule, or order shall appear, the entry of such memorandum of satisfaction shall also be stated. And be it enacted, That from and after the passing of this Act, no judgment, crown bond, or recognizance, rule, decree, order, or *lis pendens*, shall be registered by the said registrar of judgments, pursuant to the provisions of the said Act of the seventh and eighth years of the present reign, unless and until there shall be subscribed to the memorandum or minute by said Act required to be left with said Registrar, a certificate of the existence of the judgment, crown bond or recognizance, rule, decree, order, or *lis pendens*, described in said memorandum or minute, such certificate to be signed by the proper officer of the court in which such judgment, crown bond or recognizance, rule, decree, order,

QUEEN'S BENCH.

RE HOBSON AND OTHERS V. BURNS.—April 28.

ment—Adverse Possession—Acknowledgment Title—Statute of Limitations—3 & 4 Wm. 4, 27.

ment in the schedule of an insolvent debtor, the year 1828, that she had been "defeated" 1824 in a former ejectment brought on the rises of three lessors of the plaintiff, one of whom was a lessor in the present case, held, that this was no acknowledgment of title within the 14th section of the 3 & 4 Wm. 4, 27, in any one of the said lessors.

also, that such statement did not amount to more than a mere narrative of a past transaction, it was not an acknowledgment of title within the 14th section.

re—Whether a statement by an insolvent in schedule is, under any circumstances, a sufficient acknowledgment within the 14th section. *rett v. Bermingham (Flan. & Kel. 556).*

ment on the title for the lands of Cloonarcane, county of Galway. The declaration contained four demises that chiefly relied upon being in the name of Charles Davis, in whom the estate in a certain term of years in the lands in question was alleged to be vested. It appeared by a deed dated the 12th of February, 1824, that this property was demised to one William Mannion, for the term of 500 years, for the purpose of securing the re-payment of £1,300 to a mortgagee, and subject thereto, upon trust, for the benefit of the inheritance. Some time after the execution of this deed, Kelly, the beneficial owner of the property, granted a lease of the same to a person named Mannion, at a yearly rent. The estate on the mortgage debt having fallen into arrears, proceedings were taken in Chancery for recovery of the same, and a series of receivers appointed, to whom Mannion, and afterwards Edward Mannion, paid rent up to the 1st of November, 1824.

Mrs. Mannion having subsequently become a widow, an ejectment was brought against her in the year 1822, by leave of the court, which contained three demises, one of them being in the name of William Davis, the personal representative of Birch. In that action, judgment was had in favour of the plaintiff, as of Trinity Term, 1823. An order was subsequently issued, but never executed. In Easter Term, 1825, an action for mesne profits was commenced against Mrs. Mannion, and judgment was therein recovered against her for £16s. 4d., for which sum, and the taxed costs of the ejectment, £76 16s. 3d., she was ordered to pay in October, 1827.

Mrs. Mannion, thereupon, on the 14th of March, 1828, filed her petition and schedule in the Insolvent Court, duly signed by herself and verified on

oath, and was subsequently discharged from custody by order of the court. The schedule contained the following passages:—"1823, Morgan Rattler, lessee of Edward Hobson, also of George Holmes Sumner, and also of William Davis, £76 16s. 3d. costs of an ejectment in an ejectment cause, in which said Morgan Rattler was plaintiff and myself defendant." "1824, or thereabouts, the said Morgan Rattler, debt and costs, £108 16s. 4d. claimed for mesne rates of the lands of Cloonarcane, in the county of Galway, together with the costs of judgment and execution." "My husband was, in his life-time, possessed of the lands of Cloonarcane, in the county of Galway, containing about forty acres, besides bog, under a lease executed by Edmund Kelly, &c., for lives and years. After my husband's death, my husband and myself continued in possession. In 1824, an ejectment on the title was brought in the name of lessee Sumner and others, to which I took defence, not knowing any title the plaintiff had. However, on the trial a mortgage was proved which had been executed by Kelly prior to his making the lease to my husband, and I was defeated." On the face of the balance-sheet in the front of the schedule was this statement—"Since my husband died, my children and myself resided on the lands of Cloonarcane, in the county of Galway, the produce of which was barely sufficient to support us." Mrs. Mannion, after her discharge, continued in possession of the premises in question until her death, in 1840, and she was succeeded therein by the defendant Burns, who had married her daughter. No rent had been paid from 1820 down to the bringing of the present action in Easter Term, 1847. Charles Davis, the principal lessor of the plaintiff, was the administrator *de bonis non* of W. Davis, one of the lessors of the plaintiff in the ejectment of 1822, who was the representative of Birch, the termor for five hundred years. At the trial of the cause at the last Spring Assizes for the county of Galway, before Moore, J., a draft of a special verdict which had been previously agreed to, and signed by the respective counsel on both sides, was read in evidence on the part of the plaintiff. This set forth the facts enumerated above. The jury, however, under his lordship's direction, found for the defendant, the learned Judge being of opinion that the Statute of Limitations had sufficiently barred the claim of the lessors of the plaintiff. On the 18th of April, a conditional order was obtained to set aside the verdict for defendant, and enter one instead thereof for the lessors of the plaintiff, the parties consenting that the case should be argued as a special verdict on the facts stated in the draft. The point chiefly relied on for the lessors of the plaintiff was, that the passages quoted above, in Mrs. Mannion's schedule, constituted a sufficient acknowledgment of title in them, within the 14th section of the 3 & 4 Wm. 4, c. 27, to avoid the bar of the statute.

pendens shall have been entered or obtained; and he said registrar of judgments, upon the lodgment of any such memorandum or minute, shall, if required, endorse upon a duplicate thereof a certificate of the date and entry thereof, for which certificate no fee shall be paid to him beyond the fee authorized by the said Act in such entry."

Cause was this day shewn for the defendant by Walker, Q. C.—The admissions in the schedule amount to no acknowledgment of title; Beytagh on Limitation, 80, where the opinion of Lefroy, B., who tried a former action of ejectment between the same parties in 1844, is cited.

We contend, first, that an acknowledgement in an insolvent's schedule is not within the scope of the act; and, secondly, that even though such were the case, there is here no such admission as the act requires. There has been much discussion, both in this court and the Exchequer, as to whether an admission in a schedule is one within the meaning of the 40th section. There is, however, one decision of a Court of Equity on the affirmative, *Barrett v. Bermingham* (Flan. & Kel. 556, per Sir M. O'Loughlen, M. R.); see also cases of *McCarthy v. O'Brien* (2 Ir. L. Rep. 67), and *Dugdala v. Vize* (5 Ir. L. Rep. 568), in this court, where no express decision was given on the principal point. There is a marked difference between the operation of the 40th and 14th sections; the latter requires the admission to be made to the *party himself*, not to his *agent*. Can a statement in an insolvent's schedule be considered as made to a party in the character of a claimant of land? There was no intention in the mind of the insolvent to give any new right to the land, *Grenfell v. Girdlestone* (2 Y. & Coll., Exchequer, 676); *Holland v. Clarke* (1 Y. & Coll. 151). It cannot be said that any such intent appears in the present case. Has the acknowledgment been made to the party entitled? [*Blackburne, C. J.*—The detaining creditor, in the present instance, was the party entitled.] But here there is, in fact, no acknowledgment. She states in her schedule that she does not know *what title the plaintiff had*. If the acknowledgment is good for anything, it is so with respect to the title of Kelly, the mortgagor; but the ejectment is by the representatives of the testator, who claims paramount to Kelly.

Fitzgibbon, Q. C., Mr. West, and Mr. Beytagh for the lessors of the plaintiff—it is said in this case, that the admissions in the schedule are merely made to the court, but they were for the benefit of all parties intended to be affected by the proceedings. (See 1 & 2 Geo. 4, c. 59, s. 10, the Insolvent Act of the day.) The acknowledgment amounts to this, that the representatives of William Birch had *rightfully* recovered judgment. Is not this a present recognition of title? [*Blackburne, C. J.*—This may be a *present recognition* of right, but not a recognition of *present right*.] [*Perrin, J.*—This seems to me to amount to nothing more than a narrative of facts. There are four lessors of the plaintiff in the present case.] If we shew title under one, I am entitled to refer the acknowledgment to him. The recognition of the lease admits, by implication, the title of the mortgagor. [*Crampton, J.*—Your argument goes this length, that an acknowledgment by implication of law is sufficient, whereas the statute appears to contemplate an express acknowledgment.] No precise form of acknowledgment is necessary, *St. John v. Boughton* (9 Sim. 219). There is no distinction between sections 40 and 14, so far as the essence of the acknowledgment is concerned. *Incorporated Society v. Richards* (1 Dr. & War. 290), there the nature of the acknowledgment required by the 14th section of the statute is discussed. The reason why the widow Mannion disclaims previous knowledge of the lessor's title is to exclude the conclusion of the court that she had taken a

vexatious defence, *Doe dem. Lord Spencer v. Beckett* (4 Q. B. 601).

Mr. Concannon, in reply.—*Scott v. Nisbet* and *War. 388*) shews that a present right estate accrues from the time when the Statute Limitations begins to run. Can it be contended that an admission to-day that a party paid another in 1820, amounts to an acknowledgment of present title. This is a mere relation of antecedent facts. *Hill v. Stowell* (2 L. & S. per Burke, C. J., as to what should be in the mind of the person making the acknowledgment). The Act of Parliament contemplates a *present*, not a past right. Here there is not even a claim that rent was due by the insolvent from the time her possession became contentious by constructive law, which was from the day of the demise and ejectment.

BLACKBURNE, C. J.—This was an application to set aside a verdict had for the defendant in action, and to enter one for the plaintiff, and to leave reserved. The whole question turned on the legal effect of certain statements contained in a schedule filed by an insolvent debtor, pursuant to the statute, as amounting to an admission within the 14th section of the 3 & 4 Wm. IV. With respect to the question, whether an acknowledgment can, under any circumstances contained in an insolvent's schedule, at present, give no opinion. [After reading the 14th section, his Lordship observed, that the language in the schedule relied on was that commencing with the words, "My husband was, in his lifetime, possessed of the lands of Cloonarcane, &c."]. Objections have been taken to the position that these statements comply with the requirements of the statute. The first was, that there was no acknowledgment of the title of any one particular person. There are here four lessors of the plaintiff, and the name of the party who now seeks to avail himself of the acknowledgment was not specified in the schedule. In fact, the only party at issue before the court who was so named, was the defendant, *Hobson*. It is quite ambiguous of what was an acknowledgment. In my opinion it is quite impossible to hold it to be an acknowledgment of the title of *any* person. The other objection is, that the acknowledgment is more substantial in its nature; namely, that it is no recognition of any *existing* title. That objection appears to me a perfectly valid one. The recognition which the statute contemplates is not a present title, but as when once made by a party in possession, it actually and virtually vests in the person to whom it is made a present title. The construction of the 40th section confirms this view of the 14th section, both having precisely the same object; and the recognition of a present right of possession.

Could it be for a moment held that a present recognition of a right of entry, no matter how remote, could confer a title to recover? In other words, how could an acknowledgment made in 1828 of a title in 1824, operate as an admission of a present right? According to the argument of the plaintiff, such a recognition might refer to a period fifty years back, and nevertheless create a title contemporaneous with the making of the acknowledgment. What is set forth here amounts to such

more than that in 1824 the party held the premises under a certain lease which had been evicted by title paramount; and this, as has been observed, is merely a narrative of facts, and by no means such a recognition of title as is required by the statute.

CRAMPTON and PERRIN,* J.J., concurred.
Cause shewn allowed.

COMMON PLEAS.—EASTER TERM.

THE GUARDIANS OF THE POOR OF THE CASTLE-
REAGH UNION v. DILLON.—April, 28.

Bond conditioned for the performance of duties—
Assignment of Breaches—Plea of non est factum
—Verdict—Vice-guardians of the Poor.

A verdict obtained upon a bond conditioned for the discharge of the duties of Poor Law clerk will not be set aside upon the ground that no breaches were assigned before the trial.

The paid officers appointed under the 25th and 26th sections of the 1 & 2 Vic. c. 56, may properly sue under the style of "The Guardians of the Poor of the—Union."

This was an action in debt, tried before the Lord Chief Justice of the Common Pleas, in the sittings after last Hilary Term. The action was brought upon a bond conditioned for the due discharge of the duties of a Poor-law Clerk. The plaintiffs declared as on an ordinary money-bond. There were no common counts. The defendant, without craving *oyer*, pleaded *non est factum*; and issue having been taken thereon, the case went to trial, without any breaches having been assigned by the plaintiffs. Upon the plaintiffs' producing and proving the execution of the bond at the trial, Counsel for the defendant objected to the proceedings as irregular, inasmuch as the bond produced appeared to be conditioned for the due discharge of an office, and no breaches had been assigned; and called upon the judge to non-suit the plaintiffs, or to direct a verdict for the defendant, upon the following grounds:—1st, that no order of the Commissioners to bring the action was shewn; 2nd, that, upon the evidence, the plaintiffs were not entitled to maintain the action; (this objection was founded on evidence adduced at the trial, to the effect that the Guardians had long since ceased to act, and that the present Board consisted of Vice-guardians appointed under the 1 & 2 Vic. c. 56, s. 27;) 3rd, that no breaches were assigned. The learned judge, however, declined to stop the case, but reserved the points, with leave to the defendant to apply to the Court above in case of a verdict against him.

Verdict for the Plaintiff.

Mr. Meagher, having on a former day obtained a conditional order, "that the verdict had for the plaintiffs be set aside, or that a new trial be had, or a non-suit entered."

Mr. Armstrong, Q.C., (with whom was Mr. Charles Kelly,) now shewed cause. The 1st objection is, that there was no order of the Commissioners authorizing the action. [Mr. Meagher for

the defendant.—We give up that objection.] Two others remain, and the first to which I shall address myself is that which relates to the suggestion of breaches. It is assumed on the other side, that it was necessary to assign breaches before the trial, although the declaration was as on a common money-bond, and the plea thereto the general issue. The defendant's course should have been, to crave *oyer*, and set out the condition of the bond in his plea, and thus have compelled us to assign breaches in our replication. But not having done so, and having simply pleaded *non est factum*, the only question in issue is, whether the defendant executed the bond, as stated in the declaration. In *Snell v. Snell*, (4 B. & Cres. 749,) Bayley, J., says, "If a plaintiff states the legal effect of a deed, the defendant has a right to see it on *oyer*, and if it varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead *non est factum*, without setting out the deed." That was the course taken by the defendant here, and if he was conscious, as he must have been, that he had entered into a bond to the plaintiffs, the only defence raised by the plea is that of a variance. I can find no case which decides, that, upon such an issue being joined, it becomes necessary to assign breaches before the trial. In *D'Aranda v. Houston*, (6 Car. & Payne, 511,) Alderson, B., certainly expresses some doubts upon the subject. He there says—"The grave question will be, whether this trial will not be thrown away, as they have not assigned breaches under the statute 8 & 9 W. 3, c. 11." And again—"I have great doubts whether some application may not be made to the Court next term." But I have looked with care to see whether such application was ever in fact made; and I have not been able to find any report of it. The only authority which I can find is that of Mr. Sergeant Williams, who has a very elaborate note upon the subject (1 Saund. 58, a, 5th Ed.) to the case of *Gainsford v. Griffith*, he says, "With respect to the pleading upon this statute (8 & 9 Wm. 3, c. 11, English, similar to 9 Wm. 3, c. 10, Ir.) the general practice is to declare as upon a common bond, &c. But the best method seems to be to state the condition of the bond and the indenture, and to assign the breaches in the declaration. For if the defendant should plead *non est factum*, the plaintiff may find some difficulty in proceeding under the statute; for it does not seem clear whether in that case he is to suggest breaches, or to sue out a *scire facias*;" and he then refers to 2 Saunders, 187 a., 187 b. He does not say anything more than that "there may be a difficulty;" but in the note to which he refers, in 2 Saund., to the case of *Roberts v. Mariett*, that doubt is removed, and he treats the case of *Ethersey v. Jackson*, (8 Term. R. 255,) as conclusive in our favour. He there says—"It does not appear that this decision turned at all on the circumstance of the condition of the bond having been set out on *oyer*, for the reasoning of the Court seems to extend to all cases where the defendant pleads *non est factum* to the declaration. If the plaintiff should inadvertently recover a verdict on the issue of *non est factum*, without

* Moore, J., was absent from illness.

entering a suggestion on the the roll, it may be asked whether he can do so afterwards, before judgment? There seems to be no good reason why he should not, because the object and intent of the statute is as much answered as if the suggestion had been entered before the verdict; and the principle of the above cited case of *Ethersey v. Jackson*, seems to warrant the entering of a suggestion at any time *before* judgment." That note has been before the profession for a number of years, and has frequently been cited, without having ever been found fault with. But further, even if we were irregular, we have obtained a verdict which is perfectly good; and the irregularity is no ground for setting it aside. With respect to the second objection, namely, that vice-guardians had been appointed, and that, consequently, the action being brought in the name of the "Guardians of the Poor of the Castlereagh Union," must fail. There are two answers to that objection:—First, the only issue here is *non est factum*; and evidence of their being paid guardians was not to the issue, and, therefore, inadmissible. But, supposing the evidence to have been admissible, we still contend that the action is maintainable under the provisions of the Poor-law Act, 1 and 2 Vic. c. 56. The 25th and 26th sections provide for the appointment of vice-guardians to act as guardians in certain cases; and then the 27th section enacts, that the Board of Guardians for every union, "*including all persons herein-before empowered to act as guardians*" shall be authorized to sue and be sued in the name of "The Guardians of the Poor of the—Union." This, we conceive to be a conclusive authority, enabling those paid officers to sue, as here. [*Jackson, J.*—It would have been a great omission if the act had not contained a provision of that nature.]

Mr. Francis Meagher, with whom was *Mr. Joseph Burke*, contra.—There is a very material difference between the English and Irish acts. The objection is one of importance; for it is certainly made in aid of the objects of the act, and to guard the defendant against oppressive damages. The convenience of the case is clearly with the defendant. [*Jackson J.*—No doubt it would have been more convenient to assign breaches; but the question is, was it necessary to do so. *Ball, J.*—However, the inconvenience is one resulting to the plaintiff himself; it creates a difficulty in his way, as pointed out by Sergeant Williams in his note.] In *D'Aranda v. Houston*, already referred to, Baron Alderson expresses very serious doubts; and that was upon the construction of the English Act, while the Irish is much stronger. There are two classes of cases contemplated by both acts: 1st. where the defendant pleads an issuable plea, and secondly, where there is judgment by default, or on confession; but the Irish act (9 Wm. 3, c. 10, s. 8), after providing for the case of an issuable plea, goes on in these words, "and if it shall happen that such defendant or defendants *shall not plead to the issue*, but judgment shall be given against him or them, for such plaintiff or plaintiffs upon demurrer or by *nihil dicit*, &c.; then, and in such case, it shall be lawful to, and for such plaintiff or plaintiffs

to suggest upon the roll, &c." The English act merely says, "And if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit* &c.," it does not contain the words, if the defendant *shall not plead to the issue*. Now unless your Lordships will strike a pen across these words, it is impossible to suggest breaches in Ireland, after the parties have pleaded to the issue. [*Ball, J.*—Are not these words necessarily understood in the English Act? There can be no plea of *nihil dicit* where the party has pleaded to the issue; there can be no judgment on confession where the defendant pleads an issuable plea. The words of the two acts amount to the same thing. *Jackson, J.*—Both the acts profess to be conversant with two classes of cases, namely, where the parties have pleaded, and where they have not. You must shew that there is some substantial difference between the two acts.] [*Ball, J.*—There is nothing negative in the section in either act. The English act gives authority to suggest breaches in certain cases; and yet we have high authority in England that there are other cases in which the same thing may be done. If that be the law in England, it is just the same in Ireland.] There is no case in England on this subject; and no authority except that of Sergeant Williams; and, when it is considered how frequently the dicta of even the most eminent judges are erroneous, the Court will have no difficulty in now giving this act such a liberal construction as will protect the defendant, and not such an interpretation as will saddle him with the costs of two trials, where the damages assessed against him may not be forty shillings. [*Jackson, J.*—Suppose we went the full length with you, that Mr. Sergeant Williams' note is no authority, you have still this difficulty to contend with, that you are trying to set aside a verdict already had. I do not think you will find any case in which a verdict had been disturbed. We do not decide that this proceeding was regular; we only refuse to set aside the finding of a jury.] The first moment we saw the bond at the trial, and had knowledge that this was the bond sued upon, we objected, and called for a non-suit; and, the Judge having refused, we now come here still relying upon the same objection. [*Ball, J.*—The case of *Ethersey v. Jackson* appears to be a distinct authority for entering a suggestion on the roll at any time *before* judgment; and, therefore, an authority for what the plaintiff here proposes to do, namely, to hold his verdict, to proceed to enter a suggestion of breaches, and to have judgment afterwards. That course removes any difficulty which may appear in this matter; for we do not add another case to those mentioned in the statute, which all refer to suggestions *after* judgment, whereas the present case is *before* judgment.] The first part of the section is that which applies to cases *before* judgment; and in *Ethersey v. Jackson*, the plaintiff was in a condition to comply with the clause contained in that first part, that "thereupon it shall and may be lawful for the jury, not only to assess such damages, &c., but also to give damages for such of the said breaches," &c. There the plaintiff entered a suggestion before the trial, and,

consequently, there was but one jury and one verdict. [Ball, J.—My impression is, that this case falls under the first part of the section; but it is not necessary to decide that point. Jackson, J.—The clause, “thereupon it shall be lawful,” &c., is to give power to the jury to assess damages on the *postea*, which otherwise they could not. That is to say, provided the suggestions were made before the trial, for otherwise it could not be done; and, therefore, when the suggestion has not been made before the trial, as in the present case, the proper course will be, to proceed by the usual common-law method of a writ of inquiry.]

Upon the second question, counsel for the defendant contended, that the words of the 27th section of the Poor Law Act, “All persons herein-before empowered to act as guardians,” did not apply to vice-guardians, whose duties are to be defined by the commissioners.

PER CURIAM.—We think the words of the section clearly include vice-guardians. Allow the cause shewn, but without costs, inasmuch as the case is one of some doubt, and the plaintiff might have set the breaches out in his declaration, which would have been a very desirable course.*

EXCHEQUER OF PLEAS.—EASTER TERM.

CRONIN v. MURPHY.—April 18, 20.

Pleading—*Scire Facias* by Administrator.

An administrator cum test. annexo may maintain a *scire facias* upon a judgment obtained by an administrator *durante minore ætate*; and the *scire facias* is sufficient in form, though it does not aver that the defendant was summoned to shew cause why the plaintiff, as such administrator, should not have execution, &c.

Scire facias by an administrator, upon a judgment acknowledged to an administratrix *durante minore ætate*. The *scire facias* ran thus:—“Victoria, &c., to the Sheriff, &c.—Whereas Catherine Moriarty, administratrix with the will annexed of Daniel D. Cronin, late of, &c., our debtor, &c., upon the confession and acknowledgment of Thadee William Murphy, of, &c., and by consideration of the same court, recovered against the said defendant, T. W. M., as well a certain debt of £1,000, as also £2. 3s., which in said court was adjudged to the said plaintiff for his damages occasioned by detaining that debt whereof the said defendant was convicted, as by the records of said court fully appears; and whereas, at the time of the obtaining the said judgment, in form aforesaid, the said Catherine Moriarty was administratrix of the said Daniel D. Cronin, pending the minority of Henry M. Cronin, who has since obtained his full age of twenty-one years, whereupon administration with the will of the said Daniel D. Cronin annexed, was, in due form of law, granted forth of, &c., unto the said H. M. Cronin,” &c., in the common form, and concludes with profert of the letters of administration.

Special demurrer to *scire facias*, on the ground that it did not appear that Catherine Moriarty obtained the judgment, as administratrix of the said

Daniel D. Cronin, and because the said Thadee Wm. Murphy was summoned to shew cause wherefore the said H. M. Cronin ought not to have execution against him, &c., instead of being summoned to shew cause wherefore the said H. M. Cronin, as such administrator, ought not to have execution, &c.

General demurrer, on ground that *scire facias* on such a judgment was not maintainable.

Mr. Joseph Reeves (with him Mr. Leahy, for demurrer.—First, it does not appear that the judgment was obtained by Catherine Moriarty, in her representative capacity. A *scire facias* requires the same particularity of averment as a declaration, and is open to the same objections on demurrer. Several cases decide, that in declarations by an executor, the omission of the term “as” is fatal. Next objection turns on the construction of the statute 7 Wm. 3, c. 6, 1r. Unless the present case is provided for by the statute, the *scire facias* cannot be maintained at common law. An administrator *de bonis non* could not have a *scire facias* upon a judgment obtained by the original executors or administrators, for he comes in paramount to the title, and is no party thereto, *Snape v Norgate*, (Cro. Car. 167, S. C. 1 Roll, abridgment, 890, pl. 3; Sir Wm. Jones, Rep. 214; 1, Williams on Executors, 767, (last edition), if an executor brings a *sci fa*, on a judgment, and subsequently dies intestate, the administrator *de bonis non* must bring a *Scire facias*, on the original judgment, (2, Lord Raymond, 1049), *Brandling v. Barrington*, (6 B. & C. 476.) The English analogous statute has, likewise, a *casus omissus*, for it applies only to judgments after verdict. Counsel also cited Dwaris on Statutes p. 614.

Sir Colman O’Loughlen and Mr. Berkeley, contra.—As to the objections to the form of *Scire facias*, it was held sufficient, in *Hanyngton v. Cairnes*, (5, 1r. L. Rep. 333); *Vance* and another, v. *Brassington*, (1, 1r. Jur. p. 8.) [*Pigot, C. B.*—As to that point, we must treat it as “*res judicata*.” Next, as to the objection in point of substance, this *Scire facias* may be maintained independently of the statute 7 Wm. 3, c. 6. The position of an administrator *de bonis non* is not analogous to that of administrator *cum testamento annexo* on judgment obtained, by an administrator *pendente minore ætate*, as here. The former comes in by title paramount, derived from the ordinary, while the latter is the mere bailee, and acts in the name of the infant administrator. [*Lefroy, B.*—It is like the case of an infant suing by guardian, when he attains his age he can carry on the suit in his own name.] Counsel also cited Williams on Exors., 401; *Panton v. Truelock*, (2, Keble, 6, 11, 30;) — v. *Croft*, (1, Lord Raymond, 265; *Heudley v. Kelly*, (2, H. and B. 591; *Moyles Entries*, 125.)

The Court directed the case to stand, that a search for precedents might be made in the office.

April 20.—Sir Colman O’Loughlen stated, that after a diligent search, only two precedents, *Administratrix of Dowling v. Smith*, 1812; *Henry v. Phillips*, Mich. 1826, had been found of a *Scire facias* by an administrator, upon a judgment obtained by administrator, *durante minore ætate*, and the form of them coincided with the one under consideration of the Court.

* Doherty, C.J., and Torrens, J., were absent.

PENNEFATHER, B.—The question in this case is decided by reference to the course of precedents, and those are in favour of the *scire facias*, in its present form. If it were a declaration, the averment would not be sufficient, but, both in this country and England, the *scire facias* is only for the purpose of having execution on a judgment already received; and the intendment must be here, that the judgment on which the *scire facias* is brought was recovered by the conuzee in her representative capacity. As to the present case not coming within the statute of 7 W. 3, c. 6, it has been held that an administration *durante minore etate* is not a general administration; but such an administrator is a person to whom administration may be granted, as bailee in *usum* and *commodum* of an infant executor; and there is authority for holding, that an executor coming of age may sue on a judgment obtained by the administrator *durante min. etate*. Now, there is no substantial difference between an administrator and executor in this respect; they come within the same reason and the same rule. There is such a privity between the parties, as will enable the subsequent executor or administrator to have execution on a judgment recovered during the limited administration. It is not going too far to hold, that this distinction was present to the mind of the legislature at the time of the passing of 7 W. 3, and may account for their not having provided for such a case as the present.

Judgment for Plaintiff.

M'KENNA v. ADMINISTRATORS OF HARNETT.—
May 1.

Substituted Security—Action for Money paid.

Where a party gives a promissory note in substitution for another, which is accepted by the holder of the first in discharge of it, an action for money paid for the use of the defendant is maintainable.

This was an action on the money counts, and on an account stated between the plaintiff and defendant, as executors of a person named Cornelius Harnett, deceased, and had been tried at the Summer Assizes at Tralee, in 1848, before Mr. Justice Moore. The plaintiff sought to recover on the count for money paid for the use of the intestate Cornelius Harnett, under the following circumstances. The plaintiff and intestate—the former as surety—made their joint and several promissory note, at three months, dated the 11th September, 1846, and delivered it to the Messrs. Wyse, who carried on the trade of distillers, at Cork, for goods supplied by them to the intestate. This note not being paid, the plaintiff, jointly with his son, passed a note to the Messrs. Wyse, on which occasion the first note was given up to the plaintiff. The second note was not paid till after the filing of the plaintiff's declaration about a month before the trial. On this evidence, defendant's counsel objected, that the proof of payment of money before the trial, but after the filing of the plaintiff's bill, and of the service of the plaintiff's bill of particulars, in which the action was expressly stated to have been brought for money paid for the use of the intestate, did not support this action. The

learned Judge refused to non-suit, but reserved leave for the defendant to move for a non-suit, or a verdict to be entered in their favour. There was a verdict for the plaintiff.

Mr. Bennett, Q.C. (with him *Mr. Leahy*), now moved to set aside the conditional order obtained by O'Hea last Michaelmas Term, pursuant to the leave received. They contended that the bill in this case had clearly been treated as money; and relied upon *Barclay v. Gooch* (2 Esp. 571), recognised and acted on by Pollock, C.B., in *Rogers v. Maw* (15 Mee. & W. 444; Judgment, 449). The following cases were also cited:—*Fairlie v. Denton* (8 B. & C. 395); *Cusson v. Chadley* (3 B. & C. 591).

Mr. J. D. Fitzgerald, Q.C. (with him *Mr. O'Hea*) contra.—Relied on *Taylor v. Higgins* (3 East. 169), and *Maxwell v. Jameson* (2 B. & Ald. 51), as being inconsistent with, and overruling *Barclay v. Gooch*. And even supposing that the second note had been taken as a substituted security, there was no evidence that at the time when this action was brought that it would have been ever paid, or even payment demanded.

PENNEFATHER, B.*—The question left by the learned Judge was, whether the second note was taken in substitution of the first. If so, on the authority of Lord Kenyon in *Barclay v. Gooch*, and the observations of Pollock, C.B., in *Rogers v. Maw*, it must be now considered as settled law, that if the second note was so taken in substitution, it was a satisfaction of the original debt. My brother Lefroy and I are of opinion, that that question was found by the jury, and that there was evidence to warrant that finding. The Messrs. Wyse had both the plaintiff and the testator for their security on the first note; that not being paid, the plaintiff asks for time, and gives the second note, getting up the first. The Messrs. Wyse, instead of giving up that note, might have kept it for the purpose, if necessary, of enforcing payment against the intestate.

RICHARDS, B.—I think, in point of justice, the decision of my brethren the correct one. The only doubt on my mind is, whether the question of the second note being taken in satisfaction of the first, was left to the jury.

Cause allowed without costs.

WALKER v. COLLINS.—May, 5.

Practice—Affidavit to change venue.

The prescribed form of the common affidavit, for changing the venue at the instance of the defendant, must be strictly preserved.

Mr. Chatterton moved on behalf of the defendant to change the venue from Dublin to Cork, on an affidavit "that the plaintiff's cause of action, (if any,) in this cause, arose in the County of Cork, and not in the County of Dublin or elsewhere."

Mr. Colles, contra.—The affidavit is insufficient, according to the established rule of the Court. It should have proceeded, "or elsewhere out of the County of Cork."

PER CURIAM.—We must refuse this application. The rule of the Court is unequivocal.†

* Coram Pennefather, Richards, and Lefroy, B.B.
† See acc. *Kelly v. Carmichael*, (Bl. D. & O. 288)

ROLLS COURT.

KELLY v. JACKSON.—*Jan. 18. and April 17.*

leading—Discovery—Professional privilege.

re a bill charges that a defendant is connected with the preparation and execution of certain fraudulent leases, and seeks a discovery of the matters alleged to be fraudulent, the defendant cannot, by reason of professional confidence, protect himself from the discovery.

A bill in this cause was filed the 29th of August, and stated that by lease of the 30th of Nov., the premises called Montpelier House, in the city of Dublin, were demised to J. Fyans at the rent of £150 for three lives with a covenant of perpetual renewal, that all the estate of Fyans was vested in J. D. Duckett, who, by indenture of the 4th of March, 1841, in consideration of £1500, sold said premises to William Troke, one of the defendants, for the term of three lives, and a covenant for perpetual renewal, subject to the annual rent of £125, to which the original rent had been added. The bill then stated that in the year 1842, said Troke was employed in making certain building improvements on said premises, and not having paid therefor by the defendant, commenced an action, and on the 12th of February, 1848, obtained a verdict, and on the 26th of April 1848, entered judgment in the Court of Queen's Bench for the sum of £2s. 10d. That plaintiff then issued a writ of *scire facias*, and was about to extend the interest of said Troke in the said premises when he discovered that he had obtained said verdict, on the 21st of February, 1848, said William Troke caused two leases to be registered which appear to bear date respectively the 1st of February 1848, being the same day for which notice of trial was served, and which leases were to be made between said William Troke, Robert Jackson, one of the defendants, and stepson of the said William Troke. That by one of said leases the said premises of Montpelier House were demised for two lives at the rent of £120, and the other lease in consideration of £280, and the yearly rent of £14; the remaining part of said premises, called Montpelier Cottage, were also demised to said R. Jackson for two lives. That at the time when said two leases purport to bear date, said Troke was indebted to various persons, and fled to Brussels in order to avoid his creditors, and he remained up to and after the 12th of February. That it appeared by the memorials of said Troke that they were respectively witnessed by the defendant, John Graham, as to the execution thereof by the defendant, W. Troke, and they were registered on the affidavit of the said J. Graham, who was attorney of the said W. Troke in the said action, who was resident in Dublin on the said 1st of February, 1848, the day when said leases are made to bear date, and said J. Graham so continued resident in the country until the 12th of February, when said Troke obtained said verdict, and therefore it was reasonable that said J. Graham could have been a party to the execution of said leases by the said Troke on said 1st of February, but same were not executed after plaintiff's verdict, in order to defeat his demand. That said leases were prepared

by the said J. Graham, and at his suggestion, to defeat plaintiff's rights, and prevent him from recovering the said premises for payment of his judgment, and said J. Graham was privy to and cognizant of the fraud, and that previous to the execution of said leases, he caused a case to be prepared, and submitted to counsel to be advised if said leases would protect the premises from plaintiff's demand. That said leases were at a gross undervalue, and the consideration was never paid, and were really made in trust for said defendant, W. Troke, and the bill prayed that the said leases might be declared fraudulent and void as against plaintiff, and that same might be set aside, and that the costs incurred by plaintiff by reason thereof might be paid by the defendants, and particularly by J. Graham, and that an injunction might be granted to prevent Robert Jackson or Wm. Troke from interfering with said premises. The defendant, Graham, pleaded to so much of the bill as regarded a discovery concerning said leases and opinion. That for a long time previous and down to the time of the preparation and execution of said leases defendant was, and continued to be, and then was the attorney and solicitor of the defendant, W. Troke, and he had not any knowledge of, nor was he concerned in said matters, save and except only in his capacity as such attorney and solicitor. That he had not and never had in his possession, power or custody any case, or opinion, or document relating to said matters, save such cases, and opinions, and writing, &c., as came to, and were in his possession solely as attorney and solicitor to the said Wm. Troke, and prayed judgment whether he ought to make any further answer. By his answer, the defendant Graham stated that said leases were executed by said Wm. Troke, at Artane, in the County of Dublin, early in February, 1848, and admitted that same were prepared by him, but stated they were made in pursuance of contracts previously entered into; the answer then denied all fraud, and submitted that the defendant was not bound to answer the 7th interrogatory as being likely to subject him to penalties, and as the plaintiff had not waived same said bill was demurrable, and defendant craved the same benefit as if the objection was taken by demurrer.

Mr. Hughes, Q.C., and Mr. Close, in support of plea, relied on (1 Dan. C. P. 527;) Vent v. Pacey, (4 Russ. 193;) Greenough v. Gaskell, (1 M. & K. 98;) Lord Walsingham v. Goodricks, (3 Hare, 122;) Desborough v. Rawlins, (3 M. & L. 515;) Sawyer v. Bichmore, (3 M. & K. 578;) Herring v. Cloberry, (1 Ph. 91;) Jones v. Pugh, (ibid. 96;) Woods v. Woods, (4 Hare, 83;) Blenkinsop v. Blenkinsop, (10 Beav. 277, S.C. 2 Ph. 607.)

Mr. Christian, Q.C., and Mr. Burroughs, contra, contended that the plea was bad in form, not having been verified by affidavit. (Dan. C. P. 652-6.) Counsel also cited Desborough v. Rawlins, (3 My. & Cr. 515;) Foley v. Hill, (3 My. & Cr. 475;) Knight v. Gale, (Finch, 259;) Greenough v. Gaskell, (1 M. & K. 105;) Harris v. Harris, (3 Hare, 450;) Wall v. Stubbs, (2 V. & B. 354.)

April, 17.—In this case, after stating the facts as above, his Honour adverted to the form of the plea, which covered the greater part of the 7th interrogatory, and prayed judgment whether the

defendant should answer, and stated he had no knowledge of the matters save in his character as attorney, and submitted he was not bound to answer, and by his answer he made the same objection, on different grounds. Upon this point, he referred to the 46th General Order of 1843, which corresponds to the 38th English and Mit. E. P. 5th Ed. 381; (8 Beav. 40, 2 Atkyn. 284;) where it is laid down, that although a party may demur to one matter and plead to another, he cannot plead and demur to the same matter; and in Stephens on Pleading, 327, it appeared that a similar rule prevails at law. His Honour then referred to the 66th General Order, which provides "that no demurrer or plea shall be held bad and overruled on argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea," and was of opinion that the object of that order was to get rid of technical objections, and in Dan. C. P. 761, it is laid down, that in all cases not coming strictly within the terms of the Order, the principles stated by Lord Redesdale, that all the different defences must refer to separate and distinct parts of the bill, still apply; and consequently he considered the case before him within the rule stated by Lord Redesdale. He was of opinion also that the plea was bad in substance, and referred to the cases of *Bowles v. Stewart*, (1 Sch. & Lef. 227;) *Birch v. Beadles*, (10 Sim. 332;) *Ruddy v. Williams*, (3 Jon. & Lat. 1, Mit. 350; Beames on Pleading, 23; Mitf. 282, 285; Beames on Plead. 38; Mitf. Pl. 3 Ed. 199, Note; also the case of *Desborough v. Rawkins*, (3 My. & Cr. 515,) in which Lord Cottenham, page 521, speaking of the privilege of a solicitor, says, "Both *Bramwell v. Lucas* and *Greenough v. Gaskell*, shew that the privilege only applies to cases in which the client makes a communication to his solicitor, with a view to obtaining his legal advice; this is undoubtedly the same ground upon which I held, in *Sawyer v. Bichmore*, that a solicitor, when examined as a witness, was bound to produce letters communicated to him from collateral quarters, and to answer questions, seeking information as to matters of fact, as distinguished from confidential communications." "In *Sawyer v. Bichmore*, the question arose as to a solicitor being bound to disclose the circumstances of certain transactions in which he had been concerned as solicitor. I was of opinion, that the facts were not sufficiently brought before me to shew that they were privileged, and finding it laid down by the Court of King's Bench, that communications are not privileged if coming from any other quarter, but that they would be if they came from the client, I found that a case might exist in which many papers in a solicitor's hands would not be privileged." And (in page 524,) he says "The Court of King's Bench said, that the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him, as attorney in the cause, from the opposite party, in the disclosure of which there could be no breach of confidence." His Honour also referred to Peake, N. P., 508, and to *Greenough v. Gaskell*, (1 M. & K. 103,)

where Lord Cottenham says, "Thus the witness, or the defendant treated as such and called so to discover, must have learned the matter in question only as solicitor or counsel, and in no other way; if, therefore, he were a party, and especially to a fraud—(and the case may be put, of his becoming informer after being engaged in a conspiracy)—that is, if he were acting for himself, though he might also be employed for another, he would not be protected," &c. In *Stanhope v. Nott* (2 Sw. 221, note) a demurrer, on the ground that all the defendant's knowledge was acquired as counsel, was overruled, and the defendant was ordered to answer, for the trust of a counsel did not extend to the suppression of deeds or wills; and *Spencer v. Lettrel*, (ibid.) His Honour, after referring to Mitf. Pl. 224, and Beames on Pleading, 33, said he was of opinion that the plea must be overruled.

POWELL v. POWELL—April 21.

Injunction—Civil Bill Decree.

Where a decree to account has been pronounced in an administration suit, the court will restrain creditors from proceeding on foot of civil bill decrees obtained against the administratrix so far as relates to the assets of the intestate, but the decree being in the nature of a judgment de bonis propriis of the superior courts, the creditors will not be prevented from proceeding against the administrator personally.

Before the decree to account, several parties having proceeded against Catherine Powell, the administratrix of Thomas Powell, deceased, in actions at law, both in the superior and Civil Bill Courts, the administratrix applied to this court for an injunction to restrain those parties from further proceedings at law, and to order them to come in and prove their demands, together with such costs at law as were properly incurred in the said proceedings at law, up to the time at which the several parties had notice that the decree in this cause had been pronounced. The Assistant-Barrister had pronounced several decrees, and Catherine Powell having appealed therefrom, on the hearing of the appeals, Judge Ball made the following order:—"Reverse the decrees, without prejudice to the plaintiff proceeding to a new trial before the Assistant-Barrister, upon the civil bill already served in this cause, on the terms of the defendant being at liberty to establish credits as against the plaintiff on the trial of such civil bills, in the same way as she might have done upon the trial already had before the Barrister on the 16th of October, 1848, but not any credits which would not have been properly chargeable against the said plaintiff on the taking of the account at the said trial; and in the event of the terms of this order not being complied with, the decrees to stand affirmed, without costs, and the defendant to be at liberty to appeal therefrom, as if this order had not been pronounced." Judge Ball had affirmed the decrees, in pursuance of the above order, before this application was made. The defendant had served the plaintiffs with the copy of the decree in this cause, and with a notice cautioning them not to proceed

on the civil bill decrees; this notice was served on the 25th of February, 1849; and the decree had been pronounced on the 26th of January, 1849.

Mr. O'Hara moved for the injunction.

Sir Colman O'Loughlin contra.—The civil bill decrees are now confirmed against the administratrix absolutely, and the parties who have obtained the decrees have a right to enforce their rights against her, for those decrees were pronounced before the decree to account. As to the costs of the motion, *Bookless v. Crumack* (1 Purton Cooper, 125); *Jones v. Jones* (5 Sim. 678); *Egan v. Baldwin* (2 Mol. 552).

Mr. O'Hara, in reply.—They had notice of the decree on the 25th of February, and yet they went on; and those affirmances have been obtained behind the back of the administratrix.

April 23.—MASTER OF THE ROLLS.—I will stay the suits in the superior courts, and will not give the parties who so proceeded the costs of appearing on this motion; for, otherwise, if a great number of actions were depending, all the parties would be entitled to appear, for the purpose of informing the court that they could not offer any opposition to the motion. As to the civil bill proceedings, they stand upon a different footing; for a civil bill decree is in the nature of a judgment *de bonis propriis*, and an executor against whom such a judgment is obtained, is personally liable. It is not necessary to offer any opinion whether the form of judgment on the civil bills is correct or not. The decrees obtained in the present case appear to be in the usual form, and are equivalent to judgments *de bonis propriis* of the superior courts. In *Terravest v. Featherby* (2 Mer. 480), where such a judgment was obtained before decree an injunction was refused; and in the case of *Brooke v. Skinner* (ibid., note), the Lord Chancellor said, "that if the plaintiff at law recovered a judgment *de bonis testatoris*, he would not suffer execution to be taken out on such a judgment; but that if he recovered *de bonis propriis*, this court would not restrain the execution." [His Honour then referred to the judgment in *Vernon v. Thelluson*, (1 Ph. 469-70), and to *Clarke v. Lord Ormonde* (Jac. 124), where the same doctrine is expressed.] The case of *Kent v. Pickering* (5 Sim. 569) was a creditor's suit, and one of the creditors, who was not a party to the suit, had recovered judgment *de bonis testatoris et si non de bonis propriis*; and the Vice-Chancellor said, "where there is a decree for the administration of the assets of a testator, this court will interfere so far as may be necessary to give effect to its own decree; but it will not interpose to protect the executors from any liability to which they may have subjected themselves personally." Even if judgment *de bonis propriis* has been obtained, the court, although it leave the executor liable, will not permit the creditors to interfere with the assets in the hands of the executor. The civil bill decrees, being in the nature of judgments *de bonis propriis*, I can only make an order similar to that in *Kent v. Pickering*, leaving the creditors to make their decrees available against the executors personally. [His Honour then proceeded to consider whether

the decree to account would be a defence to the civil bills, and having referred to the 36 Geo. 3, c. 55, s. 7, and 56 Geo. 3, c. 88, s. 9, by which the defendant is entitled to all matters of defence that he might have had if sued at common law or equity; and to Napier on Civil Bills, p. 107, and p. 86, where the question is considered, whether new evidence is admissible on an appeal from the Civil Bill Courts, made the following order.]

"Let the said Charles Studdert, &c., be restrained from further proceedings at law in the actions commenced against the said J. Powell, as administratrix, &c., and let said parties be at liberty to come in under the decree in this cause and prove their demands, together with such costs at law as they may have respectively properly incurred, &c., up to the time at which the said parties respectively had notice of the said decree, &c., and let John North, &c., be restrained by the injunction of this court from levying in execution, or selling any part of the assets of the late Thomas Powell, under the civil bill decrees obtained by them, or from otherwise interfering in any manner with said assets; and, in taking the accounts in this cause, declare the said Jane Powell entitled to have credit for the costs properly and necessarily incurred by her in said several actions and proceedings."

R. Pet. H. Book 28, fo. 378.

PORTER v. VESEY.—May 1.

Practice—Subpoena—Clerk in Court—Answer for a minor.

Mr. M'Cartney moved that the clerk in court might be at liberty to put in an answer for the defendant, George Stewart, a minor, he had been served with subpoena by the name of Mervin Stewart, but an appearance had been entered in his right name.

MASTER OF THE ROLLS.—I have no authority to direct the clerk in court to file an answer unless the defendant has been regularly served with subpoena.

GREEN v. M'CLINTOCK.—May 1.

Practice—Separate answer—Married woman.

The Court will not make an order that a bill be taken *pro confesso* against a married woman there being no order that she should answer separately.

Mr. Murphy moved to take the bill *pro confesso* against several defendants, two of whom were married women.

Mr. Richards appeared for one of the defendants who answered previously to the motion.

Mr. Jenkins, for the married ladies, opposed the motion.

MASTER OF THE ROLLS.—I have no authority to make an order that the bill be taken *pro confesso* against a married woman, no order having been obtained giving her liberty to answer separately.

REVENUE EXCHEQUER.

REGINA v. —, May, 5.

Practice—Expense of Demurrer-books in Revenue Cases.

In Revenue Cases, the Court will not grant the ordinary rule, that the "Defendant join in the expense of Demurrer-books, or judgment for the Plaintiff."

Mr. Jebb, on behalf of the Commissioners of Excise, moved that the defendant should be directed to join in the expense of books, the traverser having demurred to the information.

PER CURIAM.—The rule of the Court at the Common Law side and the Revenue side of the Exchequer is different. At the Law side, a defendant demurring is ruled to join in the expense of books, or judgment to go for plaintiff; but at the Revenue side such has not been the practice, and we are not disposed to vary it.

QUEEN'S BENCH.—EASTER TERM.

SMITH v. M'EVROY.—April, 23.

Promissory Note—Consideration—Delivery.

A *fi. fa.* having been executed against the property of B., at the instance of A., while the money arising from the sale remained with the sheriff, it was agreed by deed that A. should relinquish the fruits of his execution, and should receive a certain composition on the amount of his claim, along with the other creditors of B. It was also agreed that A. might have the use of the money arising from the levy, on passing his note at four months for the amount to C., as a trustee for the creditors. A., on signing the deed, deposited his note with C.'s solicitor, receiving from him, at the same time, a written undertaking not to part therewith until the creditors had executed or assented to the deed. No creditor except A. signed the deed, which did not appear to have been further acted on.

Held, that, under the circumstances, there was no consideration for the note between the parties.

Held, also, that, independently of this, the action was not maintainable, the note having been deposited by A. in the hands of a third party, to be handed to C. only in a certain event, which had never happened.

Semble, that in point of law there was no delivery of the note.

Assumpsit by payee against maker of a promissory note. The declaration contained one count, on a note dated the 27th of May, 1848, payable in four months, for the sum of £97 15s. 2d., and also the usual money counts. Plea, general issue. Notice to prove consideration, was also served on the plaintiff. At the trial of the cause before Crampton, J., at the sittings after last Hilary Term, it appeared that the defendant had some time previously recovered a judgment, after much litigation, against a person named Reid, for a large amount, and had issued against him a *fi. fa.*, under which his goods were sold. A portion of the debt, however, remained undischarged, and, Reid being

indebted to several other parties, his friends endeavoured to induce the defendant to come to terms with him, and at length prevailed on the former to agree to accept the terms offered to the body of the creditors. A deed of composition was accordingly prepared and engrossed, dated the 27th of May, 1848, and expressed to be made between Reid of the first part, the plaintiff Smith of the second part, and the creditors of Reid of the third part, which recited amongst other things an agreement, that the several creditors who should come in under said arrangement, should receive and be paid a composition of 6s. 8d. in the pound sterling, on the amount of their respective debts to be secured by the notes of Reid, at four and twelve months' date; and that the said M'Evroy, (the defendant,) should have his costs of said motion, (in the suit before mentioned) as between attorney and client, and should be reimbursed the sum of £ , expended by him in lodging a docket of bankruptcy against the said T. Reid, as also the sheriff's fees and expenses of the execution of the said writ and judgment; that the funds in the hands of the sheriff, to the credit of the cause of M'Evroy v. Reid, should, after payment of the sheriff's fees and expenses, be applicable, in the first instance, to the payment of the costs when so taxed, and also the further expenses above mentioned, &c.; and that after payment thereof, the residue should forthwith be handed over to the said John M'Evroy, he passing a promissory note, at four months' date, for the amount thereof, to the said G. H. Smith, the same to remain in his hands until maturity, and then to hand a portion of the fund wherewith the said T. Reid should meet his first composition bills of £ 100 as the £1. The deed after further reciting that the defendant had, pursuant to the agreement made to the plaintiff, his note for the amount in the sheriff's hands, after making the foregoing deductions, then contained a covenant on the part of the plaintiff, Smith, to hold the defendant's note "in trust, as soon as same shall arrive at maturity, to collect and call in the amount secured thereby, and to distribute such amount when by him received rateably, &c., among the several creditors, parties &c., of the third part, they hereby covenanting to receive the same as so much paid by the said T. Reid out of the promissory notes passed by him to them respectively for his first instalment." The deed was executed by the defendant alone of all the creditors, and he, being apprehensive that, if the deed were not generally signed, and Reid made bankrupt, he might be irretrievably prejudiced, in handing over the note to the plaintiff's attorney, obtained from that gentleman the following note:—

"Re THOMAS REID with his Creditors.

* Your note for £97 15s. 10d. is not to be given up until the deed is executed or assented to by all the creditors of Thomas Reid, which bears equal date herewith.

G. D. FOTTELL.

(Dated, May 27, 1848.)

To JOHN M'EVROY, Esq.,

Meeting-house Yard.

It did not appear that Reid had made any exertions to obtain the assent of the other creditors to the deed; on the contrary, they had been settled with.

vidently. The defendant never received any money under the deed. The note when produced appeared to have been in circulation, from which it was inferred that there was no cancellation by the defendant. Upon this state of facts, counsel for the defendant called for a nonsuit, which the learned judge refused, but allowed the plaintiff to take a judgment, subject to be turned into one for the defendant, in case the Court should decide in favour of the plaintiff. The plaintiff, expressing, at the same time, that the action of his mind was with the defendant. A final order was accordingly obtained, in the terms of the present term, against which *Mr. McDonough, Q.C.*, (with him, *Mr. O'Callaghan*), now shewed cause. The plaintiff here sues for the recovery of the note, and the others for the recovery of the deed for such of the creditors as may sign the deed.

The action is by payee of a note against the maker, and notice has been served to prove consideration. The fallacy of the argument on the plaintiff's side consists in the assumption, that the deed is void if not executed by all the creditors. *Blackburne, C.J.*—If there be any consideration for the note, he cannot set up that defence. The defendant signed the deed. *Cole v. Cresswell*, (11 M. & W. 661.) The words of the deed are, "of the creditors who should elect to come in and assent to the arrangement." The document produced as a part of the deed is at variance with the terms of the deed, and was, therefore, not properly receivable in evidence, to vary the effect of the deed under seal. *Lewis v. Jones*, (4 B. & C. 16.) [*Blackburne, C.J.*—The document does in my opinion, contradict the deed, or vary the terms of it.] There is a covenant in the deed, that the note upon trust, to distribute the proceeds thereof rateably between the creditors. This is repugnant to the document, which is *uno flatu* with the deed. In the case of *Lewis v. Jones*, no objection was taken at the trial to the admissibility of the document. Parol evidence cannot be given, to shew a note not to be payable at the time mentioned. [*Crompton, J.*—If we are called on to make a presumption about the dates of these instruments, we must presume them to relate to the same action.] It is a settled rule, that the mere production of the signatures of creditors is insufficient to constitute a deed of composition; a tender to, and assent by, them, must be proved. The note ought to have been given up by the depositary, as well as the signatures of the creditors assenting to the arrangement, as well as their executing the deed, and their having received in ready cash sums of money in satisfaction of their claims, amounted substantially to a deed.

J.D. Fitzgerald, Q.C. and *Mr. R. Armstrong*, in reply.—The deed here is merely collateral to the action, and can be used for the purpose of shewing the consideration of the note. It may be, that there was no delivery of the note; but, if there was no consideration for the same; and, thirdly, there was a distinct collateral agreement, that the note should be delivered only on the happening of an event which never took place. There could have been no delivery until the deed had been executed or assented to by all the creditors. Delivery is as essential to the validity of a

note, as it is to that of a deed. It is, therefore, no contradiction of the terms of the deed, to shew that the note was delivered as an escrow. *Bowker v. Budekin*, (11 M. & W. 128.) Neither the plaintiffs nor the creditors at large were bound by the deed, as they never executed it. *Walwyn v. Coutts*, (8 Mer. 707.)

Mr. O'Callaghan in reply.—The deed must be considered to intercept the note. This latter bears Smith's endorsement, and whether there were a breach of trust in the case or not, the fact of the delivery is clear. The deed was not dependent for its validity upon the signature of all the creditors. This, in fact, was the difficulty started at the time of executing the deed—namely, that the party signing might be bound, and the others free. This led to the collateral agreement, which was intended as a qualification to the terms of the deed. It is said that there was no evidence of assent in this case, but a liberal construction ought to be given to the term. The circumstances of the case must be taken into account, in the construction of this term. [*Crompton, J.*—In no instance has this deed been acted on. How would the case have stood, if Reid had surrendered his whole property to the other creditors.] Your lordship suggests a case which would have completely encroached on M'Evoy's rights; but this is not the present state of facts. Here the main object was to avoid bankruptcy. The witnesses who have been examined in this case depose to the assent of the creditors, when they speak of the various settlements made with them. That is the species of assent contemplated by the document.

BLACKBURNE, C.J.—This was an action by the payee of a promissory note against the maker, and the consideration was examinable between the parties to the suit. The plaintiff, having been served with a notice to prove same, has proposed to do so by giving in evidence a certain deed of composition. Now, had this been a valid instrument, and acted upon by all parties, there is no doubt that the present action would have been maintainable. The plaintiff would then have been the *bona fide* holder of the note, according to the terms of the deed. Reid was indebted to many persons, but not to the plaintiff, who was a bare trustee for the creditors, and had, therefore, personally no right other than that which the deed conferred—namely, to use the security for the benefit of those creditors who should come in and execute the deed. Not one of them, however, came in, or took any benefit from it; no one assented to, or took under it. The evidence is, that some accepted more, and others less, in satisfaction of their claims, but all independently of the deed. On this head, the case is clearly with the defendant, as no consideration is disclosed by the deed, and the note is between him and the plaintiff. Contemporaneously, however, with the making of the note, and as a part of the same transaction, the defendant insisted on having a document signed by the plaintiff's solicitor, with whom the note was to be deposited, that he would not part therewith until the deed was executed or assented to by all Reid's creditors. This was plainly all one transaction, and the document was

not in contravention or contradiction of the deed, but in exact conformity with it. There was an abortive attempt to carry the composition deed into effect, for it was never executed. The plaintiff's solicitor was the trustee of the defendant; and, in violation of his trust, he handed the note over to the plaintiff, and thus enabled the latter to indorse it, and the solicitor then put it into circulation. This fact is established by the cancelled indorsement. I put no improper construction upon this act of the solicitor, but there was a legal obligation imposed upon him to retain the note until the proper event had occurred. I am clearly of opinion, therefore, that a verdict should be entered at once for the defendant, as the plaintiff has not been taken by surprise, and as a new trial could produce no other result.

CRAMPTON, J., concurred.*

Rule to enter a verdict for defendant made absolute.

HALL v. THORPE.—April 27.

Practices—New trial Motion—Surprise—Notice—Affidavit.

An application for a rule nisi, to set aside a verdict, and for a new trial, on the grounds of surprise and the discovery of new evidence, must be founded on affidavit, and notice of motion is necessary.

Mr. R. Armstrong, for the plaintiff, had, on a former day in this term, April, 20, obtained a rule nisi, to set aside the verdict which passed for the defendant, and for a new trial, on the grounds of surprise and newly-discovered evidence.

Mr. Fitzgibbon, Q.C., for the defendant, now moved to set aside the rule, as having been obtained irregularly. The 125th rule of this Court requires, that where a party seeking to set aside a verdict relies upon surprise or fatality, or upon the discovery of new evidence, the application must be grounded upon affidavit, and the opposite party must have notice of the motion.

Mr. Armstrong, contra, admitted that the rule nisi was irregularly obtained, but contended that the defendant had waived the irregularity, by having filed affidavits as cause against the rule.

The Court set aside the rule, but without costs, being of opinion that the defendant had unnecessarily increased the expenses, by having filed affidavits that were immaterial to the motion.

Rule set aside.

IN CHAMBER.

SWALLOW v. BRAZIER.—May, 12.

Practices.

A motion which might have been made during the sitting of the Court, will not be granted in Chamber.

Mr. Codd, for the defendant, moved, on the usual affidavit, that the plaintiff, being resident out of the jurisdiction, do give security for costs.

Mr. Osborne, contra.—The appearance for the defendant having been entered on the 24th of

April, this motion was unavailing during the last term, and to hear it now would be in effect turning the vacation into another term. *Smith v. Shaw*, (3 Law Rep. O. S. 270;) *White v. Mahony*, (Bl. Dun. & Osb. 192.)

BLACKBURN, C. J.—The motion ought to have been made during the sitting of the Court, and must now be refused.

No rule.

EXCHEQUER OF PLEAS.

DELANY v. NEWLAND.—April 30, 31, and May 4.

Bill of Exchange—Fraud—Indorsee without Notice—Onus of Proving Consideration—Howard v. Shaw (Ir. L. Rep. 335) commented on.

In an action by an indorsee against the acceptor of a bill, the defendant gave evidence that the bill was fraudulently filled for a larger sum than had been agreed upon between the drawer and a person who was no party to the bill, but to whom the drawer had sent the stamp, signed in blank. Held, that such evidence was sufficient to throw upon the plaintiff the burthen of proving consideration.

Howard v. Shaw (9 Ir. L. Rep. 335) commented upon, and disapproved of upon the question of fraud throwing the onus on the indorsee of proving consideration.

This was an action on a bill of exchange by an indorsee against the acceptor. Plea, the general issue. At the trial before the Lord Chief Baron at the sittings after Hilary Term, the plaintiff proved the hand-writings of the acceptor, drawer, and indorsee, and, reading the bill, closed. The defendant then went into evidence to show that the dealing from which the bill arose was between the drawer and a person named Joel, whose name was not upon the bill—that the original agreement was, that the bill should be drawn for £60—that the drawer sent a blank stamp to Joel, with the defendant's name written across it, and his own at the foot and on the back, and that he told the defendant, who accepted solely for his accommodation, that the bill was to be drawn for £60, and that the bill was filled by Joel for £200, in fraud of that agreement. Whereupon the defendant's counsel called upon the plaintiff, under these circumstances, to prove that he had given value for the bill, which, not being done, the learned Chief Baron told the jury, that, as the plaintiff had not proved any consideration given by him to Joel, and if they believed the fraud imputed to the latter, to find for the defendant; and reserved leave for the plaintiff to move the court to have a verdict entered for him for either the full amount of the bill, or for £60. Verdict for defendant.

Mr. McDonough, Q.C., and Mr. D. Lynch, Q.C., now moved pursuant to the leave reserved.

Mr. J. D. Fitzgerald, Q.C., with Mr. Scoble, contra.

[The judgment of the Lord Chief Baron so ably reviews all the cases on the principal point as to render it unnecessary to give the arguments of counsel.]

The following cases were relied and commented upon:—*Bingham v. Stanley* (1 G. & Dav. 287),

* Perrin and Moore, JJ., were absent.

v. Bailey (9 Dowl. 18); *Sheriff v. Wilkes* (1848); *Smith v. Martin* (9 M. & W. 304); *v. Barber* (1 M. & W. 425, S. C. 5 Dowl. 77, 2 Gale, 5); *Wyatt v. Bulmer* (2 Esp. 538); *v. Chapman* (16 M. & W. 355); *Percival v. Glyn* (2 C. M. & R. 180, S. C. 3 Dowl. 748); *Phibes v. O'Connell* (9 Dowl. P. C. 213, S. C. 2 & W. 371); *Newby v. Smith* (2 Esp. 537); *Bassett v. Dodgin* (10 Bing. 40); *Thicknesse v. Milom* (1 Cr. & Jer. 425); *Bailey v. Bidwell* (1 M. & W. 73); *Howard v. Shaw* (9 Ir. L. Rep.); *Brown v. Philpot* (2 Moo. & Rob. 285); *W. v. Scott* (2 Camp. 100); *Rees v. Marquis of Headfort* (2 Camp. 574); *Rowland v. Miles* (4 Jur. 460).

By 4.—PACOT, C. B. now delivered judgment. [stating the facts as above.] The question I left the jury was, whether the bill was filled in fraud or agreement. There was no evidence of contention by the plaintiff, nor was there any proof having had notice of the fraud. At the close of the defendant's case the plaintiff was called upon to prove that he was an indorsee for value. I directed the jury to find for the defendant if they believed there was evidence of the fraud. The jury found for the defendant. The first question is, whether there was such evidence of fraud as to impose upon the plaintiff the necessity of proving that he was an indorsee for value. The case of *Howard v. Shaw*, (L. R. 335,) renders it necessary that we should consider the authorities on this question. Where a note is obtained by fraud, the indorsee cannot recover unless he can shew a title untainted with the illegality or fraud, and that he is an indorsee for value. It appears certainly to have been at one time held that the circumstance of the transaction being tainted with fraud did not necessarily throw upon a remote indorsee the onus of proving value. *Wyatt v. Bulmer*, (2 Esp. 537); *Newby v. Smith*, (2 Esp. ib. note.) The contrary is so clear that, if it were not for the case of *Howard v. Shaw*, I should have had no doubt but that the proof of fraud imposed upon the plaintiff the burden of proving that he gave value. *Duncan v. Stuart*, (1 Camb. 100,) *Rees v. Marquis of Headfort*, (2 Camb. 574.) In *Heath v. Sansom*, (2 B. & C. 9,) it was held "that where the note or acceptance had been obtained by felony, by fraud, or by force, it has been usual to require proof of value or consideration on the part of the indorsee," and not dispute the propriety of that usage, as any of those facts raises some suspicion of the title of the holder, and this rule was recognized in *Bassett v. Dodgin*, (10 Bing. 40.) In *Mills v. Barber*, (1 M. & W. 425, S. C. 5 Dowl. P. C. 77,) Lord G. refers to the opinion expressed by him in *W. v. Clarke*, (2 Cr. M. & R. 342; S. C. 1 M. & W. 237; S. C. 5 Tyr. 593,) and recognized the distinction between bills for accommodation merely, cases of fraud; he says, p. 431, "If a man is introduced into Court without any suspicion of fraud but as the holder of an accommodation bill, it may be presumed he is a holder for value. The presumption of its being an accommodation bill is no evidence of want of consideration in the holder," "un-derstand, therefore, the bill be connected with some fraud, a suspicion of fraud be raised from its being

shewn that something has been done with it of an illegal nature, or that it has been clandestinely taken away, or has been lost or stolen, in which cases the holder must shew that he gave value for it, the onus probandi is cast upon the defendant;" an argument founded upon the principle that *contra spoliatores omnia presumuntur*. *Isaac v. Farrer*, (1 Tyr. & Gr. 281; S. C. 4 Dowl. 750,) was an action by the indorsee against the maker of a promissory note. The plea, after stating certain facts of the transaction, went on to say, "that the transaction was a gross fraud and imposition upon the defendant, and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was, nor is there any consideration or value on the said note between any parties thereto." Replication, *de injuriâ sua propria*. Demurrer. That case was decided solely upon the pleadings. At the close of the argument, Lord Abinger, C. B. said, "one inconvenience has occurred to me which has not been urged on the part of the defendant. Formerly, on fraud being sworn, the plaintiff was obliged to show consideration; but, if this replication is allowed, the whole burthen of proof will be thrown upon the defendant, he will have to prove both fraud and want of consideration, he will have to prove a negative; therefore, it seems to me that he still ought, after proving fraud, to be permitted to cast the onus of shewing consideration upon the plaintiff." And Parke, B.—"Formerly, fraud was deemed *prima facie* evidence of no consideration, and probably the same course would be followed, should this form of replication be allowed." The Court upheld the replication, as in accordance with established rules of pleading, and at the close of the conclusion of his judgment, Lord Abinger, C. B., says, "If this replication were not allowed, some inconvenience would follow; for in every action on a bill or note, it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it; on the other hand, if this replication be allowed, the indorsee is left in the same situation he was before—with the additional advantage, that he is made acquainted with the defence to be set up, which was one great object of the late pleading regulations; and he will be called upon to prove value given or not, accordingly as the defendant shall prove or fail in the proof of the allegation of fraud, as he would before under the general issue." I have stated thus fully the opinion of the Court of Exchequer in England, as there appears to be some misapprehension as to the effect of the decision in *Smith v. Martin*, (9 M. & W. 304,) upon this question. The learned Chief Baron then referred to *Whitaker v. Edmonds*, (1 Ad. & El. 638, S. C. 1 Moo. & Rob. 366;) *Arbouin v. Anderson*, (1 Q. B. 498;) *Shearn v. Burnard*, (2 P. & Dav. 565,) and proceeded.—Before I refer to other cases on this subject, it is necessary to observe that in *Howard v. Shaw*, it was not necessary to decide this question; the question there turned upon the absence of consideration. In *Bramah v. Roberts*, (1 Scott, 350, S. C. 1 Bing. N. C. 469,) it was held, that when the defendant set up by his plea a case of fraud, a replication stating that the

plaintiff was an indorsee for value, without notice of the fraud, was a good answer to the plea; and *Smith v. Martin* is to the same effect. There, the Lord Chief Baron Abinger refused, at the trial, to call upon the plaintiff to begin by proving fraud, as the affirmative of that allegation lay upon the defendant, who raised the question by his plea. Both those cases turned upon their respective pleadings, and *Edmonds v. Groves*, (2 M. & W. 642, S. C. 5 Dowl. P. C. 775,) is to same effect as *Smith v. Martin*. In *Bingham v. Stanley*, (1 Gale & Dav. 237, S. C. 2 Q. B. 117,) the Court of Queen's Bench expressly differed with the opinion of the Court of Exchequer in *Edmonds v. Groves*, applying the old principles to the new law of pleading, holding that an admission on the record of fraud would throw the onus of proving consideration upon the plaintiff, the Court of Exchequer holding such admission to be sufficient for that purpose. This question was not raised in *Bramah v. Roberts*. The rule established by a long line of decisions, that if the note were proved to have been obtained by fraud or effected by illegality, would cast upon the plaintiff the burthen of shewing he was a *bonâ fide* indorsee for value was again determined in the case of *Bailey v. Bidwell* (13 M. & W. 73), which case was not brought under the consideration of the Court of Queen's Bench in *Howard v. Shaw*. In the former case the illegality was proved, and the court was called upon to say, that the plaintiff should have proved that he had given full consideration, the question directly and pointedly arose. Parke, B., in his judgment says, "It certainly has been, since the later cases, the universal understanding, that if the note were proved to have been obtained or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burthen of shewing that he was a *bonâ fide* indorsee for value." On these authorities, we must hold that the evidence in this case was sufficient to cast this onus upon the plaintiff, and therefore he should have proved consideration; and are, therefore, of opinion, that on this point the verdict should stand. It was further contended, that the plaintiff was entitled to recover a verdict for £60, the defendant having given Joel an authority to that amount, on the principle that a firm may be liable for the acts of one member of it, so far as the bill is within the scope of his authority. *Thicknesse and another v. Bromilow* (2 Cr. & Jer. 425), *Wilson v. Bailey* (9 Dowl. P. C. 18), and others, plainly shew that *primâ facie* all the members of the firm are bound by an instrument drawn by one of a firm, within the scope of his authority. The learned Chief Baron also referred to *Jones v. Corbett*, (2 Gal. & Dav. 308), and *Mugroove v. Drake* (1 Dav. & Mer. 347). There is a principle to be derived from these authorities applicable to the case before us; here the fraud has been proved, and the acceptor has plainly a right to say, *non in hæc fadera veni*; and that he is not bound by this instrument to any extent; that there is no liability whatever. I do not clearly understand the case of

Rosland v. Evans (4 Jur. 460), at least from the body of the report, but, coupled with the rest of the report, it appears to be an authority in favour of the view the court has taken of the question. We are, therefore, of opinion, that the plaintiff cannot have a verdict for any part of this bill, nor do we think the verdict contrary to the weight of evidence; all the facts were proved, and they have drawn their conclusions from them, and have the authority of my brother Lefroy for pressing his concurrence in the judgment pronounced.

PENNEFATHER, B., expressed his full concurrence.*

LESSEE JORDAN v. CASUAL EJECTOR—*Vis. Practice—Renewal of Habere*—9 & 10 Vic. c. 111.

The Court of Exchequer will allow the tenant to renew when he has signed the acknowledgment required by the 8th section of the 10 & 11 Vic. c. 111, to remain in possession till he has reaped the crops sown by him since the former habere.

This was an application for liberty to renew *habere*, pursuant to the provisions of the 9 & 10 Vic. c. 111, s. 8. The tenants were the immediate tenants of the landlord, by whom the ejectment was brought; they had no under-tenants. They signed the acknowledgment required by the 8th section of the 9 & 10 Vic. c. 111, and refused to give up possession, having put crops on the land.

Mr. J. Pennfather.—It could never have been contemplated by the legislature that the immediate tenant was to be kept out of possession, nor that the tenants should have the power of tilling the land. In this case, we are willing to pay for the value of the seed and labour expended. The Court of Queen's Bench has put the party bringing the ejectment under the terms not to execute the second *habere* till the tenant could reap the fruits of the crops put in the land since the former *habere*†.

The Court, having taken time to consider, made the following rule, stating they would make a general one for all applications of this nature.

"It is ordered by the court, that the said lessor be at liberty to issue a writ of *habere facias* possessionis directed to the Sheriff of the County of Tipperary, without further motion. The costs of this order, of such renewal, and of taking possession thereunder, to be borne by the said lessor of plaintiff, and such renewal to be executed until the expiration of three weeks after service, either personally on the said tenants, or at the respective dwellings of houses of said Richard Stokes and Edmund Stokes, upon some inmate thereof, of the order, and of a notice annexed, bearing the effect hereof, and the course to be pursued by the said tenants, if they so desire, to discharge the limit, or vary this order.

* This case was heard before Pigot, C.B., Pennefather, and Lefroy, B.B. Richards, B. absent.

† See *Lessee Wellington v. Casual Ejector* (Ex. D. & C. 1893), *Lessee Nevins v. Ejector* (ib. 275). Q. B. contra.

‡ The general order will be found, ante Misc. p. 220.

COURT OF CHANCERY.

MILTON v. HAMILTON.—April 28, May 12.

Bill of Revivor—Plea—Order to Revive.

Defendant to a bill of revivor appeared to it regularly; an order to revive was obtained, and afterwards, within a month from his appearance, defendant filed a plea. Held, confirming decision of the Master of the Rolls, that the order to revive did not preclude the filing the

case the bill stood over to be amended, by the personal representative of F. Hamilton pursuant to an order made at the hearing. Illustration to him was taken out by one of the defendants. The bill was amended by that it might be taken as a bill of revivor in her, in her capacity of administratrix, but requiring an answer. A subpoena to revive was served. The defendant within eight appeared; the plaintiff obtained the usual rule to revive on appearance of the defendant; subsequently, but within a month from service, the defendant filed a plea to the bill. The plaintiff moved to have the plea off the file as irregular, being a plea to the bill which had been already obtained. The Master of the Rolls refused the motion.

Christian, Q.C., moved, by way of appeal from the order; he referred to the form of subpoena *revivere* (*Smi. Ord. Appx.* 35), and argued that it, that not only must the appearance be entered, but cause must be shewn within eight days, the plaintiff may revive—that cause against the bill can only be shewn by plea or demurrer, the cause against maintaining the suit may also shewn by answer, *Harris v. Pollard* (3 P. Wms. *Lewis v. Bridgeman* (2 Sim. 465); *Codrington v. Houlditch* (5 Sim. 286); *Langley v. Langley* (10 Sim. 345; 2 Dan. Ch. P. 1422; Red. 290); *Attorney-General v. Carden* (How. 4); *Brownlow v. Chandos* (Vern. & Scriv. *Daly v. Kirwin* (not reported); 1 Harr. Ch. P. 1422. In *Bowyer v. Beamish* (R. 63), the bill was to revive and answer; here only to revive, and we have obtained all we can by the side-bar rule.

Brewster, Q.C., and *Mr. Deasy, Q.C.*, for the defendant.—The effect of the practice contended would be to make it impossible to prevent the bill. The 64th Rule of 1843 prescribes the time within which to file a plea or demurrer, *v. Blake* (2 Hog. 99) was not decided on special facts of the case, but on the general principle, and it governs this case, (Red. lead. 289). *Cathcart v. Hewson* (Glascock reports *Boyle v. Blake*. [They referred to the Rule of 1831, Eng., and contended that it has been the practice to inquire whether the order to revive was obtained or not before filing a

reasonable construction on that practice. The subpoena is regularly in this form:—"Victoria, &c. We command you, that within eight days after the service of this writ upon you, exclusive of the day of such service, and laying all matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery in Ireland, to a bill of revivor filed against you in our said court by A. B., and shew cause, if any you can, wherefore a cause lately depending in our said Court of Chancery, between C. D., plaintiff, and others defendants, and the proceedings thereon had should not be revived by the said C. D. against you, the said," &c. Now, it is argued, that meaning is, that the appearance must be entered, and the cause shewn, within eight days. I must doubt if that be the true construction. The order to revive is in the following terms:—

"Whereas Mr. G. F., solicitor for the plaintiff, this day informed the Court that the cause formerly depending in this Court, abated by the death of defendant, and thereupon the plaintiff exhibited his bill of revivor in this cause, and that appearance been entered thereto for the defendant, It is ordered by the Court, that the said cause be revived, and that the same and all proceedings therein had do stand in the same plight and condition as the same were in at the time of the death of the said," &c.

Applying to the construction of this document, the passage in Lord Redesdale's Treatise and the 64th Order, it will be seen whether they cannot be reconciled, and whether, after the order to revive, the defendant is not entitled to shew that the plaintiff is not entitled to maintain his bill. At the hearing of the cause, the defendant can shew that the plaintiff has no right to revive. In England the order to revive is entered, stating that the time for answering has expired, not as here, on the appearance of the defendant. I take the form from Seton's Decrees, 384, shewing that in England the order is made on a party failing in performance of what the subpoena requires him to do. In this country, it is made merely on appearance, although, according to the rules of the court, the defendant has a month to plead or demur in general. It has been argued, that that cannot mean to plead to a bill of revivor, because the rule says, "The party shall, on the expiration of such fourteen days, proceed on such plea as if the same were an answer deemed sufficient." I do not read that as if the plea then became an answer, to all intents, where a plea ought to have been put in. I cannot look upon that as overruling the first part of the sentence. I find the subpoena calling on the defendant to appear and shew cause against the revivor, and I look on the bill as being liable to be defeated by plea or demurrer.

[His Lordship deferred his final judgment, on this motion until the 12th of May.]

May 12.—LORD CHANCELLOR.—The Master of the Rolls' order in this case must be affirmed. It does appear that this plea was filed consistently with the practice of the court. The practice here is different from that in England; that is to say,

F. Fitzgerald, Q.C., in reply.

D CHANCELLOR.—My present impression is, the order of the Master of the Rolls is right, it exhibits an anomalous condition of the law; but I must try to put a rational and

the rules in England are different, and define more accurately the practice on this point. This was a plea to a bill filed in time, as a plea within the 64th General Order, which provides, that "each defendant shall be allowed one month from appearance first entered, to file any demurrer or plea to the whole bill." There is no rule in these orders respecting the rule to revive. According to the English practice, a party has eight days' time to appear, and then eight days further for pleading or demurring; and it is not until the expiration of both periods that the order to revive can be entered. The rule, as stated by Lord Redesdale (Mit. Plead. 1827, p. 77), is, that "upon a bill of revivor, the defendants must answer in eight days after appearance, and submit that the cause be revived, or shew cause to the contrary; and, in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion, as a matter of course." But he states in the next page what seems either inconsistent with that proposition, or to put a construction on the order to revive, which is the same put on it in one or two cases in this country—"And notwithstanding an order for revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the further proceeding of the bill, and which will be noticed in treating of the different modes of defence to bills of revivor." Now, the modes of defence to a bill of revivor seem to be by plea or demurrer. In p. 201 he says, "If a bill of revivor does not shew a sufficient ground for reviving the suit, or any part of it, either by or against the person by or against whom it is brought, the defendant may, by demurrer, shew cause against the revival;" and in p. 289, "If a bill of revivor is brought without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to shew that the plaintiff is not entitled to revive the suit against him." I cannot read that passage in p. 78 without respect to the subsequent passage; it is quite impossible to exclude these two subsequent parts of the same treatise in considering the first. According to the present English rule, it would seem, that a plea or demurrer would be too late after the order to revive; and there is good sense in that, because by that order to revive, the cause is placed in the same state in which it was before the abatement; and if the plea or demurrer were allowed, there would be on the same record two orders inconsistent with each other. In this country there is no definite rule. Formerly the practice—both in Chancery and in the Exchequer—was that a plea or demurrer could not be put in after an order to revive; that appears from *Attorney-General v. Carden* (How. Eq. Pr. 5). When we come to look at the form of the documents they do not seem very intelligible, because the subpoena calls on the party to enter an appearance and shew cause: "We command you, that within eight days — you do cause an appearance to be entered for you in our High Court of Chancery in Ireland to a bill of revivor, — and shew

cause if any you can, &c." And the order to revive merely states that the party appeared, but contains not a word about his not having shown cause, though one would expect that to be entered; the only way to construe that sensibly is, that an appearance without plea or demurrer is assumed to be a submission to a revivor. However, whatever may have been the old practice, the modern practice is not the same, at least in no important case has a plea under these circumstances been set aside. In *Boyle v. Blake*, (2 Hog. 99,) it is treated as according to the current of practice of the court. It does appear on the documents in this cause that the question arose whether the order to revive was entered in time because it was obtained on the same day that the demurrer was filed, and was not served till afterwards, but it does not appear from the report that that was much argued, and the judgment goes on the general principle. Mr. Ball for the defendant said: "This demurrer was filed within eight days after the entry of the defendant's appearance, and pleas and demurrers have frequently been filed to bills of revivor after the order to revive has been entered." That statement of counsel was made to Sir William Mac Mahon, a very competent judge of the practice of the court, who says: "The order of revivor entitles the plaintiff to carry on the proceedings in the original cause, and he will get the benefit of them if he shall appear to be entitled to it at the hearing of the cause, but it is not in any manner conclusive as to his right to revive the suit. Nothing can be more desirable for the plaintiff if he has no right to revive them that the defence should be set up as soon as possible. The entry of an appearance cannot be any bar to a defence either by answer, plea or demurrer." It was alleged that the report was incorrect because this other ground of controversy appeared on the documents, but I cannot so treat it. It is well known that this reporter was a person in the confidence of Sir William Mac Mahon, and that his reports have in consequence much authority on points of this sort. In *Cathcart v. Hewson*, (Glas. 169; S. C. Hayes, 447,) the court recognized the judgment of Sir William Mac Mahon in *Boyle v. Blake*, which was there referred to as a MS., or within the recollection of counsel. So far, therefore, as any printed case of late years it seems that the entry of the order to revive does not prevent the filing of a plea or demurrer, the entry is on appearance merely. Now it is remarkable that the orders of 1834 contain an order for the rule to revive, the 16th providing, "That in all cases of bills of revivor the rule to revive may be entered immediately upon the appearance of the party being entered with the registrar, and without any attachment to warrant same." The 18th, which immediately follows, provides that each defendant should be allowed one month to file any demurrer on plea to the whole bill. It does appear from those two rules, so close to each other, that the attention of their framers must have been drawn to the power to enter the rule to revive immediately on appearance, while, by the subsequent order, they gave the defendant one month's time to plead or demur. In the new rules, the 16th rule is omitted, the 18th is retained as part of the 64th rule. It was contended that that was controlled by the subsequent part of the same rule, but I can-

not accede to that argument. I had inquiry made upon the practice, but that did not throw much light on the point. I have the report of the Deputy Keeper of the Rolls, and it seems that cases of this sort are very rare; and the officer states that there is no established practice on the point. That being so, and as it appears that without overruling *Boyle v. Blake*, and throwing more difficulty on the defendant than he should have, I cannot disturb the Rolls Order, it must be affirmed. Perhaps it would be proper that the practice should be settled, and made more consistent by an order. I do not think it a case to give costs on either side.

Chancery Motion Book 4, p. 248.

ROLLS COURT.

IRWIN v. DE MASSEY.—April, 21.

Practice—Injunction—Proceedings by creditor after decree—Costs.

Bill to administer assets, after a decree to account one of the creditors with notice of the decree, served upon the executrix; a civil bill for a debt due by the testator alleging promises by the executrix, an injunction was granted, and the creditor was directed to pay the costs of the motion.

The bill in this case was filed to administer the assets of W. H. De Massey, deceased, and a decree pronounced on the 25th of January, 1849; previous to the decree some of the creditors instituted proceedings at law in the superior courts, and others, and amongst the rest a person named Michael Kennedy proceeded by civil bill against the defendant, Mary De Massey, executrix of the deceased, and obtained decrees. From the affidavit of the defendant's solicitor it appeared that the judgment debts due by the deceased amounted to the sum of £6,000, simple contract debts, £1,500, and the assets amounted to only the sum of £1,000. On the 21st of February an application was made on behalf of the defendant to restrain such of the creditors as were proceeding at law, and an order pronounced staying all further proceedings as to the parties then proceeding in the superior courts against Mary De Massey, the executrix, with liberty to them to come in and prove under the decree to account their demands and costs properly incurred, and no rule was pronounced on said motion as to Michael Kennedy and the other creditors who had obtained civil bill decrees before the said decree to account was pronounced. The civil bill decrees having been subsequently reversed on appeal at the Spring Assizes for the County of Limerick, said Michael Kennedy, on the 13th of March, 1849, had a second civil bill served for the same demand, varying from the former one by laying a promise to pay by the executrix. The affidavit of the defendant's solicitor stated that Michael Kennedy and his solicitor had full notice of the decree to account, and of the said order restraining the other creditors from proceeding.

Mr. Hughes, Q. C., on behalf of the executrix, now moved that an injunction might issue to restrain Michael Kennedy, his solicitors, attorneys and agents from proceeding at law against the defendant, and that his solicitor being at liberty to file a general charge for his several clients under the decree to

account in this cause might be restrained from instituting further proceedings against the defendant as such executrix of the said W. H. De Massey.

Mr. R. Ferguson and Sir Colman O'Loughlen, contra, cited *Lord v. Wormleighton*, (Jac. 148,) *Jones v. Brain*, (2 You. & C. Ch. 170,) *Haywood v. Constable*, (2 You. & C. Ex. 143.) Even though the creditor have notice of the decree he is entitled to his costs including those of the motion, and though the Court in some instances refuses the creditor his costs, yet there is not any case in which the costs have been given against him. *Pepper v. Foster*, (6 Ir. Eq. R. 384,) *Egan v. Baldwin*, (1 Hog. 195,) *Bookless v. Crumack*, P. Cooper, 141.

"Let an injunction issue in this case, to restrain the said Michael Kennedy, his solicitors, attorneys, and agents, from further proceeding at law against the petitioner; and it appearing to the Court that the said Michael Kennedy, and his solicitor, Mr. J. Delmege, had notice of the decree to account in this cause before he served the civil bill of the 13th day of March last, let the said M. Kennedy pay to the petitioner the costs of this application, and let it be referred to the Master to tax same, &c., and let the said J. Delmege be at liberty to file a general charge for his several clients under the decree to account in this cause, and be restrained from instituting further proceedings against the petitioner, as such executrix of said W. H. De Massey, deceased."

R. P. H. B., lib. 28, fo. 363.

KELSON AND WIFE v. LEWIS.—May 15.

Practice—Publication—Notice of motion to respite.

Publication should not be passed where notice of motion has been served to respite same, and the opposite party will not be delayed thereby.

The facts of this case are stated ante p. 226.

Mr. Hobart, for the plaintiffs, now moved that publication should be respited from the 7th day of May to the 21st—the plaintiff undertaking to set down the cause for hearing in the Lord Chancellor's list, on the first day of Trinity Term.

Mr. Dobbs contra.

MASTER OF THE ROLLS.—It is the practice in the Exchequer, and in this court, to respite publication when the opposite party will not be delayed. Where a notice is served for that purpose the other party proceeds at his peril; and the court expects that no proceedings will be taken after the service of the notice, if the case is proper for discussion, and no delay is caused thereby. I will respite publication, and will not give the costs of this motion to the defendant, as the examiner cautioned his solicitor not to pass publication.

"It appearing to the court that the defendant's solicitor, after the service of the plaintiffs' notice to respite publication of the depositions of witnesses in this cause on them, insisted on the examiner of this court passing publication of said depositions, although informed by the examiner that he ought not to require such

publication to pass, until the pending motion should be decided. It is ordered by the Right Hon. the Master of the Rolls, that the plaintiffs be, and they are hereby at liberty to examine witnesses in this cause, notwithstanding publication having passed—the plaintiffs' hereby undertaking to close such examination before the second day of next Trinity Term, and to set down this cause for hearing on the second day of next term; and it is further ordered, that the defendants be, and they are hereby at liberty to cross-examine such witnesses, and it is further ordered that the parties do abide their own costs of this motion.*

Lib. 285, fo. 238.

EQUITY EXCHEQUER.

In re TURNLEY ex parte THE MAYOR AND BURGESSES OF BELFAST.

Practice—Costs—Transferring money by Town Council to Court of Chancery, to the credit of lunatic.

Mr. W. C. Dobbs moved that the purchase-money lodged in this Court, pursuant to the provisions of 69 sec. of the 8 Vic. c. 18,† be paid into

* In order to avoid misapprehension, it is right to mention that the observations of his Honor, reported ante page 226, were made with reference to the particular circumstances of the case, and are not to be considered as laying down the general rule, that in every case in which a notice to respite publication has been served, proceedings should be stayed until the motion is heard. By reference to the report of the motion as above, it will be seen that it is only in cases where the opposite party will not be delayed, that publication should not pass pending a motion to respite.

† The 69th section enacts, that "If the purchase or compensation which shall be payable in respect of any lands or any interest therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life, or in tail, married woman served in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this act or the special act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of two hundred pounds, the same shall be paid into the bank, in the name and with the privy of the Accountant-general of the Court of Chancery in England, if the same relate to lands in England and Wales, or the Accountant-general of the Court of Exchequer in Ireland, if the same relate to lands in Ireland, to be placed to the account there of such accountant-general, *ex parte* the promoters of the undertaking, (describing them by their proper name,) in the matter of the special act, (citing it,) pursuant to the method prescribed by any act for the time being, in force for regulating moneys paid into the said Courts, and such moneys shall remain so deposited, until the same be applied to some one of the following purposes: that is to say,

"In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or to the like use, trusts, or purposes.

"In the purchase of other lands to be conveyed, limited and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or

"If such money shall be paid in respect of any buildings

the Court of Chancery, as the person entitled to it at the time of the purchase by the Railway Company, had since been found a lunatic, incapable of managing his affairs. He was a lunatic at the time of the purchase. Prior to the purchase his father devised the property from him, which devise was, subsequently to the purchase, declared invalid, and the lunatic became entitled as heir at law.

Mr. Meade, contra.—The committee of the lunatic has no right to get the money out of Court during the life of the lunatic. This is an application to transfer the fund to the Court of Chancery, where it will be administered without reference to the provisions of the act which authorises this court alone to deal with it. The lunatic can acquire no greater title now than he had at the time of the purchase; if not entitled then he cannot become so during the continuance of the lunacy. [On the question of costs he cited *Es parte Tetley and another v. the Great North of England R. Co.* (4 Rail. Ca. 55); *Es parte Thornton in re the Midland Counties Railway*, (17 Law Jour. 167.)]

Mr. Dobbs, in reply.—The argument on the other side would go to deprive us of the reception of the money in any event; it could never have been intended that the property of a lunatic should be administered in this court. In this case there is a party absolutely entitled to this fund, for whom there are persons in existence capable of performing the necessary trusts, to whom this court will pay it. As to the costs we are entitled to them under the provisions of the 80th* sec. of the 8 Vic. c. 18. The cases cited on the other side do not apply, they were not applications under the provisions of this act.

PENNEFATHER, B.—I think this is a payment out

taken under the authority of this or the special act, or incurred by the proximity of the works, or removing or misplacing such buildings, or substituting other in their stead, in such manner as the Court of Chancery shall direct."

* The 80th section enacts, That all monies deposited in the bank under the provisions of this or the special act or an act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the land in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters to the undertaking, (that is to say) the costs of the purchase, or the taking of the lands, or which shall have been incurred in consequence thereof other than such costs as are herein otherwise provided for, and the costs of the investment of such moneys in Government or real securities, and of the re-investment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for payment of the dividends and interest of the securities upon which such moneys shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants; provided always, that the costs of one application only for re-investment in land shall be allowed, unless it shall appear to the Court of Chancery in England or to the Court of Exchequer in Ireland that it is for the benefit of the parties interested in the said moneys that the same should be invested in the purchase of lands, in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking.

of court, and, putting an end to the matter, the order was to pay it into the Court of Chancery to the credit of the lunatic matter, and the company will be liable to no further costs. I can scarcely think that the Legislature intended that this court should interfere with the jurisdiction of the Lord Chancellor as to the property which the lunatic would be otherwise entitled to.

“ Let the sum of £250l 16s. 5d. be transferred to the Accountant-General of the Court of Chancery, to be placed to the credit of the matter of Robert Turnley, a lunatic, and let the Town Council pay to the petitioner the costs of the petition and proceedings thereon, and of this motion, and the transferring of said stock, &c.”

QUEEN'S BENCH.—HILARY TERM.

BENNETT v. ANDERSON.—Jan. 29.

Policy of Assurance—Proposal and Declaration—Fraudulent Concealment, or Untrue Allegation—Materiality of Answer not a question for the Jury—Mis-direction.

Assumpsit on three several policies of assurance on life; each of them contained a provision, declaring that it should be void “if anything stated by the assured, either in the declaration or attestation therein before mentioned to have been made by him, should not be true.” The proposal for insurance contained the following particular:—“Has the party's life been accepted or refused at any other office, and if accepted, was it at the usual premium, or with what addition?” The answer returned by the assured was, “Asylum and National Office, at the usual premium.” The following agreement appeared at the foot of the proposal, and was signed by the assured:—“I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void.” The defendant proved at the trial that the assured had proposed the same party's life for insurance at two other offices, previous to effecting the insurance with the defendant's Company, and that his proposal was rejected. The Judge, in summing up, stated to the jury, that it was for them to say whether there had been a concealment by the assured of any circumstance which it was material for the Company to know.

Held, that this was a misdirection, for that the assured had contracted with the defendant's Company that the several matters contained in the proposal should be answered truly, and, consequently, that the question, whether an answer given was more or less material, was not open to him.

Assumpsit by the plaintiff, as administrator of Humphrey Palmer, deceased, against the defendant, sued as one of the directors of the United Kingdom Life Assurance Company, on three policies of assurance on the life of the deceased,

amounting to £1200, dated respectively the 2nd of September, 1840. Each of the policies contained the following recital:—“Whereas H. Palmer is desirous of making an insurance upon his own life, and has declared that he, the said H. Palmer, did not exceed the age of 34 years on the 22nd of August, 1840, has had the small-pox, has not had the gout, has not suffered a spitting of blood, and is not affected with any disorder which tends to shorten life, and that he has led and continues to lead a temperate life.” One of the terms of the policies was, that they should be void “if anything stated by the assured, either in the declaration or attestation thereinbefore mentioned to have been made by him, should not be true.” The proposal for insurance contained particulars to be filled up, signed, and witnessed; and one of these particulars was as follows:—“Has the party's life been accepted or refused at any other office, and if accepted, was it at the usual premium, or with what addition?” The answer returned to this question was, “Asylum and National Office, at the usual premium.”

The plaintiff was the party who proposed the life for insurance, and the following agreement, appearing at the foot of the proposal, was signed by him:—“I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void.”

The declaration set forth the three policies and conditions of assurance annexed, and averred, in the usual manner, that all the conditions of the policies had been complied with.

The declaration also contained the money-counts, and the defendant pleaded the general issue.

On the trial of the cause before the Lord Chief Justice, at the sittings after Michaelmas Term, 1848, it appeared from the defendant's evidence, that the plaintiff, previous to effecting the insurance with the defendant's company, had proposed H. Palmer's life for insurance at two other offices, and that his proposal was rejected by them. The defendant's counsel thereupon submitted that this was a fact which should have been communicated to the defendant's company by the plaintiff, when answering the particulars, and that the not doing so amounted to a fraudulent concealment on his part, and rendered the policy void.

The Lord Chief Justice left it to the jury to say whether there had been a concealment of any circumstance which it was material for the company to know. The jury found, that there was no concealment of any material circumstance, and gave their verdict for the plaintiff, for the amount of the sum insured.

On a former day in this term,

Mr. Martley, Q.C., moved for and obtained a rule nisi for a new trial, on the ground of misdirection of the Lord Chief Justice, and that the verdict was against law and against evidence.

Mr. Brewster, Q.C., (with him *Mr. Fitzgibbon, Q.C.*), now shewed cause. The question is, whether the declaration is so incorporated with the

policy as to make it matter of warranty. The present case is distinguishable from *Scanlan v. Seale*, (6 I. L. Rep. 867.) and from *Geech v. Ingall*, (14 M. & W. 95;) for in these cases the declaration, being distinctly referred to, was considered as embodied in the policy, and to have thereby become a part of it, and, consequently, matter of warranty; but in the present case the policy does not refer to any instrument, and to import into a contract a document which is not referred to, is a violation of the statute of frauds, and contrary to the general principles of the law. Regarding the declaration as matter of representation, the question of materiality was for the jury.

Mr. Martley, Q.C., and *Mr. George, Q.C.* for the defendant.—The question is, whether there is a sufficient reference in the policy to a declaration, so as to enable the defendant to give in evidence what that declaration is. The policy is only signed by one of the parties, and we are entitled to read the words in the policy, "has declared," as saying that Palmer "has made a declaration." The principle established in *Scanlan v. Seale*, is, that if the document is referred to, it forms part of the policy, and we submit there is enough to identify the declaration with the policy. It was material that the defendant should have known that the insured was rejected by another office six weeks before he applied to be insured in the defendant's office.

Mr. Fitzgibbon, Q.C., in reply.—The policy commences by declaring that H. Palmer did not exceed the age of thirty-four years—has had the small-pox, has not had the gout, &c. Here is a statement of facts, which, if true, would make Palmer's life an insurable one, and all the other questions are put with the view of testing the accuracy of the former answers. What is intended to be made warranty is extracted from the statement or declaration, and it is only reasonable and just the company to stipulate that those matters which go to make an insurable life should be made matter of warranty, but it would be unreasonable for them to require that matters no way affecting this question should also be made warranty. The policy says, if any of the allegations are not true, it is to be void; but the declaration has the words *fraudulent concealment*, which is a question for the jury. The fallacy at the other side is in supposing that the attestation in the policy means a proper attestation, and not an act. We contend that the policy refers to a verbal statement, and not to the written statement and declaration. In *Scanlan v. Seale*, there was an express reference to a written declaration; and in *Geech v. Ingall*, the Judge narrowed the question too much.

BLACKBURN, C.J.—We are of opinion, that I was wrong in leaving the question of materiality to the jury. The verdict, therefore, which was anything but satisfactory, must be set aside without costs, and without costs of this motion. It is plain, whether the written declaration be incorporated in the policy or not, there was a conditional stipulation on the part of the company, that the various matters contained in the proposal should form the basis of the contract between the assured and the company, and both parties contracted that those several matters should be answered truly.

CRAMPTON, J.—I am of opinion, unless we overrule *Scanlan v. Seale*, followed by *Geech v. Ingall*, we must hold, that the written declaration is incorporated in the policy, and is thereby made matter of warranty, and not of representation.

PERRIN, J.—I do not wish to give a decided opinion as to the meaning of the words in the policy; it involves the true construction of the instruments, how far the one refers to the other, but having regard to the terms of the proposal, and the agreement at the foot of it, I take them, as in every other contract would be implied, as containing this provision, namely, that I have given these answers upon the terms, that they shall form the basis of the contract between the assured and the company; and if there be contained therein any fraudulent concealment, or untrue allegation, I shall have no right of action. I do not think it is open to the party afterwards to say, that the answer given is more or less material. In my opinion, he bound himself to answer truly.

MOORE, J.—I do not desire to express any opinion, as to whether this declaration is incorporated in the policy or not; if it be incorporated, it amounts to warranty. My impression is, that it is not. In both the cases which have been referred to, there was a clear reference in the policy to the declaration.

Rule absolute.

EXCHEQUER OF PLEAS.

April 31, and May 4.

BRADY v. ROTHERHAM.

Practice—Lodgment of Money in Court before Declaration—Motion to Change Venue—Undertaking to give Material Evidence.

Proof of the ordinary rule to lodge money in court, in discharge of the action, before declaration filed, satisfies an undertaking to give material evidence in the original venue.

This was an action of trover, which had been tried before the Lord Chief Baron at the sittings after Hilary Term, 1849. After the service of the writ, and before the filing of the declaration, the defendant lodged money in court, in discharge of the action, under the 34th Gen. R. (Yeo. 54).

The defendant having moved, after the filing of the declaration, to change the venue on the common affidavit, the plaintiff retained the venue, upon the usual undertaking to give material evidence in the county where the venue was laid (the county of the city of Dublin.) At the trial, the only evidence on the part of the plaintiff, arising within the venue, was the defendant's rule to lodge money, and certificate of the officer of the lodgment of same. The defendant's counsel called for a nonsuit, on the ground that plaintiff had not satisfied his undertaking; and the Chief Baron having given liberty to move, and a verdict having been given for the plaintiff,

Mr. McDonough, Q.C., with *Mr. Batterley*,

, now moved, pursuant to the leave reserved. lodgment of the money can be no acknowledgment of a cause of action not disclosed, and constantly is not material evidence. The 52nd rule, (Yeo. 77,) provides, that upon process served for the payment of any debt, amount of the debt shall be endorsed.* That is compulsory, *Ryley v. Boissomas*, (1 Dowl. 100.) *Curwin v. Mosley*, (1 Dowl. 432;) but does not apply to the action of trover.† [Pennfather, I understand the rule to be, that some evidence material to the issue, and arising in the case where the venue is laid, must be given.] I would inflict great hardship upon a defendant, from the form of the process, was led to suppose himself called upon to defend an action which he was willing to admit to the extent of his lodgment. If he were subsequently called upon to defend an action of a different character, to which he may have a full defence, and that his admission of the one would be used as an admission of the latter. *Towers*, (2 Y. Rep. 275;) *Santler v. Merrett*, (2 Sir W. BL 1050;) *Ewerth v. Bell*, (1 M. & W. 158;) *Kingham v. Robins*, (5 M. & W. 158;) *Stevenson v. Mayor and Burgesses of Berwick*, (1 Q. B. 156;) *O'Brien v. Hamilton*, (6 Law Rep. 127.)

Fitzgibbon, Q.C., with *Mr. R. Armstrong*, for the plaintiff.—The lodgment admits the property, and the conversion of that property, and a cause of action to the extent of the money lodged. It is stated that evidence of the rule is sufficient to maintain the undertaking. [Pennfather, B.—The question is, whether the lodgment being before the trial makes any difference.] The lodgment states as an admission of whatever cause of action the plaintiff may subsequently disclose in his statement. If the defendant is mistaken—in the statement of the action brought against him, and that he had intended to meet by the lodgment,—it is an inherent jurisdiction in the Court to set aside the lodgment, by obliging the plaintiff not to give evidence in evidence. In the action stated in the statement, the defendant has taken no steps to defend himself from the difficulty which exists, and is now bound by his acquiescence. *Lee v. Baxton*, (3 C. B. 871;) *Clerk v. Dunsford*, (2 M. & W. 724.)

Cur. ad vult.

4. *PROOF*, C. B.—In this case we have considered all the authorities, and think it right to lay down some general rule on this subject. We

in the Court of Exchequer, all ordinary process is in whatever may be the real cause of action.

The 3 & 4 Vic. c. 105, s. 46, enacts, "That it shall be lawful for the defendant in all personal actions (excepted from assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) to apply to any of the said superior courts where such action is brought, or a Judge of any of the said superior courts, to set aside a sum of money by way of compensation or satisfaction, in such manner, and under such regulations as to the payment of costs and the form of pleading, as the said court, or such eight or more of them as aforesaid, shall, by rules or orders by them to be from time to time made, order and direct.

are of opinion, the defendant's rule is material evidence, whether obtained before or after declaration filed.

Motion refused, with Costs.

DOE, LESSEE OF BAKER AND WHITE, v. HARTE.

Ejectment—Demand of Possession.

Upon the expiration of a lease for lives which contained the following covenant:—"That the lessor his heirs, or assigns, upon the death or demise of the before named four lives, or cestui que vies, should and would add and insert to the time or term of that demise, the natural life of such person as should be nominated by the said lessee, his heirs and assigns, in the place and stead of the said four lives, during which the said estate should be continued in consideration that the said lessee, his heirs or assigns, should lay out and expend in building a dwelling-house upon the said premises, the sum of £200, within the period of four years next ensuing," an ejectment was brought, and the Judge directed a verdict for the plaintiff. No evidence of the fulfilment of the condition having been given, and no demand of possession proved, subsequently to the trial, evidence of a substituted contract which was performed was discovered, Held—That a new trial should be granted, for the purpose of submitting the new evidence to the jury.

Held, also, that if the original contract, or the substituted one, were performed by the defendant, the lessor of the plaintiff could not sustain the ejectment without a demand of possession.

Ejectment on the title. At the trial before the Lord Chief Baron, at the Summer Assizes of 1848, it appeared, that by lease bearing date the 7th of March, 1803, the lands, for the recovery of which the ejectment was brought, were demised to one John Harte, for four lives therein mentioned, the last of which expired in February, 1848. The lease contained the following covenant:—"That the lessor, his heirs or assigns, upon the death or demise of the before named four lives or *cestui que vies*, should and would add and insert to the time or term of that demise, the natural life of such person as should be nominated by the lessee, his heirs or assigns, in the place and stead of the said four lives, during which the said estate should be continued, in consideration that the said lessee, his heirs or assigns, should lay out and expend in building a dwelling-house upon the said premises, the sum of £200, within the period of four years next ensuing."

The plaintiff having proved his case, and it appearing that the dwelling-house had not been built, but that some money had been expended in the planting of trees, counsel for the defendant called for a non-suit, on the ground that in this case a demand of possession was necessary, and none had been proved. The Judge directed a verdict for the plaintiff.

Subsequently to the trial, a lease had been found, dated February 22, 1830, by which one Thomas White, who was entitled to the reversion in the pre-

mises in remainder, on the death of Richard White, demised a portion of the premises to John Harte, reciting the original lease and the aforesaid covenant, and that it had been agreed upon between the parties that certain trees should be planted instead of the building originally stipulated for.

Mr. Battersby, Q. C., (Mr. Hamilton Smythe with him) now moved, on behalf of the defendant, that the verdict should be changed into a verdict for the defendant, or a non-suit entered. A tenant under a lease for lives, with a covenant for the addition of a new life, is not a trespasser upon the expiration of the lives, but is entitled to a demand of possession. Such a tenant stands somewhat in the position of a purchaser, who, when he enters into possession before the completion of the purchase, is held to be a tenant at will, and there must be a demand of possession to determine the will. In the case of *Lessee Walker v. Byrne* (3 L. L. Rec. N. S. 68), it was held, that upon the expiration of a lease for lives, which contained a clause for perpetual renewal, a demand of possession must be made to sustain the ejectment. So in the case of *Doe dem. Newby v. Jackson* (1 B. & C. 448), where an agreement was made between A. and B. that the former should sell certain premises to B. if it turned out that he had a title to them, and that B. should have the possession from the date of the agreement, a demand of possession was held necessary to sustain an ejectment. [*Richards, B.*—A covenant to renew is not quite the same as an agreement, because the latter binds both parties, there being mutuality between them; but the case of a covenant is somewhat different.] *Right dem. Lewis and others v. Beard* (13 East. 210) is to the same effect. Counsel also cited *Doe dem. Winterscale v. Newcomen* (1 Jones Ex. Rep. 496, 4 L. R., N. S. p. 100.)

PIGOT, C. B.—In the present case the consideration is one which goes to the whole contract, and therefore the condition must be performed before any contract legally arises.)

Mr. M'Donough, Q. C., (Mr. Plunket, Q. C. with him,) for plaintiff.—There was no evidence at the trial of a release, disposition, or waiver of the conditions, and no evidence given of its performance, this is merely a qualified covenant for a renewal. In *Lessee Pilkington v. Talbot*, (5 L. Rec. N. S. 11,) where an under-tenant holding under a *toties quoties* covenant to renew, subject to forfeiture or default, had neglected to renew, he was held precluded from setting up the want of a demand of possession as a defence. (This case is given more fully in 1 Furlong, L. & T. 204.) The dictum of Abbot, C. J. (3 B. & A. 327,) is to the same effect.

PIGOT, C. B.—We shall set aside the verdict in this case, as we conceive it right that the instrument of February 1830, which is most material in this case, should be subjected to the investigation of a

jury; the costs of the last trial to abide the event. It is unnecessary to enlarge on the points discussed in argument. We are of opinion that the rule laid down—in the cases cited by the defendant's counsel—is a correct one, in proceeding against a lessee for lives, after the expiration of a lease, and where there is a covenant for renewal, as here. Where there is a distinct contract, unannulled by any misconduct on the part of the tenant, and no condition unperformed then on the dropping of the life, the tenure is referable to the contract, and a demand of possession becomes necessary. We are likewise of opinion that if there be a contract, the terms of which are unperformed, the tenant cannot be held to continue in possession under the contract, and, therefore, a demand of possession is unnecessary. In this view we are of opinion that a demand of possession is necessary, if the jury are satisfied that the condition was fulfilled. Now, if the instrument, bearing date in 1830, be genuine, and, as recited, another condition (which has been fulfilled,) was substituted for the original one, the defendant would be entitled to have the verdict entered for him.

LUSCOMBE v. BLAKE—May 3.

Interpleader—Costs of Sheriff.

Where, after the sheriff has obtained the common interpleader rule, the claimant and execution creditor enter into a compromise whereby the former abandons a portion of his claim, the claimant was directed to pay the sheriff all the costs incurred.

Mr. Blackburne having obtained the common interpleader rule on behalf of the High Sheriff of Meath, the claimant and execution creditor subsequently compromised the matter out of court.

On the day appointed by the rule for the parties to interplead, *Mr. Blackburne* applied for the costs of the sheriff.

Mr. Richards for the execution creditor.

Mr. Tuthill, for the claimant, relied on *Bell v. Bruen* (Bl. D. & O. 283.)

The following order was made:—

"That the said J. C. E. (the claimant) do pay to the said sheriff the costs of the said order of the 24th of April (the rule to interplead), and of this motion, when taxed, &c., without further motion."

ERRATA.

Read the two first lines of the marginal note *Lessee Jordan v. Casual Ejector*, ante p. 240:—"The Court of Exchequer will not allow a tenant who has signed," &c.

In *JURIST* No. 26, page 210, first column, line 16, for "there were two," read "there never was."

HOUSE OF LORDS.

O'BRIEN v. THE QUEEN, M'MANUS v. THE QUEEN.

Held. That the commission being directed, first to three judges by name, and, subsequently to the same judges and others therein mentioned, was not thereby rendered ambiguous.

That the plaintiff in error was not entitled to a copy of the indictment, or a list of the witnesses, or of the jury ten days before the trial, because the 36 Geo. 3, c. 7, did not extend to Ireland, nor was it extended by 57 Geo. 3, c. 6, nor by 11 & 12 Vic. c. 12.

That those acts which were treason in England by the statute of Edw. 3, were made treason in Ireland, if committed there.

That the allocutus, ante p. 170, was in the proper form.

The errors in this case were the same as those assigned in the court below, and reported ante pp. 169-176.

Sir Fitzroy Kelly, Q. C., Mr. Napier, Q. C., Sir Colman O'Loughlin, for Mr. Smith O'Brien.

Mr. Segur, Mr. O'Callaghan, and Mr. M'Mahon for Mr. M'Manus.

The Attorney-general for England, the Attorney-general for Ireland, Mr. Welsby, and Mr. Peacock for the Crown.

The case was argued by Sir F. Kelly, Mr. Napier, Mr. Segur, and Mr. O'Callaghan for the plaintiffs in error; at the conclusion of their arguments, which were similar to those used in the court below, and reported ante p. 171. The counsel for the Crown were not called on, the learned judges having intimated their opinion, that their decision was formed, and which was delivered by the Chief Justice of the Common Pleas.

WILDE, C. J.—I am authorized by the learned judges to report their unanimous opinion that the errors assigned have not been maintained by the arguments urged at your Lordships' bar.

As to the first objection, the judges are of opinion that the allegation upon the record that the three judges who executed the commission in relation to the trials of the several plaintiffs in error, were nominated and appointed to execute that commission, is an affirmative allegation of their authority to perform that duty, and that it is in no respect rendered uncertain or ambiguous by the subsequent statement that the commission by which they were so authorized nominated and appointed, was directed to them and others.

The second objection involves two points: first, whether the plaintiffs in error in respect of the sixth count of the indictment were entitled to have a copy of the indictment, a list of the witnesses, and a list of the jury ten days before the trial under the provisions of the statute of Wm. 3, and the statute of Anne. Secondly, whether, if they were so entitled, the objection founded upon the non-compliance with the provisions of these statutes was matter properly urged by plea.

The judges are of opinion that the plaintiffs in error were not entitled to have delivered to them the list and copies referred to in the error assigned in that respect, and therefore it becomes unnecessary

to consider whether the objection was properly urged by plea.

The right of the plaintiffs in error to be furnished with the copy of the indictment and the lists referred to, has been endeavoured to be sustained by the counsel for the plaintiffs in error at the bar upon two grounds: first, upon the ground that the statute of the 36 Geo. 3, c. 7 extended to Ireland; secondly, or that, if that statute did not originally extend to Ireland, it was afterwards so extended by the operation of the 57th Geo. 3, c. 6, and by the 11 & 12 Vic. c. 12.

The Judges are of opinion that neither of these grounds can be supported.

The statute of the 36 Geo. 3, passed before the Union, and did not bind Ireland; and, therefore, if it has any application to Ireland, it must be by the effect of 57 Geo. 3, or 11 and 12 Vic.

The 1st section of 36 Geo. 3, c. 7, enacted, that certain acts during the life of his Majesty, Geo. 3, and until the end of the next session of Parliament after a demise of the Crown, should be deemed treason; and the 1st section of the 57 Geo. 3, c. 6, made these provisions perpetual, but did not extend the operation of the statute of the 36 Geo. 3 to Ireland.

The 4th section of 57 Geo. 3, cap. 6, has been principally relied upon, which expressly gives the benefit of the 7 and 8 W. 3, and the 7 Anne, cap. 21, to persons accused of any treason made or declared by that act of the 57 Geo. 3; and it is enough to say that the charge in the sixth count is not for any treason made or declared by that statute.

With regard to the statute of the 11 and 12 Vic., the only effect of that statute was to extend to Ireland certain of the provisions of the 36 Geo. 3, made perpetual by the 57 Geo. 3, and the 4th sec. of the 57 Geo. 3, which has been relied upon, is limited to treason, made or declared by that act; and the treason which is the subject of the sixth count was not one of them, and to which, therefore, it does not apply.

As to the objection, that the counts charging the levying of war in Ireland do not charge an offence which in point of law amounts to treason, this objection depends upon the construction of the statute of Henry 7, passing by the name of Poyning's Law.

By that statute, we think that those acts which were treason in England by the statute of Edward 3, were made treason in Ireland, if committed there; and we cannot deem it necessary to say more upon the subject, than that the terms of the statute admit of no doubt.

As to the objection to the allocutus, we think it is in the proper form.

All that the prisoner in that stage of the proceedings can properly be asked, is, what has he to say why judgment should not be pronounced; and as to precedents which go further, we deem the matter beyond the question stated, to be surplusage.

The only remaining error assigned refers to the challenge of the jury. That error has not been urged at your Lordships' bar, and we think it was very properly abandoned, as the question is not

open to any doubt, the language of the statute of 9 Geo. 4 being clear and unambiguous.

The Judges have not thought it necessary to trouble your Lordships with a more detailed statement of their reasons for the opinions they entertain, as the general assignments of error have been so fully, and ably, and satisfactorily discussed by the learned Judges of the Court of Queen's Bench in Ireland, and which arguments are before your Lordships.

The Lord Chancellor, Lord Lyndhurst, Lord Brougham and Lord Campbell severally expressed their entire concurrence in the opinion of the Judges, and affirmed accordingly the judgment of the court below.

COURT OF CHANCERY.

BANKRUPTCY.—May, 23.

Ex parte DICKSON, *in re* VOGAN.

Mortgage—Practice.

Where the mortgaged premises were clearly insufficient for payment of the debt, on the assignees submitting, they were ordered to convey the equity of redemption to the mortgagees, in consideration of a release from the debt.

The Commissioner, by memorandum of the 4th of February, 1849, had adjudged that the petitioner, Benjamin Dickson, had a good security by equitable mortgage on the estates of the bankrupt, for the sum of £5089 15s. The petitioner went into possession of the mortgaged premises.

By memorandum of the 17th of January, 1849, the Commissioner ascertained to be due, on foot of the mortgage, up to the 1st of November, 1848, £6521 7s. 6d. By memorandum of the 26th of January, 1849, the Commissioner directed the assignee to inquire and state upon affidavit the nature and value of the mortgaged premises, and what sum the same would be likely to realize, if sold by auction, and whether sufficient for payment of the said sum of £6521 7s. 6d.

The value was estimated at £3310. The yearly profit fell short of the interest money, and judgment in ejectment for non-payment of rent due before the petitioner went into possession had been obtained against two of the lots composing the mortgaged premises. The premises had been offered for sale by the bankrupt, but no bidders offered, though the interest was then more valuable. The mortgagees had incurred considerable costs in proving his claims.

Mr. Armstrong, Q.C., for the mortgagee, the petitioner, moved that Bernard Mooney, the assignee, might be ordered to join as a party to, and execute a conveyance of, the equity of redemption of the mortgaged premises, in consideration of the value thereof, and of the petitioner releasing the assignee and the estate of the bankrupt. This application is in order to avoid further costs, the mortgagees having already incurred a considerable amount.

Mr. Creighton, for the assignees, submitted to act as the Court should direct, in order to avoid further costs.

LORD CHANCELLOR.—I think it desirable to save further expense. Be it so.

ROLLS COURT.

GARDINER v. BLESSINGTON.

BYRNE, Petitioner, GARDINER, Respondent.
April 17 & 19.

Receiver—Petition—Allowance for maintenance.

The Court refused to appoint a Receiver, on the petition of a judgment creditor, over an allowance directed by the Court to be paid to the inheritor for maintenance.

By order bearing date the 26th day of June, 1834, and made in the cause of *Gardiner v. Blessington*, it was ordered that the sum of £600 per annum should be allowed to the plaintiff, C. J. Gardiner, for his maintenance, and that same should be paid by the receiver over the lands in the Co. Tyrone, and be in addition to the use of the house at Mountjoy Forest, and the part of the demesne then in the occupation of the plaintiff.

That part of the house and demesne having been subsequently sold, pursuant to the decree in the cause, on the 19th of July, 1847, an order was made, that an allowance of £700 per annum, to commence from the 1st of January then past, be made to the said C. J. Gardiner for his support and maintenance, out of the rents of the Tyrone estates, in lieu of the mansion house and that part of the demesne of Mountjoy Forest hitherto in his possession, and lately sold under the decree in the cause.

In Easter Term, 1848, the petitioner, Lawrence Byrne, obtained a judgment against the said C. J. Gardiner, for the sum of £132 7s. 9d.

On the 16th of June, 1848, a writ of *f. f.* issued on said judgment, directed to the sheriff of Tyrone, and a return of *nulla bona* was made thereto. Byrne then presented a petition for a receiver over this sum of £700 per annum, and having obtained the usual notice order, that a receiver would be appointed, unless cause shewn, within ten days.

Mr. Rolleston, Q.C., now shewed cause, and contended, that this allowance was not such an annuity or rent-charge as was contemplated by the sheriff's act, or 3 & 4 Vic. cap. 105, and the Court had no authority to appoint a receiver over it.

Mr. Hughes, Q.C., and *Mr. H. Smythe*, contra, cited *Rochard v. Fulton*, (7 I. E. R. 131.) *Dillon v. Plasket*, (2 Bli. N. S. 241.) *Evans v. Blennerhassett*, (1 I. E. R. 115; Reilly on Receivers, page 125, 2 P. W. 211.) *Harris v. Davison*, (15 Sim. 128.)

Mr. Ryan, in reply, contended, that even if this allowance came within the terms of the statute, the petitioner was not entitled to the benefit of the 3 & 4 Vic. c. 105, as the judgment was entered in Easter Term, 1848, within a year. *Smith v. Hurst*, (1 Coll. 705.) *Cassidy v. Hopkins*, (10 I. E. R. 206.)

MASTER OF THE ROLLS.—I do not think that this sum which the receiver was directed to pay *Mr. Gardiner*, is an annuity or rent-charge within the meaning of the acts of Parliament—the Sheriff's

act, or the 3 & 4 Vic. c. 105. The Court frequently makes an allowance to an inheritor for his support, although there may not be a surplus, and I am not bound to treat that as liable to be extended at law by an *elegit*; nor does this case come within that part of the 21st section, which provides that the Court may appoint a receiver over property which could be made available by filing a bill. The Court of Exchequer gave a strict construction to the act of 5 & 6 W. 4, c. 55, and considered, that where a legal impediment existed to the issuing of an *elegit*, such as an outstanding term, a receiver ought not to be appointed, and such an application was refused, where the respondent held only an equity of redemption. This Court gave a more liberal construction, and was in the habit of appointing receivers in cases where only a temporary bar existed, which could be removed by filing a bill in aid of the execution at law; and this part of the 21st section was enacted to get rid of the difference of opinion, and put an end to the questions on which the Courts differed. But I do not think it was intended to give jurisdiction by petition, in every case in which a bill might be filed. In this case the petitioner has mistaken his remedy, for the petition should have been entitled in the cause in which the Receiver has been appointed, and prayed that he might be extended to his demand.

"No rule on said petition, without prejudice to the petitioner amending his petition, if he shall be so advised, and entitling same in the cause in which the receiver has been appointed, and applying for the extension of the receiver to this matter; and let the respondent have £5 for his costs of appearing on this motion, and let same be set off against the petitioner's demand."

R. P. H. B., lib. 28, fo. 320.

LAWLER v. LOWRY.—May, 10.

Practice—Continuing Proceedings under the Sheriff's Act.

Where a notice pursuant to the first order under the 154th General Order has been served, and before the second order has been made, the Court cannot continue the proceedings under the Sheriff's Act.

The petitioner, Lawler, had served a notice on the respondent, Maria Lowry, and on James Scott Molloy, her provisional assignee, the respondent being an insolvent. Maria Lowry had filed affidavits to shew cause against the appointment of a receiver, but died before cause shewn. All her next of kin were in America, and she had no personal representative.

Mr. Lawson, Q.C., moved to continue the proceedings against James Scott Molloy, the provisional assignee, and against the tenants of the lands, under the 5 & 6 W. 4, c. 55.

MASTER OF THE ROLLS.—I have no power, when there was no receiver appointed to continue the proceedings. I must, therefore, refuse this motion. I cannot continue proceedings that never existed. You must serve a *scire facias* on the tenants.

EQUITY EXCHEQUER.—SITTINGS AFTER HILARY TERM.

LEVINGE v. DE MONTMORENCY.

Practice—Staying proceedings—Costs of parties in stayed cause—Loftie v. Forbes (2 I. Eq. Rep. 443,) considered—Tangney v. Holmes, (1 Ir. Jur. 78, 125, 163,) dissented from.

Where a creditor's suit, instituted in the Court of Chancery, has been stayed by reason of a prior decree to account obtained in this Court, in a cause of a similar frame and between the same parties, and the plaintiff in the stayed cause had paid the costs of one of the defendants, the Court will not order the receiver in the first cause to pay the plaintiff in the stayed cause the amount of the costs so paid, to the prejudice of prior incumbrancers.

*In such a case, the plaintiff in the stayed cause is personally liable to the costs of prior incumbrancers, if the fund proves deficient, and *prima facie* creditors are only entitled to their costs in the same priority as their respective demands, but this Court will restrain the defendants from proceeding against the plaintiff in the stayed cause for their costs therein, until the fund is realised.*

The Courts of Chancery and Exchequer exercise a concurrent jurisdiction, and the rule as to the enforcement of costs under staying orders is the same, whether the suits are instituted in the same or different Courts of Equity.

This was an application made under the following circumstances:—On the 22nd of January, 1848, the usual decree was pronounced in this cause, which was a foreclosure suit, and the usual accounts directed to be taken. Eyre and Morrogh, two of the defendants in the Exchequer cause, had, subsequently to the institution of the suit in the Exchequer, but before the decree to account,—viz., on the 26th of May, 1847, filed a bill of foreclosure in the Court of Chancery against De Montmorency and others. Several of the defendants in the latter cause had appeared and answered. By an order of the 3rd of June, 1848, the Court of Exchequer restrained Messrs. Eyre and Morrogh, the plaintiffs in the Chancery cause, from proceeding, on the usual terms, that they should be at liberty to come in and prove their demand in the Exchequer cause, together with their costs necessarily incurred in the Chancery cause, with the costs of the motion, and the costs of such of the defendants in the said Chancery cause as were properly made parties thereto, in the priority of the defendants' demands respectively. By an order of the Master of the Rolls, bearing date the 1st of December, 1848, it was referred to the Master to tax the costs of the plaintiffs and defendants in the Chancery cause. Messrs. Eyre and Morrogh subsequently paid over the sum of £18 2s. 5d., being the ascertained costs of E. C. Tuthill, a defendant in both causes. The present motion was made on behalf of Messrs. Eyre and Morrogh, the plaintiffs in the stayed cause, that the receiver in the Exchequer cause should be directed to pay over to them the said sum of £18 12s. 5d., and likewise pay the several defendants in the stayed cause their respective ascertained costs in the said cause; or that the restraining

order might be varied, and that the several defendants in the stayed cause might be restrained from proceeding against the plaintiffs in that cause for their respective costs, and that it might be stated specifically by whom and in what manner and priority, and out of what funds the costs of the defendants in the stayed cause should be paid.

Mr. J. B. Murphy, in support of the application.—The liability of the plaintiffs in a stayed cause was lately discussed before the Master of the Rolls and the Chancellor, in the case of *Tangney v. Holmes*, (1r. Jur. pp. 78, 125, 163. In p. 126, the Lord Chancellor observes, that “the proper way to consider this petition is to look at the position of the defendant, whose costs are in question, and what would have been his rights as to those costs, if the stayed cause had come to a hearing. It is plain that the order would have been that these costs should be paid by the plaintiff, who would have them over against the fund, or the plaintiff, being entitled to redeem the defendant and failing to do so, he would have been bound to pay these costs without having them over.” Again—“I do not look upon this order as simply a staying order, but substantially a decree in the stayed cause.” Here there are different classes of defendants; first, creditors, who are necessary parties; secondly, formal parties. Some of the creditors may be *prior*, others *puisne*, to the plaintiff. The latter are only entitled to get their costs in the same priority as their demand, so that it would be an injustice to the plaintiff in the stayed cause to make him personally *liable*. If the order were varied, by introducing the words “that the defendants in the stayed cause shall get their costs in the same priority as their demands,” all difficulty would be removed.

Mr. Vincent Scully, on same side, relied on *Jackson v. Curtis*, (2 Moll. 463, *ibid.* 466;) *Croker v. Copley*, (*ibid.* 469;) *Crofts v. Pos*, (3 Ir. Eq. Rep. 151,) where Pennefather, B., lays down the rule—“The costs are given against the plaintiff, as an ultimate security to the party, but are not to be enforced against him, unless it appears that there are no funds in the cause applicable to their payment, or that the plaintiff is guilty of laches in prosecuting the suit.” This is the spirit of the order we ask for, that the defendants in the stayed suit be restrained from proceeding against us until the fund proves deficient. *Hall v. Hill*, (5 I. Eq. R. 11,) is to the same effect.

Mr. Bennett, Q.C., for a prior mortgage creditor.—There is no prospect of the fund being sufficient; therefore, to order the receiver to pay over these costs, would be to make my client, having the first claim on the fund, provide for *puisne* incumbrances. In *Crofts v. Pos*, a final decree was pronounced, and in *Lofie v. Forbes* there was no suggestion of a deficient fund.

Mr. Sausse, Q.C., for another incumbrancer.

Mr. M. O'Donnell for W. De Montmorency, a formal defendant, being executor of the testator, who devised the lands charged to the principal defendant. There was only a portion of the incumbrances created by the testator, so that we are entitled to costs as against the plaintiffs in the stayed cause. [*Richards, B.*—He stands in the position

of the original mortgagor. If the latter were alive, he could only have his costs out of the surplus fund.]

Mr. J. B. Murphy contended against the claim of Mr. O'Donnell's client, and relied on *Pepper v. Foster*, (10 Ir. Eq. Rep. 352;) *Rutherford v. Cottenham*, (8 Ir. Eq. Rep. 391; *Daniel's Ch. Pr.* vol. 2, 1297.

PENNEFATHER, B.—This is a case of considerable importance as regards the practice of this court, and the more so because it affects the Court of Chancery as having a concurrent jurisdiction. The present question arises on an order made in this court, dated June, 3, 1848, restraining the plaintiff in the Court of Chancery from proceeding with the *suit* instituted in that court, and was made on the ground that proceeding there was unnecessary, a decree in this court having been pronounced under which all rights could be adjudicated on. That order was obtained at the instance of the plaintiffs here, and it would appear as if they considered the funds were insufficient. It is an order made for the protection of the funds and property, made at the instance of the creditor interested in their preservation, and only made when the funds are likely to be insufficient, and therefore we cannot act as if this fund was sufficient to answer the demands of all parties. It is an application highly beneficial to all persons interested, and avoids further expense as soon as a decree is obtained in either court to answer all the purposes of the suitor. Provision was made for costs which it will be necessary to vary in some respects according to the principles the court will presently advert to. The present motion is, that the costs to which the plaintiff in the Chancery cause is liable should be paid in the first instance by the receiver out of the funds collected by the receiver, or that the defendants in the Chancery cause be restrained from taking proceedings against the plaintiff in the stayed cause, on their demand for costs against him. In justice it would appear that the plaintiff in the Chancery cause, who is restrained from proceeding there by the order of this court, is entitled substantially to relief in one or other of the shapes in which he seeks it. In *Lofie v. Forbes*, it was stated, from the MSS. of the late Sir Michael O'Loughlen, that where both *suits* were instituted in the Court of Chancery, the defendants in a stayed suit would be prevented from levying their costs against the plaintiff, because the court having restrained him it would be unjust to allow the defendants to proceed against him. In the propriety of that observation I fully concur; but, with great respect to the judges of the Court of Chancery, I would extend a similar rule to an order made by the Court of Exchequer. In a matter of this nature the courts have a co-ordinate jurisdiction, and it ought to be the object of both courts to discourage litigation. It would appear from the MSS. read to us that it does not signify in what court the order is made, and the same principles are applicable to both courts. I feel bound to say so much, approving of what fell from Sir M. O'Loughlen, and, as a necessary consequence, of the equitable jurisdiction, and if I was now adjudicating on this matter in the Court of Chancery I would hold myself bound to prevent the defendants from dismissing the bill. I have said this from the necessity of observing on the general question, where the two equity courts are acting in

the same subject matter. The present motion is free from all difficulty of this sort, because all parties in the Chancery suit being also parties in this court, there can be no difficulty in making an order restraining them in such manner as we may think right to give effect to the spirit of our order, but I have said this, because cases may arise where the defendants in Chancery may not be all parties in this court. In such a case there may be a difficulty in restraining a party from dismissing a bill when he was not a party to the suit in the other court. In the present instance there are two grounds of application. Now with regard to the payment of costs by the receiver appointed by this court, we ought not to make such an order. It is resisted by a prior creditor, who alleges the funds in the receiver's hands belong to him, and we think this a valid objection. It is said on the part of the plaintiff in the Chancery suit that the effect of the restraining order here was to make him liable in the first instance to the costs of the defendants in that suit—that is not the meaning of our order. It was not our intention that the order should bear this construction; but we will introduce some words which will get rid of any ambiguity. I very much approve of the words of Sir M. O'Loughlen, that the costs shall be, as far as possible, provided for by the staying order; but, it must be remembered, that these are prospective orders, and that any order for interlocutory costs diminishes the fund distributable at the final hearing. As to the costs of prior creditors whom the plaintiff brings before the court as defendants in the Chancery cause, he is undoubtedly liable in the event of a deficient fund, because the suit in Chancery, however excusable in its inception, turns out unnecessary in the end; and, as to their costs thereon, the prior creditors, in addition to the security of the fund, are entitled to have the personal liability of the plaintiff. This is the rule laid down by this court in *Crofts v. Poe*, and subsequently by Sir Edward Sugden in *Hall v. Hill*. With regard to subsequent creditors they must get their costs in the same priority as their own demands; the costs of puisne creditors are not to be put out of their proper priority. That disposes of the different classes of creditors. Where there is a trustee; if he be a trustee for a plaintiff he is to get costs in the same priority as the plaintiff, if he be a trustee for any creditor he is to get his costs in the same priority as his *cestui que trust*. He is not entitled to costs as against the plaintiff personally, unless he is a personal representative set up by the plaintiff, then he is entitled to costs against the plaintiff. As to the executor, Sir W. De Montmorency, he is not entitled to get his costs out of the real estate but out of the personal estate of the original mortgagor. I have mentioned the general principles applicable by either courts of Equity to these very salutary and useful orders, and conceiving each court to have a concurrent jurisdiction have endeavoured to frame such a rule as would answer each court. Now we have all the parties before us in this court, and feel no difficulty in making the order to restrain the defendants in Chancery from dismissing the plaintiffs' bill or taking any proceeding against them for their costs.

RICHARDS, B.—I think I was right in reserving this application, which originally came before me,

for the consideration of the other members of this court. I spoke on the subject to the Lord Chancellor, with the concurrence of the Lord Chief Baron, and stated it was very desirable to assimilate the practice of both courts. The Lord Chancellor had probably then before him the case in the Irish Jurist. At first I was struck with the difficulty in which an unfortunate plaintiff would be placed by a restraining order, making the plaintiff advance costs, and recover them afterwards as best he might. The costs sometimes are very heavy, and the plaintiff might have to pay more than it would be possible for him to meet, and in default of payment he might be sent to gaol. Let us see the consequences to which such a ruling would expose parties. It would impose on the plaintiff the hardship of waiting for the costs which he had advanced, until the fund was realized. We, however, consider it more just, to delay the payment of the costs until the actual fund is realized; but, in truth, the effect of our order is neither to expedite nor delay; we leave parties in precisely the same position in which they originally stood, instead of compelling an innocent plaintiff to pay costs to a party to whom he owes no debt. To decide on such a principle is not only repugnant to our notions of natural justice, but against the authority of *Crofts v. Poe* and *Hall v. Hill*, referred to in argument. It is contended for, on this motion, that not only prior incumbrances, but those that are puisne, and even parties who have no charges on the lands, are to be paid their costs by this unfortunate plaintiff out of his own pocket. This appears to me to be a monstrous proposition, and if this were the law, I for one have no hesitation in stating, that I would never be a party to staying a suit. [His Lordship referred to a note of the case of *Lofthouse v. Forbes*, from the MS. of the late Sir Michael O'Loughlen, as confirming the view taken by the Court in the present case.]

QUEEN'S BENCH.—EASTER TERM.

SMITH v. RITCHIE.—April 26.

Assumpsit—Bill of Lading—Consignee—Charter party—Evidence—Arrest—Reasonable and probable cause.

A. being the holder of a bill of lading of a certain cargo of coals, therein expressed to be deliverable to him or his assigns, brought an action against B. the captain of the vessel, for the non-delivery of the same. The goods were stated in the instrument to have been shipped by C.

Held that A. was entitled to sue in his own name, in the present form of action.

It appeared at the trial, on the cross-examination of one of the plaintiff's witnesses, that there was in existence a charter party, relating to the cargo in question, which the plaintiff omitted to produce.

Held that the bill of lading constituted in itself a complete contract, and that it lay with the defendant, if he sought to vary the terms of the same, to produce the charter party.

Held likewise, on a motion for leave to enter a suggestion under the 43 Geo. 3, c. 48, that notwithstanding the defendant had been arrested for more

than the sum ultimately recovered, the plaintiff had reasonable and probable cause for making the arrest for the larger amount.

Assumpsit. The declaration contained one special count, which stated that the defendant was master of a certain vessel called the *Harmony*, and that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped upon the said vessel a certain cargo of goods and merchandize, to wit 93 tons weight of coals, of the value of £200 to be carried by the defendant, as such master from Newport to Waterford, at and for certain freight and hire to be paid by the plaintiff to the defendant, to wit for the freight of 5s. 6d. for every ton of the said coals so to be carried as aforesaid, with primage and average accustomed, and in case the said cargo of coals was not discharged within four working days after the arrival of the said ship in Waterford, then the sum of £1 demurrage for every day which should elapse after the expiration of the said four working days before the discharge of the said cargo, the defendant then and there undertook and promised the plaintiff to carry the said cargo of coals and deliver to him the same (all and every the dangers and accidents of the seas, and navigation of whatever nature and kind soever excepted) within a reasonable time after the arrival of the said ship in Waterford. *Averments*, that no dangers of the seas, &c., prevented the defendant, and that the defendant carried the coals from Newport to Waterford, and a reasonable time after the arrival of the vessel for the delivery of the coal elapsed. *Breach*, that the defendant did not within such reasonable time after the arrival of the vessel, or at any time afterwards, deliver the said cargo to the plaintiff, and that the defendant within such reasonable time wrongfully sold and disposed of the said cargo, and converted the same to his own use, without the consent, and against the will of the plaintiff, and thereby incapacitated himself from performing his promise and undertaking, whereby the said cargo was wholly lost to the plaintiff.

The declaration also contained counts for money had and received, and on an account stated; the defendant pleaded the general issue, and also served a notice of set off, whereby he claimed a certain sum in respect of the freight of the same cargo.

At the trial of the cause before Jackson J., at the last Spring Assizes of the City of Waterford, it appeared that the plaintiff, who was a merchant residing in Waterford, had received from a Welsh firm the bill of lading of the coals in question, and on the arrival of the vessel, had proceeded some way in discharging them, when a dispute arose between him and the defendant respecting the payment of some demurrage claimed by the latter. After a good deal of fruitless negotiation between the parties, and in spite of the remonstrance of the plaintiff who made a formal tender to the defendant of the full amount of the freight, the latter called an auction and sold the coal, converting the proceeds to his own use. The plaintiff produced and proved the defendant's signature to the bill of lading of the coals, which was as follows:—

“Shipped in good order and condition, by the

Abercain and Gwythen Colliery Company, in and upon the good ship or vessel called the *Harmony* of Roseharty, whereof Alexander Ritchie is master for the present voyage, now riding at anchor in the port of Newport, and bound for Waterford, to say 93 tons coals, being marked and numbered as in the margin, and are to be delivered in like good order and condition at the aforesaid port of Waterford (all and every the dangers and accidents of seas and navigation of whatever nature or kind soever excepted) unto Mr. Thomas Smith, or to his assigns, he or they paying freight for the said goods at the rate of 5s. 6d. per ton, four working days allowed for discharging, or to be paid a demurrage of £1 per day, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

“Dated in Newport, 4th day of Nov. 1848.

(Signed)

“Weight unknown to ALEXANDER RITCHIE.”

About 40 tons had been delivered to the plaintiff previous to this dispute, and some money had been paid to the defendant on account of the freight. The value of the portion detained and sold by the captain, after deducting therefrom the amount of freight payable for the part actually delivered, somewhat exceeded £25.

A witness named Hayes, who was examined for the plaintiff, admitted in cross-examination that he saw a charter party of the coals on board the *Harmony*, in the plaintiff's counting-house. He did not state further particulars respecting it. Evidence of the value of the article at the time having been given, the plaintiff closed his case, whereupon counsel for the defendant called for a non-suit, on the ground that the charter party contained the proper evidence of the contract between the parties, and ought to have been produced, and that the bill of lading disclosed a contract not with the plaintiff, but with the *Colliery Company*. The learned judge refused to non-suit, but reserved liberty to the defendant to move to enter one, in case the court should be of opinion that the defendant was entitled thereto. The jury found a verdict for the plaintiff generally on all the counts, assessing the damages at £13 10s. 6d., which was the value of the coals wrongfully sold by defendant, less the amount of freight thereon which would have been payable in case the whole of the cargo had been duly delivered.

Mr. Martley, Q. C. in the early part of the term obtained a conditional order to enter a non-suit pursuant to leave reserved, or for a new trial on the grounds above mentioned. Cause was this day shewn by

Mr. Lynch, Q. C., (with him *Mr. Pm.*) [after stating the facts of the case as they appeared in evidence at the trial.] The bill of lading was the instrument whereby the captain, the defendant here, undertook to deliver the goods to the plaintiff. *Prima facie* the property vests in the consignee named therein. *Coleman v. Lambert*, (5 M. & W. 505.) Here also there was a part delivery to the

gnee, which, at all events, established the position in him. The onus of disturbing the verdict in the parties obtaining the order.

Martley, Q. C. and Mr. Harris, contra—charter party ought to have been given in evidence by the plaintiff, it having been the original act between the parties. The charter party in existence, and being in writing ought to have produced. It is no answer to say that it was foundant's hands, as, if so, he ought to have been d with notice to produce it. The consideration t to have been truly stated. The contract was ind indivisible. Besides this, the contract has been set out according to its legal effect. That stated in the bill of lading was between the com- and the defendant. *Moore v. Wilson*, (1 T. 59,) *Sargent v. Morris*, (3 B. & Ald. 277.) Although a bill of lading may transfer the property, it does not transfer the contract. [*Blackburne, C. J.* The question here is, whether the bill of lading contract with the plaintiff.] *Davis v. Jordan, mother*, (5 Burr. 2680.) [*Perrin J.*—My difficulty here is that it is alleged in the declaration the plaintiff caused these goods to be shipped.] *as v. Peck*, (8 T. R. 330,) *Berkeley v. Walling*, (d. & El. 29.) For anything that appears on the face of the bill of lading it might have been made to the benefit of the consignors, the coal company, and the document states in unambiguous terms to the shippers. [*Perrin, J.*—There is no doubt that the plaintiff may maintain an action against the defendant, but the question here is, whether he is not embarrassed himself by the form of his pleading.] [*Crampton, J.* referred to *Evans v. Marlett*, (d. Ray. 271.)] That case has been overruled in subsequent decisions. [*Perrin, J.*—Is not the bill of lading, being made to the plaintiff, evidence in support of the jury of his claim to the property? It does not mean follows that the existence of one right of action on an instrument displaces another.] *Per. Peet* in reply.—The verdict ought to be sustained both on principle and on authority. The bill of lading is a perfect contract, containing both a promise and a consideration; *Wain v. Walters*, (5 T. 10,) and that promise must be considered as made to the consignee, as from him the consideration arises. A charter party may have existed without having been made between the parties to the suit, one of whom the equity of a third party may have been transferred by indorsement. Assuming that the charter party was between these parties, it lay on the defendant to produce it, in order to vary the contract stated in the first count, because the bill of lading was a contract in writing perfectly complete in itself, and the principle relied on by the other side applies only in cases where parole agreements come into competition with instruments in writing. The cases cited against us are quite distinguishable. In *Moore v. Wilson*, it was held that a consignor might, under the circumstances, sue, without, however, ruling the contrary with respect to a consignee. In *Sargent v. Morris*, it was distinctly proved by the defendant that the property was vested in the consignee, and the goods in fact never reached the consignee, who was his factor. The point decided in *Berkeley v. Walling* was quite collateral to the pre-

sent, and the dicta of the judges in that case are strongly in our favour. The right of property is presumptively attributable to the consignee. *Dutton v. Solomonson*, (3 Bos. & Pul. 582,) *Brown v. Hodgson*, (2 Campb. 36.) *Evans v. Marlett* is not overruled, but was distinctly recognized in *Sargent v. Morris*, and in the still later case of *Clark v. Anderson*, (2 Bingh. 20,) which is indeed much stronger than the present.

BLACKBURNE, C. J.—This is an action brought by a party who alleges that in consideration he had shipped goods on board the defendant's vessel on certain terms, the defendant undertook to carry and deliver them at a certain place. The mere question resolves itself into this, whether the party who here sues for the non-delivery is the person who held the property in the goods, the result of all the cases being, that an action like the present must be brought by an individual so entitled. Now, had the plaintiff here the property or the goods when the defendant took them on board his ship? The bill of lading admits them to have been his property, and he was not bound, until the contrary was shewn, to offer strict proof in support thereof, although the defendant was not concluded from disproving the facts. There was, therefore, some evidence that the goods were the plaintiff's, and, according to the authorities, he is entitled to maintain this action. With respect to the question about the charter party, we know nothing respecting the contents of that instrument, nor between what parties it was executed. The contract contained in the bill of lading sustains the declaration, and any thing calculated to qualify and contradict it should have come from the defendant.

CRAMPTON, J.—The plaintiff is entitled to succeed on the present motion. It is said by the defendant that the charter party is part of the contract, but we know not between whom that document was executed. At all events it lay in the defendant's power to produce it fully as much as the plaintiff's, and I do not think that its production by the latter was essential to the maintenance of the action. With respect to the other point the common principle seems to be this, that when goods are transmitted to a vendee by a carrier, who does not even know him, the vendee is deemed to be the party who contracts with the carrier for the delivery. The plaintiff here having an interest in the property can maintain the action. The company at the other side were his agents for shipment, which view would sustain the allegation in the declaration that the plaintiff caused the goods to be shipped. To arrive at this conclusion let us simply look at the form of the bill of lading, whereby the goods are undertaken to be delivered to the plaintiff and his assigns. In the case relied on by Mr. Martley the property in the bill of lading was specially consigned to the plaintiff in the name of the shipper; here we have a bill of lading with the plaintiff named as the consignee, which is always *prima facie* evidence of ownership. No evidence has been offered in disproof of this, and there are even some facts in evidence tending to shew that the plaintiff was actually the owner of the cargo. I am therefore of opinion that the action is maintainable.

PERRIN, J. concurred.

Cause shown allowed.

May 2—On this day *Mr. Harris* moved for liberty to enter a suggestion on the record, to deprive the plaintiff of his costs, and after taxing the costs of the defendant, to issue execution against the plaintiff for the balance which should remain, over after deducting thereout the amount of the damages, pursuant to the 43 Geo. 3, c. 46. The application was grounded on the affidavit of defendant's attorney, who deposed to the fact of the defendant having been arrested in the present action, under a judge's fiat, pursuant to the 8 & 4 Vic. c. 105, for the sum of £25, whereas the sum ultimately recovered was only £13 10s. 6d. The defendant had lodged money in court in lieu of bail. Counsel contended that this was *prima facie* proof of absence of reasonable or probable cause for such arrest, and the court had jurisdiction to entertain the application, inasmuch as such lodgement was in lieu of bail, and tantamount thereto. *Josel v. Peard* (10 Ir. L. R. 550) is no authority to the contrary.

Mr. Peet contra.—We resist this motion, both on the merits, and for want of form. With respect to the latter it is now too late to make it, as judgment has been marked, and the entry of such a suggestion would be repugnant, and vitiate the record, *Smith v. Roberts*, (13 Jur. 40.) The affidavit sworn on the part of the defendant is bad, because it does not negative the existence of reasonable and probable cause. The burthen of proof lies on the defendant. *Roper v. Shearby*, (1 Cr. & M. 496.) [He was then stopped by the court.]

PER CURIAM.—We are of opinion that, under the circumstances of the present case, which was an action for the non-delivery of goods, the plaintiff was justified in holding the defendant to bail for the value thereof, and that there was no want of reasonable and probable cause. We make

No rule on the motion.

EXCHEQUER OF PLEAS.

CLOSE v. BATT.—April 17.

Practice—*Bill of Exceptions*—*Time at which they should be delivered to the Judge*—*Form of Record.*

Where objections were taken to the Judge's charge, and overruled, and the Judge gave time to have the exceptions reduced to writing, and the document was not until after the jury were discharged—*Held, that the court could not hear*

these exceptions, as it did not appear from the record whether they were taken before the jury were discharged.

This was a bill of exceptions taken to the charge of Mr. Justice Perrin, at Down Assizes.

Mr. Holmes was proceeding to state the nature of the exceptions, a portion of which were to the evidence, the remainder to the charge of the learned Judge.

Mr. Whiteside, Q.C., objected to the argument of the exceptions to the charge, the exceptions not having been tendered until after the discharge of the jury.

The learned Judge reported the facts as follows:—

Mr. Holmes (Mr. Joy, Q.C., with him)—At the trial, our objections were overruled by the Judge as each was made, who then gave us time to have the exceptions made up, and they were received by the Judge before the verdict was recorded. [*Richards, B.*—If the exceptions were not tendered till the jury were discharged, how can we entertain any question on those exceptions?] The dominicle only was not delivered to the judge, but the objections contained in it were made and overruled by him. The Judge having received and signed the exceptions, and they being now upon the record, the court cannot go behind it. The Judge might, if he thought fit, decline to receive the exceptions, as being too late, and we then could have had our remedy under the statute. We were in sufficient time until the verdict was recorded. [*Lefroy, B.*—We must take the record as it is before us; it distinctly states that the jury were discharged.] [*Richards, B.*—For anything that appears on the record, the jury may have been discharged before a single exception was taken.]

Mr. Whiteside, Q.C., contra.—The objection must be made while the jury are in the box, *Ball v. Mannin*, (Sm. & Batt. 461-2). It is absurd to say that a Judge could tell a jury after they were gone, that what he told them was incorrect. [*Pennefather, B.*—There is nothing in this record to shew that any objection was ever made.] [He cited Stat. of West. 2, c. 31; 2 Coke Inst. 437; *Wright v. Sharpe* (1 Salk. 288); *Armstrong v. Lewis* (2 Cro. & M. 274); *Armstrong v. Lewis* (4 Moo. and Sc. 23, per Denman, C.J.)]

PENNEFATHER, B.—It is utterly impossible to hear these exceptions on the present record.

RICHARDS, B.—We cannot hear these exceptions. If the objections were made in time, I would struggle to let you in.

COURT OF CHANCERY.

In re ROBERT TURNLEY, a lunatic; *ex parte* HINCKS, CUMMING, SMYTH, and CROMIE.

April 21st and 28th.

Costs—Practice.

A bill having been filed on behalf of the lunatic, in pursuance of the Master's report, in order to clear away doubt from the lunatic's title, which without suit could not have been done, and the lunatic having succeeded, Held, that under the circumstances the principal defendants, were trustees for a charity, were entitled to the costs out of the lunatic's estate.

This was a petition presented under the following circumstances:—Francis Turnley died, seized of considerable real estates, leaving Robert Turnley, the lunatic in the matter, his heir-at-law. Amongst the papers of Francis Turnley were found instruments purporting to be his will, and codicils, by which he devised certain estates to trustees therein named, upon trust to convey the same to the petitioners and others, for a trust to be called the Cushendall Trust.

The immediate devisees disclaimed, in consequence of which the legal estate descended on the lunatic, who remained in receipt by his committee of the rents and profits of the devised lands.

The Master, by his report made in the lunacy matter, found that it would be for the benefit of the lunatic that proceedings should be taken to dispute the validity of the will and codicils, and recommended that a bill should be filed on behalf of the lunatic against the persons taking estates under the will. A bill was accordingly filed, in pursuance of this report, against several parties, including the petitioners, the Commissioners of Charitable Donations, and the Attorney-General, alleging that the will and codicils were executed while the testator was insane, and that the plaintiff could not have his title freed from the claims of the devisees save by a decree of the Court of Chancery, and praying that an issue might be directed to try the validity of the documents. The petitioners by their answer did not assert the validity of the said instruments as the will of Francis Turnley, but submitted their rights to the court. No proofs were made on behalf of the petitioners. On the hearing, the Court directed an issue *devisavit vel non*, giving the petitioners the carriage of it. The verdict on the issue was in favour of the plaintiff in equity, and against the petitioners; and on the final hearing, a decree was pronounced declaring void the said instruments, purporting to be the will and codicils of the said Thomas Turnley. The petition prayed that the petitioners might be declared entitled to their costs in the suit, and consequential directions.

Mr. F. Fitzgerald in support of the petition.—*Cranch v. Brissett*, (5 Ves. 398); *Hicks v. Wrench*, (6 Mad. 93); *Johnston v. Todd*, (8 Beav. 489); *Turner v. Frampton*, (2 Coll. 1331); *Ex parte Sherwood*, (19 Ves. 208).

Mr. Dobbs, for the committee of the lunatic, did not object, but observed that the Commissioners of

Charitable Donations being before the court, were sufficient to protect the interest of the charities.

Mr. J. B. Miller in reply.—*Lynn v. Beaser*, (1 T. & R. 63); *Thomason v. Moses*, (5 Beav. 81); *Ash v. Berry*, (3 Moll. 97.)

LORD CHANCELLOR.—I think this case is very much governed by that case of *Ash v. Berry*, reported in (Beatty, 255, and 3 Moll. 97.) There it is stated that the "costs of a bill dismissed were given to the plaintiff, where the fund in litigation could not be enjoyed by the party entitled to it, without the declaration of the court." That is a strong case. However, as it is reported in Molloy, it seems that the Lord Chancellor had at first much difficulty in giving to the plaintiff the costs of a dismissed bill; but eventually retained the bill, making a declaration of the rights of parties, and then gave the costs out of the fund. Some of the other cases seem to have proceeded on the same ground; as to the short case in 5 Ves. it does not appear what the particulars of it were. In *Johnston v. Todd*, (8 Beav. 489,) "the plaintiffs stating themselves and some of the defendants to be the next of kin, filed a bill for the administration of a testator's estate. Their claim was displaced, upon inquiries directed by the court, and other persons, not parties to the cause, established their right, and became entitled to a large residue. The case being one of great difficulty and doubt, and an investigation being absolutely necessary for the administration of the estate, the plaintiffs and defendants were allowed their costs out of the fund." The Master of the Rolls then says, "The next question is whether the costs of this investigation ought not to be considered as costs in the cause. The inquiry was necessary for the administration of the estate; and the only scruple I have had is this, whether those parties who were originally brought here, and before the Master as next of kin, but whose claims were displaced, shall receive any costs. I think that they ought, and for this reason, because as between them and those claiming through Peter Marshall, it was so doubtful who was right, and so impossible to decide the matter without careful investigation, that if they had not brought forward their claims, there could have been no adjudication." That in fact is giving them their costs, because they brought forward the claims on the estate. I think to the same effect is the case of *Hicks v. Wrench* (6 Mad. 93.) The case here is particular in its circumstances. These parties do not appear to have instituted any proceeding to disturb the heir at law; but it was found that it would be necessary to have a suit, the trustees having disclaimed. The Master then thought he ought to have a proceeding instituted for that purpose. These parties were called on to come forward; they submitted their claim for the protection of the court, as they were almost bound to do—as trustees for a charity they were hardly at liberty to refrain from so doing. The court directed this proceeding to be taken, which has benefited the lunatic. These parties made no vexatious defence, and I do not think they occasioned any expense by being made parties. Under these special circumstances I do not fear

this case being made a precedent, for it does seem strong to say that the heir at law should pay the cost of litigating a will which he set aside; but we must remember that he was the promovant, and that the proceeding was for his benefit. No extra expense having been occasioned, it does seem a proper case for this estate, which is within the province of the court, and which it is able to administer, to pay the costs of all parties.

Book 4, p. 344.

TILLY v. BROWNE.—*May 23rd & 28th.*

Practice—Caveat—Opening of an Enrolment.

A caveat was entered and allowed to expire; the plaintiff enrolled the decree without giving notice to the defendant; Held not to be irregular. A caveat should be renewed after 28 days. An enrolment will not be opened for a party who delays the application unreasonably.

This was a motion to open an enrolment of a decree, under the following circumstances:—Carmichael, a defendant, had lodged a caveat on the 27th of June, 1848, the day on which the decree in this cause had been pronounced; on the 27th of December, 1848, the plaintiff enrolled the decree, without giving any notice to the defendant, Carmichael, who had lodged the caveat. The plaintiff, having been informed in the secretary's office that the caveat expired 28 days after it was lodged, and, not having been renewed, it ceased to have any effect; on the 27th of December, 1848, enrolled the decree, without giving any notice to Carmichael. The defendant, Carmichael, had presented a petition for a re-hearing, and on the 2nd of March, 1849, the Lord Chancellor made an order granting the prayer of that petition. On the 17th of March, the plaintiff applied to the Court to have the said order for re-hearing discharged, on the ground of irregularity; and an order was made for that purpose.

Mr. Hughes, Q.C.—The plaintiff has six months to enrol a decree, but when a caveat is lodged, notice should be given by the plaintiff of his intention to enrol the decree. In England, where a caveat has been entered, the duty of giving notice is cast upon the Chancellor's secretary's (2 Dan. C. P. 1007.) In this country there is no case which shews that the Chancellor's secretary ought to give notice, but the practice here is for the plaintiff's solicitor to serve the notice, which in England is given by the secretary. *Robinson v. Newdick*, (3 Mer. 13;) *Enright v. Fitzgerald*, (1 D. & W. 72.)

Mr. Christian, Q.C., and **Mr. F. Walsh**, contra.—No doubt, the practice in England is what has been stated, but it is different in this country. There is no such practice here; nor is it the practice here for the plaintiff's solicitor to give the notice. There are two grounds upon which this application is made,—surprise and irregularity. There is no surprise in this case. *Balgny v. Chorley*, (1 M. & K. 641;) *Barnes v. Wilson*, (1 R. & M. 486.) The plaintiff was in no way irregular, for he was informed in the office that the caveat was a nullity. There is a difficulty

in such a case as this in opening an enrolment at the instance of one party, where there are several others who do not apply to have it done.

Mr. Collins, in reply, insisted that the case of *Enright v. Fitzgerald* overruled the English case cited by Mr. Christian, and cited *Anon*, (1 Ves. Sen. 325, Barry and Keogh, C. P. 468,) as giving the form of the caveat. (Beame's Orders, 308.)

May 28th. LORD CHANCELLOR.—I have in this case inquired what the practice in this country is as to caveats, and I find that the practice has been to renew caveats after 28 days, for the caveat only lasts for that time, and there are several instances of renewals of caveats. I also find that it is the practice of the office to inform parties who lodge a caveat, that it will only continue in force for that time. No doubt, the practice in England is different, *Burnet v. Theobald*, (1 P. Wms. 609; Beame's Orders, 308;) *Robinson v. Newdick*, (3 Mer. 16;) *Anon*, (1 Ves. S. 235;) *Sheehy v. Lord Muskerry*, (7 C. & F. 23;) *Barnes v. Wilson*, (1 R. & M. 486.) There is no order in this country similar to the English orders of 1698, but I think the course adopted here is equally reasonable; and as I find it has been acted on for a length of time, and as I see nothing inconvenient in the practice, I shall not alter it. It seems, the plaintiff was informed in the office that the caveat had expired; therefore, there was not anything irregular in his proceeding then to enrol the decree. If the defendant, immediately after the caveat expired, had applied to the Court for assistance, the Court might have then thought it reasonable to do so; but now, after the other party has been allowed to go on in the office, and after such a lapse of time, the motion must be refused with costs.

ROLLS COURT.

SEAVEY v. FIVEY.—*April, 25.*

Practice—Motion to dismiss—Amendment.

Notice of motion to dismiss a bill served on the 14th of April, on the same day notice of amendment was served, but the bill was not amended until the 16th, Held that the amendment was no answer to the motion to dismiss.

Mr. Trevor moved that the bill in this case might be dismissed for want of prosecution, under the 82d General Order. The bill was filed to set aside a deed as voluntary and fraudulent against the plaintiff. On the first of November 1848, the answer was filed, on Saturday, the 14th of April, the notice of motion to dismiss the bill was served, and on the same day the plaintiff served notice of amendment, but the bill was not amended till Monday, the 16th of April. In the case of *Mark v. Willington*, (11 I. E. R. 269,) it was held that an amendment of a bill after notice of a motion to dismiss was no answer to the motion, and the plaintiff was directed to strike out the amendments.

Mr. Leach, contra, contended that, according to the terms of the 82nd Order, the bill should not be dismissed, for it provides that "if the plaintiff shall not proceed with the cause" the defendant may move to dismiss the bill; by the 49th Order the plaintiff is at liberty to amend once after answer, and by so

doing he was proceeding with the cause, and so came within the proviso in the 82nd rule. [Counsel also cited *Moore v. Lawler*, (9 I. E. R. 148,) where the bill was amended after the defendant was entitled to dismiss it, and the Court refused to dismiss the bill.]

MASTER OF THE ROLLS.—It has been already decided that after a notice of motion to dismiss a bill for want of prosecution an amendment of the bill is no answer to the motion. It was so held by Sir M. O'Loughlen in *Dycers v. Golding*, (2 I. E. R. 57) and I have followed that decision; the practice, therefore, is not new. I admit there have been some exceptions to the rule, but those were under special circumstances, and previous to the case of *Davies v. Davies*, (10 I. E. Rep. 614.) In this case the answer was filed in November, and the necessity for the amendment then arose; it might have been different if the subject matter of the amendment occurred recently. It is the duty of every solicitor, within a reasonable time after an answer comes in, to lay it before counsel for his advice and direction for the conduct of the cause. If the amendment had been made in November the cause could have been set down for hearing this term; and, besides, there is not any affidavit to account for the delay, and, consistently with the case of *Davies v. Davies*, I do not see how I can avoid dismissing the bill; however, if the plaintiff is willing to strike out the amendments, I will make a similar order to that in *Mark v. Willington*.

[The plaintiff having declined to take an order that the amendments should be struck out, the bill was dismissed with costs.]

PRATER, Petitioner; RIGHT HON. JOHN, EARL OF PORTARLINGTON, Respondent.—April 25.

LORD PORTARLINGTON, Petitioner; PRATER, Respondent.

Practice—Security for Costs—Petition for Receiver.

A mortgagee resident out of the jurisdiction presented a petition for a receiver, and a conditional order was obtained. Upon a petition to shew cause, the respondent objected to the Petitioner being heard without giving security for costs. The petitioner was allowed to proceed, his solicitor personally undertaking to pay any costs which the Court should direct.

In this case a petition had been presented by Prater, the petitioner in the first matter, who was resident in England, for a receiver under the mortgage act; and on the 20th of January, 1849, a conditional order was obtained. On the 3rd of July, 1844, a petition was presented by the respondent, who also resided out of the jurisdiction, praying that the conditional order of the 20th of January might be discharged, and that the petitioner might give security for costs.

Mr. H. Smythe, for Lord Portarlington.—The petitioner in the first matter, as resident out of the jurisdiction, is bound to give security for costs. Where a client resident abroad applies for taxation of his solicitor's costs, he must give security for the costs of that proceeding. *In re Pas-*

more, 1 Beav. 94, *Bodecote v. Bostock*, (ibid, note,) in *ex parte Seidler*, 12 Sim. 106, a petitioner who was resident out of the jurisdiction was directed to give security for costs, although the respondent had answered the affidavits. (See also *Anon*, 12 Sim. 262.) A foreigner who petitioned to have his claim referred to the Master, was directed to give security for costs. *Drever v. Maudesley*, (5 Rus. 11.) A defendant who is resident abroad will not be compelled to give security for costs, although the plaintiff is, *Baxter v. Morgan*, (6 Taunt. 378.) In a petition under the mortgage act, it was held that the conditional order for a receiver could not be served on a respondent resident out of the jurisdiction. *Wolfe v. Jackson*, (2 Hog. 194.)

Mr. Green, Q. C., with **Mr. Rogers**, for the petitioner. The petitioner should not be directed to give security for costs. There is no precedent of such an application as the present.

The **MASTER OF THE ROLLS** made the following order:—

"The petitioner's solicitor personally undertaking to pay any costs which the Court may adjudge the respondent to be entitled to on this motion, the Court doth declare that the petitioner is at liberty to be heard on this motion without giving security for costs, &c."

R. P. H. B. 28, *fu.* 416.

The cause shewn by the respondent was subsequently disallowed.

RUSKELL v. CHURCH.—April 25.

Practice—Objections to Title—Costs of purchaser.

Where several objections to the title have been taken by a purchaser, some of which are allowed, and others overruled, on motion to discharge the purchaser, and that he be paid his costs, the costs of the objections which have been overruled will be set off against those which have been allowed.

In this case the purchaser had taken several exceptions to the title of the lands sold, some of which had been allowed, and others overruled.

Mr. Hughes, Q. C. for J. Lynam, the purchaser of part of the lands sold in this cause, moved that he might be discharged from his said purchase, and that the accountant-general might transfer to him, so much of the stock to the credit of the cause, as would amount to the purchase money, and that he might be paid his costs.

Mr. P. Blake, for the plaintiffs, moved a cross notice, that the taxing master might be directed to tax the costs of any of the several objections filed on behalf of J. Lynam, to the title of the lands which had been overruled, and that said costs might be set off against the costs payable to said purchaser. [Counsel referred to the case of *Martin v. Cotter*, (9 I. E. R. 44,) where the purchaser was declared not entitled to his costs, although he ultimately succeeded in his objections, on account of the great delay, as he was aware of the defects in the title several months before.]

MASTER OF THE ROLLS.—I am not aware of any case in which such a discussion as to the costs has been raised on a motion to discharge a purchaser.

My present impression is, that it is not the practice to make such an order. However, I will look into the matter.

May 3.—On this day his Honour made orders in the terms of both notices.

—♦—
QUEEN'S BENCH.—TRINITY TERM.

See 14 Jurist 297
MIDLAND G. W. RAILWAY CO. v. QUIN.

May 25th.

*An action of debt for railway calls having been brought against an infant shareholder, he pleaded infancy at the time of "the making of the contract in declaration mentioned." Held on special demurrer, that inasmuch as his individual liability might in one particular case have arisen independently of contract, the plea was in its present form no answer to the action. Quere, whether the Companies' Clauses Consolidation Act, 1845, (8 & 9 Vic. c. 16,) affects the legal status of infant shareholders?**

Debt for railway calls. The declaration, (which was framed in the statutable form,) alleged that the defendant was indebted to the company in respect of a call of £5 a share on 40 shares.

1. Plea, general issue;

2. Plea, *onerari non*, because he says that he, the said defendant, at the time of the making of the said supposed contract in the said declaration mentioned, was in fact under the age of 21 years—to wit, of the age of 19 years, to wit, at the place aforesaid, &c., *verification*.

Special demurrer to second plea, assigning for causes, *inter alia*, that it was uncertain what contract is referred to therein, there being none mentioned, and then declared that the plea should have averred the infancy of the defendant, either at the time of the registration of the shares or of making the calls.

Also, that the plea was no answer to the action, and that by the provisions of the Companies' Clauses Consolidation Act, 1845, an infant shareholder is liable to calls.

* Section 8. "Every person who shall have subscribed the precise sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of the shareholders hereinafter mentioned, shall be deemed a shareholder of the Company."

Secs. 18 & 19 prescribe the formalities to be observed in case of the transmission of shares, "in consequence of the death, or bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this the special act," without which formalities "no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof."

Sec. 21 provides, that with respect to the provisions for enforcing calls, the word "shareholder" shall extend to and include the legal personal representative of such shareholder, (as defined in sec. 8.)

Sec. 79. "If any shareholder be a lunatic or idiot, such lunatic or idiot may vote by his committee, and if any shareholder be a minor, he may vote by his guardian, or any one of his guardians, and every such vote may be given either in person or in proxy."

Joinder in demurrer.

The defendant appeared and pleaded by his guardian.

Mr. Boyce for the demurrer.—The calls have been made by the company pursuant to 8 Vic. c. 16, (Companies' Clauses Consolidation Act,) sec. 21 & 22. The meaning of the term shareholder is defined by sec. 8, where there is no reservation in favour of infants. In sec. 79, minors holding shares are expressly provided for. Dwaris on statutes, 516–51. A party may become entitled to shares by original subscription, transmission, and assignment. Sec. 18 provides for the case of a female marrying whilst entitled to shares, and makes her husband liable. The cases where parties have been held liable for rents accrued during their infancy, are analogous. *Mahon v. O'Ferrall*, (10 Ir. L. Rep. 527;) *Kirton v. Elliott*, (2 Bulstrode, 69, 1 Furlong, 114, and manuscript case there cited;) *Billing v. Osbrey*, (Exch. Hil. 1829.) *Evelyn v. Chichester*, (3 Burr. 177.) The plea here should be taken in the most unfavourable sense for the pleader. In *Cork and Bandon Railway Co. v. Casenove*, (11 Jurist, 302.) almost the point in question was decided, as it was there held that a party who had attained his majority was liable for calls which accrued during infancy, without any act of ratification on his part.

Mr. Henn, Q.C., and *Mr. O'Hara*, contra.—This plea speaks of a contract, and this was proper, the declaration merely omitting to set it out, in consequence of the succinct form prescribed by the act. The latter makes no reservation in favour of infants, and the provision of the common law must be taken to apply to them. Contract is the sole medium of liability here. It does not follow, even in the case of a legatee, that he must accept of the gift, (19 sec.) Such acceptance, we submit, cannot be binding till 21. [*Blackburne, C.J.*—It is evident that the Act of Parliament recognizes the existence of an infant shareholder.] The cases referred to respecting lands are distinguishable, and rest on peculiar principles. This is a matter connected with trade. In the case in 11 Jurist, the action was brought after party attained his full age, and Coleridge, J., distinctly avoids giving any opinion as to the liability of a party sued whilst an infant. Lunacy and idiocy are both defences under a plea of *non est factum*, and it would be quite absurd to hold lunatics and idiots liable under sec. 79. The 19th section treats the vesting of shares in a husband as a *legal consequence*, and this raises an inference in our favour. The true rule seems to be this, to consider the act as contemplating only such parties as contractors, who are legally of ability to contract. [*Blackburne, C.J.*—It is not possible to conceive a liability, without some act on the part of the person made liable.] The Court ought not to extend the principle contended for beyond the cases of landlord and tenant. It is very doubtful whether in all these last-mentioned cases the actions were not brought after the infancy determined. *Kettle v. Elliott*, (cited in 1 Rolle Ab. 731, K. i.) and *Ketsey's case*, (Cro. Jac. 320, S. C. Brown. 120.) both of which are probably identical with *Kirton v. Elliott*, (2 Bul. 69;) *Loos v. Griffith*, (1 Scott, 458.) The general proposition of law

concerning infancy has been laid down in 3 Com. Dig. Tit. Infants, C. (2.) 565. "So regularly a contract by an infant, if it be not for necessities, shall be void." *Ballott v. Parsons*, (8 Burr. 1805;) *Gibbs v. Merrill*, (3 Taun. 307;) *Williams v. Moore*, (11 M. & W. 266.) This plea of infancy is a sufficient avoidance of the contract.

Mr. Martley, Q.C., in reply.—This demurrer must be allowed, unless the Act of Parliament be repealed by the Court. There may be a shareholder independently of contract, as, for example, by transmission. [*Blackburne, C.J.*—The plea assumes, that the defendant is liable by virtue of a contract.] The act provides for the registering of an infant. [*Crompton, J.*—I observe that in the case in the 11 Jurist the pleas negatived fresh registration.] That was merely intended to exclude any implication of ratification. If the argument on the other side prevail, an infant shareholder cannot have an existence. [*Moore, J.*—Cannot an infant repudiate the act of another party on his behalf?] If so, what is to become of the company? [*Crompton, J.*—Does not the subsequent registration of a transmitted share amount to a contract?] [*Blackburne, C.J.*—I cannot suppose that any person can be sued by way of contract, unless either himself or some other party has bound him. How does the case stand, where the father bequeaths his share in a business to his infant son, and directs his executors to carry on the business?] This can only be done through the medium of a subsequent arrangement with surviving partners. [*Moore, J.*—But would the son be liable for losses in trade incurred by such partnership?] The 27th sec. of the act is also material to be considered.

Cur. ad vult.

May, 29.—*BLACKBURNE, C.J.*, this day delivered the judgment of the Court.—We intend giving no opinion upon the important questions which have been discussed in this case. We allow the demurrer, on the mere ground of informality in the plea, in referring to a contract not stated in the declaration, thus assuming that the defendant's liability could solely have arisen through the medium of contract. The liability of a formal shareholder, strictly speaking, rests solely and directly in contract; but a possible case might arise, where, consistently with the allegation in the plea, the defendant might have been liable—namely, in case he had married a female shareholder. This species of liability would be independent of contract on his part. For this reason we consider the plea bad, but the defendant may amend the same, if so advised, on payment of costs. There is, however, no species of defence which is not open to him under the general issue.

Demurrer allowed.

COMMON PLEAS.—EASTER TERM.

EXECUTORS OF KING v. KER.—*May 3.*

Principal and Agent—Loan Fund Society—Liability of Officer—Nonsuit.

A. the clerk of a loan society, received money from K. for the purposes of the society, upon an agree-

ment with A. (who acted on behalf and with the sanction of the managers of the society) and that K. should receive £6 per cent. interest upon the loan, being a rate of interest which the society was not legally competent to give. A. upon receiving the money, gave K. the following acknowledgment:—"Mr. Thomas King has deposited with me this day, by his son, the sum of £100 sterling, to be added to the amount of capital in the Drumsckett Loan Fund, and for which he will get interest at the rate of £6 per cent. from this date. Dated this 12th March, 1844."

Held, that notwithstanding this receipt, and the illegality of the transaction, A. was not personally liable for the sum lodged with him in an action by the representatives of K.

This was an action of assumpsit for money had and received. The case was tried before the Lord Chief Justice of the Common Pleas at the sittings after last Hilary Term. The action was brought for the recovery of £60 being the balance of a sum of £100 deposited by Thomas King, the plaintiff's testator, with the defendant as clerk of the Drumsckett Loan Fund Society. The defendant pleaded the general issue. Upon the trial the plaintiffs proved the rules of the Society, made in pursuance of the act of 6 & 7 Vic. c. 91. The 11th rule was as follows:—"That funds be raised for the use of the society, by deposits bearing interest at the rate of £5 per cent. per annum. Debentures shall be granted for sums amounting to £20; and deposit receipts for sums less than £20. No interest shall be payable on fractional parts of a pound. Three months' notice shall be required previous to the withdrawal of any sum lodged in debentures," &c. The plaintiffs also proved the above acknowledgment, and that on the 1st July, 1847, Thomas King the deceased, sent his son to defendant for the money deposited, whereupon the defendant paid the son a sum of £40; that upon that occasion the defendant changed the figure 6 in the above acknowledgement into a 5, in order to make the interest given appear conformable to the rules of the society; that notwithstanding such alteration, King received £6 per cent. interest, and that no debenture was ever offered to King from the time of the lodgement in the year 1844, up to the month of June, 1847, when the defendant then tendered a debenture to King, which he refused to take, stating that it was his money he wanted, and not a debenture. It further appeared upon the cross-examination of Mr. Piesse, the secretary of the Loan Fund Board in Dublin, and one of the witnesses for the plaintiff, that in the annual account of the Drumsckett Society for the year 1844 (which was received at the head office in the ordinary way of business) Thomas King, the deceased, appears entered as a depositor of £100; similar accounts were proved for the years 1845, 1846, and 1847; and by them it appeared that £5 per cent. interest was paid for each year to the said Thomas King, on said sum of £100. [These documents were objected to by the plaintiffs' counsel, but admitted by the court, and read in evidence.]

Upon the close of the plaintiffs' case, counsel for the defendant called upon the learned judge to

nonsuit, which, however, he declined to do, reserving liberty to the defendant to move for a nonsuit, in the event of a verdict for the plaintiffs.

The defendant went into his case, and proved, amongst other matters, that the money was converted into a loan by the Loan Fund Society, on the day of its lodgement, or the next day; and that depositors had the privilege of recommending borrowers to the society, which the deceased Thomas King had, on more than one occasion, exercised.

The jury found for the plaintiffs.

Mr. Tombs, Q.C., with whom was *Mr. R. M. Mills*, showed cause against the conditional order for entering a nonsuit. The plaintiffs could not sue the Loan Fund Society for two reasons; 1st, The rate of interest received by King was contrary to the act of Parliament, and the rules of the society; 2ndly, King had no debenture, which he was required by the rules of the society to have. The defendant, therefore, by entering into a contract with King, which he had no authority to enter into on behalf of the society, has violated his duty, and taken upon himself the responsibility of the contract. [*Ball, J.*—The receipt shows the facts of the contract, and that interest was to be paid at £6 per cent.; and your case is, that inasmuch as the defendant could not bind the Loan Fund Society, and, although acquainted with the rules, yet was guilty of a violation of them in the contract, he thereby made himself personally liable. Have you any case?] The case of *Higgins v. Senior* (8 M. & W. 834) is an authority. It was there laid down by the learned judge in his charge, "that if the defendant had acted as agent, not having authority to make the contract, he was liable for so acting, and that he was responsible whether the party knew he so acted or not—that knowledge made no difference." [*Mr. Hutton, Q.C.*—We rely on that case as an authority for the present defendant. There the contract was entered into in the defendant's own name, and the question was whether he acted as agent or not.] [*Ball, J.*—Here, however, he enters into the contract for the society, and to do something on their behalf.] The words of the contract are future as regards the society. They are "to be added to the amount of capital," &c., implying that he himself should do something thereafter, in order to make this money the property of the society. It matters not whether the original intention of the testator was to enter into a contract with the society, or with the defendant personally: the defendant exceeded his authority, and was guilty of a breach of duty, he is therefore liable. *Appleton v. Binks*, (5 East. 148); *Story on Agency*, p. 118. The evidence which supports this view, is the document itself, in which he contracts that certain things should be done, which could not be legally done, and which were never done in point of fact. It is perfectly clear upon the face of that receipt, that the defendant exceeded his authority.

Mr. Hutton, Q.C. (with whom was *Mr. J. Adair*), contra.—The whole transaction was evidently one with the society; and though irregular, it cannot fix the defendant with a liability he never contemplated. The returns (which, being regular official documents,

signed by the trustees, we submit, are admissible evidence,) show that the defendant as clerk did his duty and transmitted the money to the trustees. It is further in evidence that the deceased recommended borrowers to the society, which he could only have done as a depositor. It was with the full concurrence of King that no debenture was given, as he would not have been entitled to receive more than £5 per cent. interest on such debenture. [*Ball, J.*—There can be no doubt that the act of Parliament was violated, and very illegal transactions entered into. There was gross culpability; but the question is, whether the mere instrument of the parties is liable in this action. It has been laid down in *Dorman v. Williams*, (7 Ad. & El. 111.) that the burden of showing that the agent had no authority, is imposed upon the plaintiff. That decision is very important in this case.] There is no evidence to show that the defendant had not authority to do every thing he did. On the contrary the trustees adopt his acts, and he would have been liable to them in an action if he had not handed over the money. *Tenant v. Elliott*, (1 B. & Pul. 3.) [*Jackson, J.*—The plaintiffs say that this was an illegal transaction, and that therefore the defendant is liable. It certainly was a gross irregularity, but an irregularity to which King was a party, and by which he was benefitted. *Ball, J.*—How do the plaintiffs escape from the maxim *turpi contractu non oritur actio*?] Whether the transaction was illegal or not, the defendant was nothing more than a clerk, and if the action is against all, it should have been brought against the principal. *Stephens v. Badcock*, (3 Barn. & Adol. 561.) *Sadler v. Evans*, (4 Burr. 1985.) In *Spicer v. Lavendar*, (2 Brod. & Bing. 452,) *Park, J.* says: "It is not merely because he calls himself as agent that he can become liable; he must so frame the undertaking as to make his additional engagements clear beyond dispute." There is nothing of the kind in this case. The fair construction of the instrument is that it was a contract with the society. The effect of that instrument was entirely for the consideration of the judge, who ought, therefore, to have ruled against the defendant.

Mr. Mills, in reply.—The question the judge left to the jury was, whether the loan to the defendant was in his personal or official capacity. The nonsuit question, therefore, does not affect us, for that assumes that the loan was to the Drumstick Loan Fund Society. [*Jackson, J.*—We are not now to look at what the judge left to the jury, or at any thing he did after he refused to nonsuit. We are to consider the question as it stood at the close of the plaintiff's case.] But the evidence of the money having been paid to the society came from the defendant's witnesses.

PER CURIAM.—There was abundant evidence on the face of the plaintiff's case to show that the loan was made to the society. The receipt of *William Ker*, which is the document on which the plaintiffs sue, and the document coming out of the hands of their own witness, *Mr. Piesse*, and which were clearly in evidence, are quite sufficient to establish that fact. There is no proof that the defendant had not authority from the society to receive that loan on their behalf upon the terms he entered into it.

we do not think, therefore, that any case has been made out to fix him with personal liability.*

Non-suit entered with costs.

TAYLOR v. CRUISE.—June 5.

Non pros—Removal of suit to Inferior Court.

If proceedings instituted in one of the superior courts be removed to an inferior jurisdiction, at the instance of the plaintiff, and with the defendant's implied consent, the defendant cannot afterwards enter a rule for non pros in the court above.

Mr. O'Callaghan, for plaintiff, moved to set aside the order of the 23rd of May, for *non pros*, "unless declaration filed within four days." Counsel relied on the affidavit of plaintiff, which stated that it was agreed on between the parties—after service of the writ, and before declaration—to abandon proceedings in that court, and to proceed by civil bill, in consequence of the smallness of the demand; that in pursuance of said agreement, proceedings in the superior court were stayed, the civil bill process issued, and a decree pronounced in favour of the plaintiff, which the defendant obeyed by paying the amount, and thereby admitting the jurisdiction of the court.

Mr. Darley, in support of the order, read defendant's affidavit, which negatived the fact of his having been a party to the abandonment of the proceedings in the superior courts, and the substitution of civil bill proceedings.

TORRENS, J.—Did the defendant appear below?

Mr. O'Callaghan.—He did, and opposed the plaintiff's claim, and when defeated, paid the debt. It was clear defendant, when below, considered the agreement in existence, as he did not plead a suit pending in a superior court, in which case plaintiff could not have obtained a decree.

TORRENS, J.—We are of opinion that defendant, even if no verbal or written agreement took place, consented to abandon the suit in this court, by appearing below, and admitting a jurisdiction there; the motion to set aside the order must, therefore, be granted, with costs.†

EXCHEQUER OF PLEAS.

COLQUHOUN v. NOLAN AND OTHERS.—April 19.

The statute 9 Geo. 4, c. 82—Commissioners appointed pursuant to, not a corporation.

In an action brought against N., and others, being the town commissioners of Cashel, appointed pursuant to 9 Geo. 4, c. 82, Held that they were properly sued as individuals, and are not a corporate body.

Assumpsit on a special contract and the common money counts brought by plaintiff to recover the price of certain building works done by him for the defendants, Nolan and others, the Town Commissioners of Cashel. On the trial before Mr. Justice

Crampton, at the Spring Assizes for Nenagh, 1848, there was a verdict for the plaintiff below, with liberty for the defendant to move to enter a non-suit if the Court should be of opinion that the Commissioners of Cashel were a corporation according to the true construction of the act of 9 Geo. 4, c. 82, and should have been sued accordingly. There was another point reserved as to the right of plaintiff to recover on the common counts, a special contract having been given in evidence. This point, however, was abandoned by defendant's counsel in argument.

Messrs. Martley, Q. C. and Lynch, Q. C. for the defendants now moved accordingly. The Commissioners have a common name, and a perpetual succession of their property is provided for.

Messrs. George, Q. C., Wall, Q. C. and Hobart for the plaintiff.

PIGOT, C. B.—This was an action of *assumpsit*, and the declaration contains a count on the special contract and the common counts. As to the first ground of objection relied upon on behalf of the defendants it is contended, that as the terms of the particular contract have not been fully complied with, the plaintiff is not entitled to recover. The Court intimated in the course of the argument that this came within the class of cases where the parties who receive a partial benefit are liable *pro tanto*, and in *Lucas v. Godwin* (5 Scott, 500) the rule, that applies to such cases, is well laid down. The next and principal point was that the Commissioners of Cashel are a corporation, and ought to be sued as such—a question certainly involved in great doubt, arising rather from the language of the Municipal Act than from that of 9 Geo. 4. A case lately coming before the Court of Queen's Bench, but not as yet reported, has been referred to, and though it was not necessary to decide the question there, yet it was fully raised and argued, and the Court referred to it in delivering their judgment, and expressed a strong and decided opinion upon it. I do not refer to this case as an authority but merely as showing what was the strong impression of that Court as well as of the public, on the question. In like manner, in a cause at present pending in the Court of Chancery, we find those very Commissioners made parties by name, and not treated as a corporation. I refer to those circumstances as indicating strongly that since the act they have not been treated nor considered as a corporate body, and it would require very strong reasoning and authority to induce us now to hold them to be such. Now, there is nothing in the terms of the act necessarily to constitute them a corporate body. It is quite true that where a charter invests a body with certain rights, and contemplates the discharge by them of certain duties, and that those objects cannot be effectuated unless by their being a corporation, in such cases, even in the absence of express terms of incorporation, whatever the words used may be, the law would hold them to be a corporation; and there is no distinction in this respect between a body incorporated by charter and by act of Parliament. But here the provisions of the 9 Geo. 4, as to their succession and the mode of suing, are consistent with their not being a corporation. There are two principal points, the succession of the property and the use of a common name,

* Doherty, C. J. and Torrens, J. were absent.

† Doherty, C. J., was absent.

relied on, as constituting these commissioners a corporation. The provisions of the act are amply sufficient to secure the protection of the property without that sort of succession which is peculiar to a corporation. The act provides for the election of commissioners, and that every three years the entire body shall go out, and others are nominated in their stead, and the Legislature enacts that the property shall be conveyed from one set to another. Now, that provision would seem to imply that, though in the preceding section the term "succession" is met with, yet the Legislature seemed to have thought a provision necessary for securing the transmission of the estates. This provision affords a key to our construction, for while on the one hand it provides for the protection of the common property, on the other it indicates that the Legislature did not intend to treat them as a corporation. Then, in the subsequent provisions as to the mode in which they are to be sued, the terms "he" and "they" frequently occurring are inconsistent with the Commissioners not being named individually in such proceedings. If, therefore, the matter rested on the 9 Geo. 4, I should have no difficulty in holding them not to be a corporation. The provisions of the Municipal Reform Act directs these Commissioners to authenticate their proceedings by seal, but without their being a body corporate they may test and vouch the authenticity of their acts by seal or otherwise. That act vests in them property for which there was no guardian, and transfers it from one set of commissioners to another, as if it were by conveyance. On the whole we are of opinion that there is nothing in either act to coerce us to hold them to be a corporation, and, therefore, we are not disposed to unsettle the practice, and we think that in the present case the defendants were properly sued. If it is suggested that any inconvenience may arise from such a view, it must be for the Legislature to remedy it.

PENNEFATHER, B.—There is nothing in the 9 Geo. 4, to make it necessary to hold these commissioners to be a corporation in order to effectuate the object of the Legislature, and there are many provisions inconsistent with that view.

Motion refused.

HAYDEN v. O'RYAN.—May 31.

Practice—Amendment of return to *Sci. Fa.*

The Court will, as of course, direct the sheriff's return to a sci. fa. to be amended, where by mistake there was a return of nil instead of service.

Mr. Hemphill, on behalf of the plaintiff, applied that the return to the *scire facias* in this case might be amended. The judgment was marked in Hilary term, 1847, and *scire facias* issued last Easter term. The defendant resided in the county of Tipperary,—the venue of the action in which the judgment had been recovered. Agreeably to the practice of the Court, the *scire facias* was served on the defendant, and affidavit accordingly. By mistake, a return of *nil*, instead of *service*, was indorsed on the *scire facias*. The officer on this

return refused to allow the judgment of revivor to be marked. It is a mere formal amendment, and no party can be prejudiced.

PER CURIAM.—Take the order.

BROADBENT v. POTTER.—June 8th.

Practice—The general rule of 25th April, 1801—

Filing declaration.—Nunc pro tunc.

Where the last day for entering appearance to a writ was the 1st of June, which was also the last day in Trinity Term for filing a declaration so as to entitle plaintiff to a judgment or a plea as of that term, and notice of the appearance was not served on the defendant until the following day, in consequence of which delay the plaintiff lost his opportunity of declaring in time; the Court granted liberty to the plaintiff to file a declaration, and enter the rules to plead nunc pro tunc, as of the 1st of June, and the costs of the motion.

Mr. J. Dunne moved that the plaintiff might be at liberty to file a declaration and enter the rules to plead as of the first of June. The defendant had appeared on the 1st of June, but, in violation of the rule, did not serve notice of appearance till the 2nd of June, the plaintiff consequently lost his opportunity of declaring in time. The defendant's attorney excused himself by stating that he had mislaid the copy of the *capias*, and, therefore, could not enter the appearance.

Mr. R. Ferguson for the defendant.—The plaintiff was not placed in any worse position by our laches, for we had till 9 o'clock, P. M. on the 1st of June to serve the notice of an appearance, and, if served up to that time, it would have been perfectly regular, by 32nd General Order. That would have been too late for the plaintiff to have filed his declaration on the 1st of June, so that he has not been damaged. [Counsel also referred to *Ryder v. Stubbs*, (2 L. Rec. O. S. 496; *Moore & Lowry's Rules*, 166.)]

PIGOTT, C.B.—The rule of the Court is express. We must hold practitioners to a *bona fide* observance of those rules, and as the defendant here seems to have acted so as to retard his adversary, we must hold him to the strict rule.

Motion granted, with costs.

* *Saturday, 25 April, 1801.*—"It is ordered by the Court, that where the plaintiff's attorney serves a common law subpoena, he shall sign the same with his proper name, and the place of his residence in the city of Dublin, or in default thereof that such service shall be considered null and void; and further, that where the defendant's attorney enters an appearance, he shall serve the plaintiff's attorney either in person or at the place of his residence with notice thereof, or in default thereof, that such appearance shall be considered null and void."

ERRATA.—In page 256, after the words "The learned judge reported the facts as follows," insert "The judge having charged the jury, and jury having retired to consider their verdict, the counsel for the defendant prayed for, and took time to consider their exceptions, and the jury having returned, and said they found for the plaintiff, and having been discharged, the counsel for defendants then, and before the said verdict was recorded, excepted to the said direction of the learned judge."

COURT OF CHANCERY.

MAHONEY v. O'CONNELL.—June 9.

Practice—Subpœna to hear judgment.

Under the 94th rule, ten days must intervene between the day of the service of the subpœna to hear judgment, and the first day of the ensuing term.

In this cause publication had passed on Thursday the 10th May, and the subpœnas to hear judgment were issued and served on the same day. Trinity Term commenced on Tuesday the 22nd May. The officer of the court refused to set down the cause to be heard in Trinity Term, alleging that the subpœnas were not issued in time. The plaintiff petitioned the Lord Chancellor that the cause might be ordered to be set down.

Mr. R. Greene, Q.C. for the petitioner, contended that the subpœnas had been served in time. The 94th rule required the subpœna to hear judgment to be made returnable on the first day of the next ensuing term, and though the 2nd rule orders the computation of time to be exclusive of holidays, and of the first day, it orders it to be inclusive of the last, in which case the subpœnas were issued in time.

Mr. J. D. Fitzgerald, Q.C. and *Mr. Sergeant O'Brien*.—The plaintiff was not in time. *At-gen. v. Ball*, (9 L. E. R. 463), though upon a different rule—the 86th—decides the construction of this. The subpœna must be served ten days *before* the first day of term, and exclusive of the day of service, and of the two intervening Sundays; these were served but nine days before. The same point was decided in *Res v. Hereford*, (3 B. & Ald. 581.)

Mr. Berkeley in reply.—*Attorney-General v. Ball* shows that there is a distinction between the 86th and the 94th order. In the 86th rule the words are “ten days at least,” here the words “at least” are omitted. *Ex parte Farquhar*, (1 Mont. & M.A. 7). The word “before” cannot alter the construction—it only shows the direction in which the time is to be calculated.

LORD CHANCELLOR.—There is some doubt about this case. The 86th rule specifies that the notice shall be served ten days *at least*, not before the examination, but before the day named for commencing the examination. The courts in England have taken a distinction between “days” and “days at least.” In *Reg. v. Shropshire*, (8 A. & E. 173), Littledale, J., says, “We must abide by what has been decided, though it appears to me that a day is a day, whether at least be added or left out.” Whoever discovered that distinction, had at least the merit of great ingenuity. However, I have made inquiry from the officers of the court, and find that the construction which has been put on this rule in the office, is that which has been put on it here. It is perhaps better to follow that practice than to disturb it. I believe that to be the true construction.

No rule on the petition, without costs to either party.

Chancery Petition, book 3, p. 117.

ROLLS COURT.

PHIBBS v. FARRELL.—April 28.

Practice—Motion by Receiver to let lands in the possession of a defendant.

Although in general a motion to let lands in the occupation of a defendant should not be made by a receiver, yet where a receiver having advanced a sum to pay head rent, and save the lands from eviction, obtained an order to set lands in possession of the defendant, the court refused to set the order aside, upon the ground of its having been obtained upon a motion of the receiver.

In this case the bill was filed to raise part of a charge of £800, of which £200 was vested in the plaintiff.

In July, 1848, P. Phibbs, the former receiver, passed his final account, and the sum of £95 14s. 5d. appeared due by him. Shortly afterwards, H. Boyd was appointed receiver; and at the time of his appointment, considerable sums having been permitted to accrue due, on account of head rent, ejectments were brought, and the habere executed at the suit of Lord Aldborough, the head landlord. In order to save the lands from eviction before the time for redemption expired, the receiver advanced the sum of £117 10s. 3d. pursuant to a consent whereby said advance, with interest thereon, was to be a salvage demand upon said lands.

Arrears of head rent still remaining due, on the 16th day of April, 1849, the receiver obtained an order that the part of the lands in the possession of the defendant, W. Farrell, should be let. This was an application on the part of the defendant, W. Farrell, that this order should be set aside.

Mr. R.C. Walker, Q.C. and *Mr. P. Blake* for the defendant Farrell.—This order which we seek to set aside was obtained upon the application of the receiver. In *Wrixon v. Vise*, (5 L. E. R. 276,) it is laid down that the receiver has no right to bring forward a motion, which should be made by the plaintiff, and the application was refused with costs on that ground; also in *Bruce v. Blennerhasset*, (ibid note), a similar application made by the receiver was refused, although he was required to make it by the plaintiff who served him with notice that he would hold him responsible for any rent lost by his delay; besides, in the present case, the demand sought to be raised by this suit is small, and the profit rent over which the receiver is already appointed amounts to £320 per annum, and there is also a sum due by the former receiver.

Mr. Hughes, Q.C. and *Mr. W. Woodroffe* contra.—The objection that the motion was made by the receiver does not apply, as a sum was advanced by him to save the lands from eviction; he thus was placed in the position of a first incumbrancer. There is still an arrear of head rent due, and if this order is set aside, the receiver may have some difficulty in recovering his demand.

MASTER OF THE ROLLS.—With respect to the objection that this order which is sought to be set aside, was obtained upon the motion of the receiver, I do not think the observations of the late

Master of the Rolls, in the case which has been referred to, apply. I entirely concur in the view taken by him; and in the case of *Ireland v. Bade* (7 Beav. 55,) it is also laid down that a receiver ought not to originate any proceeding in a cause, and any necessary application should be made by the parties to the suit, and the general rule is, that the receiver is not to apply to set lands in the possession of a defendant; he has no interest in the matter, and should not, in his character as receiver, originate such a motion. I am prepared to follow the case of *Wrixon v. Vize* (5 L. E. Rep.), and will not make any order on such application by receivers; but I do not apprehend that because a person happens to be in the situation of receiver he is on that account to lose rights acquired by him in another capacity, and in the present case there is no imputation whatever on the conduct of the receiver, who, under a consent signed by the parties in the cause, advanced a sum of money to redeem the lands, and this advance is the first charge on them. The receiver is thus in the position of a first incumbrancer, and does not come to the court for the purpose of making costs; so far therefore, I consider the objection technical, and will not set aside the order on that ground. In general the court will not set lands in the possession of a defendant, unless the circumstances of the case are such as to require it; but the defendant must shew that it is not necessary to do so. In this case the total rent is £490, the head rent £280, and if £90 be recovered from the former receiver, I think I am justified in permitting the portion of the lands formerly in the occupation of the defendant, to remain in his possession, and by setting aside the order of the 16th April, I do not think I will endanger the security of the receiver.

His Honor made the following order:—

"It appearing to the court that the gross rent payable out of the lands over which the receiver was appointed in this cause, is £495 10s. 7½d. a-year, or thereabouts, and that the head rents payable are £230 19s. 3d., leaving a profit rent of £264 11s. 4½d. a-year, and it appearing that a year's head rent is due to Lord Lorton, up to and including the 25th day of March last, amounting to £152 6s. 11½d., and that there is a sum of £116 6s. 2d. due to Lord Aldborough for head rent, up to and for the 1st day of May, 1849, and making together the sum of £268 12s. 3½d. and it appearing to the court, having regard to the proceedings by the sureties of the late receiver, that there will probably be a fund at the end of twelve months arising from said profit rent of £264 11s. 4½d., and the sum to be received from said sureties, which will be sufficient to pay off said arrear of head rent of £268 12s. 3d., and that the profit rent from and after the said period of twelve months, will be properly applicable to put in a course of payment the sum of £117 advanced by the present receiver to redeem the premises, let the order of the 16th April, 1849, be set aside without prejudice to the receiver renewing the present motion if he can shew that payment of said sum of

£117 is likely to be delayed unreasonably, endangered by the non-payment of the said profit rent, and let the receiver have his costs of said order of the 16th of April, 1849, and of this motion as costs in this cause, and let the defendant abide his own costs of this motion."

Lib. 284, fo. 250.

BELCHER v. BELCHER. PHILAN HENSTFORD v. HENNESSEY.—April 28.

Practice—Defendant appointed Receiver in a cause.

Mr. Drury, on behalf of R. Mortimer, moved that he might be discharged as receiver, and that it should be referred to the Master to appoint a receiver in his place.

Mr. Wall, for the plaintiffs in the third cause, moved that a consent in that cause, that Thomas Izod, a defendant, might be appointed receiver. The consent was signed by several of the parties in the cause, and notice had been served on the other parties. Mr. Izod was entitled to a charge upon the estate, and, in a certain event, would become entitled to part of the property in right of his wife.

His Honor made the following order:—

"Let said R. Mortimer, the receiver in this cause, be discharged as such receiver, and in pursuance of said consent thereon, let the said Thomas Izod, a defendant in the first and third cause, be appointed receiver in the room and stead of said R. Mortimer, on his entering into security by recognizance, &c."

Lib. 284, fo. 146.

O'BRIEN v. BERNARD, April, 28th.

Receiver—Distress—Replevin.

The Court will not make an order to stay proceedings by a tenant in a replevin suit unless there has been some irregularity therein, and the receiver is likely to be defeated on technical grounds.

In this case, on the 14th of March, the receiver was distrained for rents, and notice of distress was served on the tenants whose lands had been seized. It did not appear that any rent had been paid to the receiver, or tenancy admitted.

Mr. Butt, Q. C., on behalf of the receiver, moved that the tenants might be restrained from proceeding in the replevin suits. The proceedings by the receiver have been perfectly regular.

MASTER OF THE ROLLS.—I cannot decide on replevin suits. In cases where the receiver is likely to be defeated on a technical ground, or there has been any mistake or error in his proceedings, I may make such an order as you now seek: but here everything has been perfectly regular, and I was to make the order, it would be deciding on the replevin suit.

BELAS v. NORRIS.—June 4th.

Costs—Retainer—Solicitor.

The case of In re Bracy, (14 L. I. Ch. 299.) where it was held that under a common order directing the reference of a solicitor's bill for taxation, the Taxing Master has jurisdiction to decide a question of retainer, will not be followed in this Court.

This was an application to set aside an attachment issued against Mr. Henry, the plaintiff in one of the causes, for not furnishing an undertaking to tax costs, which by order of the 8th of May he was directed to do when required. Mr. Henry objected to give the requisition, on the ground that he was not liable for the costs as Mr. Wilson had not been retained as his solicitor.

Mr. W. Smyth, for Mr. Wilson, contended that he might have furnished the requisition, preserving his right to dispute the retainer before the Master, and cited *In re Bracy*, (9 Jur. 417, and 14 L. I. Ch. 299,) according to which case the Taxing Master, under a common order of reference of a solicitor's bill for taxation, has jurisdiction to decide the question of retainer, except as to those items in respect of which the petitioner has in his petition admitted the retainer.

The MASTER OF THE ROLLS said he would not act upon the authority of that case.

Mr. Smyth then proceeded to give evidence of retainer.

SCOTT v. HARMANN.—June, 14.

Practice—Receiver—Security.

Mr. William Henderson moved that the receiver appointed in this cause might be at liberty to give security by recognizance, himself in £7,500, and three securities in £15,000, in the aggregate ones in £10,000, and other two in £2,500 each. In the case of *Pigott v. Batten* in this Court in March, 1849, an order was made similar to that which we now seek, and the amount of the security was less than in the present case.

MASTER OF THE ROLLS.—It is contrary to the practice of the Court to make such an order as this. In some cases, however, where the amount of the security required was very large such orders have been made. I think in this case I may make the order.

CAMPBELL v. BROWN.—June 14th.

Practice—Receiver—Security.

The Court will not make an order giving liberty to a receiver to give security by a guarantee society.

This was an application that the receiver might be directed to give additional security in the place of one of his sureties, who had left the country in embarrassed circumstances.

Mr. O'Donnell, for the receiver, asked his Honour whether, in the event of there being any

difficulty in procuring security, he might be at liberty to give security by means of the guarantee societies, as he understood the banks were in the habit of accepting their security.

The MASTER OF THE ROLLS stated that he would not alter the established practice of the court.

QUEEN'S BENCH.—TRINITY TERM.

CLANMORRIS AND ANOTHER v. LAMBERT.

June 8th and 9th.

Process—Statute of Limitations—Amendments.

*A plaintiff having sued out writs of capias ad respondendum against an absent defendant, and having duly filed and continued them, pursuant to the 3 & 4 Vic. c. 105, s. 7, in order to defeat the bar of the statute of limitations, will be permitted, on payment of costs, to amend formal errors in the endorsements, return, and form of the said writs, even after plea of the statute of limitations pleaded by the defendant, provided he has substantially complied with the provisions of the former enactment.**

This was an application by the plaintiffs to amend the several writs of *capias ad respondendum* issued and filed in this cause, pursuant to the 3 & 4 Vic. c. 105, sec. 7, in the particulars hereinafter mentioned. The plaintiffs had commenced against the defendant an action of assumpsit, for the recovery of the amount of certain promissory notes, which fell due in the year 1842, and the latter had pleaded the statute of limitations. The plaintiffs had issued the first of the above series of writs within six years from the accruing of the cause of action, and having been unable to effect service on the defendant, had sought to keep alive their remedy by continuing the proceedings pursuant to the statute. The following are the respective dates of the issuing, *teste*, return-day, and time of filing, of the several writs in question:—

* 3 & 4 Vic. c. 105, s. 7, enacts, that "in order to prevent the operation of any statute of limitation, in bar of the cause of action of any plaintiff in cases in which such cause of action would be barred, unless a writ of process issued and was continued for that purpose, every writ or process may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested or held to bail thereunder or served therewith; provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested or held to bail thereunder, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ shall be returned *non est inventus*, and entered of record within one calendar month after the expiration of the return of such writ or process, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon or subscribed thereto, specifying the day of the date of the first writ, such return *non est inventus*—in process not ballable, in case of non-service thereof, to be made by the plaintiff or his attorney suing out the same, and signed by him."

Writ issued.	Tested.	Returnable.	Filed.
1. June, 9	June, 1	June, 16	June 27, 1848
2. June, 27	June, 16,	Nov. 1	Nov. 28, 1848
3. Nov. 28	Nov. 25, 1848	Jan. 10	Jan. 26, 1849
4. Jan. 13, 1849	Nov. 25, 1848	Jan. 20, 1849.	

The writs had been all duly issued, and had been filed, (except the last, to which the defendant had appeared,) within the period prescribed by law. The plaintiff's had, however, omitted to endorse on the *second, third, and fourth* writs the *teste* and date of the return day of the *first* of the series. It was apprehended that for want of such endorsements a replication to the defendant's plea of the continuance of proceedings commenced anterior to the bar of the statute of limitations, might fail. An application was accordingly made to the Court, early in the present term, for leave to amend in this respect. Several English cases were cited. As, however, the power of the Court to allow such amendments was more fully canvassed on the occasion of the second application, and the question was therein debated more at large, it will not be necessary to say more with respect to the first, than that it was allowed, the Court considering the authorities to be in the plaintiff's favour.

At the hearing of the motion, the defendants insisted on the existence of other informalities in the proceedings, but the Court were of opinion that these objections were irrelevant to the question then before them. It appeared that the writs subsequent to the first were in the form of originals, instead of running in *alias* and *pluries* style respectively. The return of the writ of the 1st of June was, that "The within-named defendant does not reside in the county of Galway." To the writ tested June 16th, it was returned that "The within-named defendant was not to be found in the county of Galway;" and to that of November 25th, that "The defendant is not to be found in the county of Galway to answer."

Mr. Fitzgibbon, Q. C., on the part of the plaintiffs, this day moved for liberty to amend the subsequent writs, by inserting in the second the words "*as we before commanded you*," and in the third and fourth, the words "*as we often before commanded you*;" also to amend the return of the writ tested the 1st of June, by expunging the words "*does not reside*," and by inserting in their place the words "*is not found*;" and to add to said return, and to those of the writs of the 16th of June, and 25th of November, the words "*within mentioned*." We seek for the amendment of mere formal slips. *Culverwell v. Nugee*, (4 D. & L. 30—*Alderson, B.*); *Horton v. Inhabitants of Stamford*, (1 C. & M. 773); *Williams v. Williams*, (10 M. & W. 174); *Frodsham v. Round*, (4 Dowl. P. C. 569.)

Mr. Joy, Q. C., (with him *Mr. Andrew Vance*), contra.—The words of sec. 7 are mandatory, not directory. The Queen's Bench and Common Pleas in England have entirely disapproved of the decisions of the Exchequer on this head, and the latter court has latterly retracted. *Higgs v. Mortimer*, (1 Ex. R. 711.) The return to these writs has not been made by the sheriff, or any officer of the court, but by the attorney of the party. We have already pleaded the statute of limitations, and

have acquired a vested right, which it is now sought to divest. The object of the legislature will be frustrated if this application be granted. *Brennan v. Monahan*, (7 I.L.R. 545, note); *Campbell v. Smith*, (5 C. B. 196.) 1 Tidd's Practice, 9th Ed. 162, MSS. case, *Benson v. King*, cited *ib.*; *Roberts v. Bate*, (6 Ad. & Al. 778.)

June 9.—*Mr. Andrew Vance* resumed the argument against the motion.—This is more in the nature of an application to issue fresh writs, and would have the effect of repealing the act. The courts have laid down the principle that they will not amend, in cases where an amendment would not have been allowed before the act. The first amendment asked for, is to make a formal return of *non est inventus*. *Harris qui tam v. Woolford*, (6 T. R. 617). The second application is to convert the subsequent writs into an *alias* and *pluries*. *Kenworthy v. Peppiat*, (4 B. & Ald. 288.) The merits of the application are beside the question.

Mr. Fitzgibbon, Q. C. in reply.—It is quite plain that a return of *non est inventus* was intended. *Bilton v. Clapperton*, (9 M. & W. 473, S.C.; 1 Dowl. 386, N.S.); *Rennie v. Bruce*, (2 D. & L. 946—51—*per Coleridge, J.*) The court will amend at their discretion for the furtherance of justice. *R. v. Mayor and Burgesses of Grampound*, (7 T. R. 701.) The attorney of the plaintiff acted under the direction of the officer of the court. [*Blackburne, C.J.*—I deny that he had any right to consult the officer of the court upon the construction of an act of parliament. He ought to have consulted counsel.] *Kirk v. Dolby*, (6 M. & W. 636); *Eccles v. Cole*, (8 M. & W. 537.) The courts in England have deliberately acceded to such applications. A line has been definitely drawn by courts of law, with respect to making amendments, and what we seek are within it. *Neavin v. Hughes*, (9 Ir. L. Rep. 504.) The courts in England did, it is true, make a resolution against amendments in such matters, but they were forced to abandon it.

BLACKBURNE, C. J.—Were the present application a *res nova*, I should feel considerable hesitation in departing from or interfering with the express terms of the statute. There is, however, authority for granting this motion, the courts in England having, in cases similar in character to the present, where the bar of the statute would otherwise have interfered, allowed the parties to correct their slips, just as in other matters of form they have exercised a jurisdiction for the furtherance of justice. I feel bound by their authority, but I am not prepared to go further. The plaintiffs may therefore amend on payment of costs.

CRAMPTON, J.—I concur with my Lord Chief Justice, and think that the amendment should be allowed on the terms. It is quite plain upon this motion, as it has been discussed, that it was the intention of the party to comply with all the requisites which the statute makes necessary in order to prevent the operation of the statute of limitations; it is plain that within the one calendar month all the necessary steps were substantially taken by the plaintiffs' attorney, and the necessity of this application arises not out of an omission by the

plaintiffs to do what was required, but by the default of the attorney in not entering on the writs the steps which had actually been taken. Now I agree that there is danger in our departing from the terms of the act; but the consideration that the refusal of an amendment in a matter not of substance but of form, would have the effect of barring a valuable remedy, disposes the court to grant this application. There is, moreover, authority for every branch of this motion. With respect to the return that the party "did not reside" within the county, it is quite plain that this was a mere slip, which had the sheriff made, the court would have ordered an amendment. So also with respect to the amendment of the writs themselves in point of form, and all we are called upon to do is to supply such words for the sake of doing substantial justice between the parties. I am also influenced by another consideration, which is, that our refusal of this motion would tend to exonerate the real debtor, the defendant, and toonerate the attorney for the slip which he has happened to make. **PERRIN and MOORE, J.J.** concurred.

Motion granted on payment of the costs thereof, and of the amendment; the defendant to be at liberty to amend his pleas.

COMMON PLEAS.

MACRILL V. DUNLOP.—June 9.

Libel—Change of venue on special grounds.

In an action for libel this court will not change the venue upon special grounds, if issue be not joined upon all the counts in the declaration.

Mr. J. D. Fitzgerald, Q. C., with **Mr. Coffey**, for defendant, moved to change the venue from the county Louth to the city of Dublin. The action was for a libel alleged to have been published in a pamphlet by defendant, reflecting upon the general management of the affairs of the Dundalk and Enniskillen Railway Company, and containing certain comments having particular reference to the plaintiff, **Sir John Macneill**, the engineer of the Company. The defendant's affidavit stated, that he could not have a fair trial in Dundalk, as **Lord Roden**—who was a director of the Company, and whose conduct the defendant, in his capacity of shareholder, had made the subject of comment and censure—was the owner of that town, and possessed considerable influence over the inhabitants, the majority of whom were his tenants, and acted as jurors; and that several of the directors of the Company, and the plaintiff himself, had residences, and great influence amongst the class of persons who were generally summoned on the record panel of the county Louth. Counsel proposed to refer to the pleadings to shew that a fair trial could not be had in Dundalk. [**Mr. Whiteside, Q. C.**, for plaintiff, objected to a reference to the pleadings, as the notice of motion did not refer to them.] [**Torrens, J.**—I think the pleadings may be referred to, to shew whether the case is a proper one to change the venue or not.] [**Jackson, J.**—In a

motion to change the venue, the court will presume that the pleadings are before it, even though the notice of motion omit to say they would be relied on.] **Mr. Fitzgerald, Q. C.**, read passages from the alleged libel and from the defendant's affidavit to show that the case would be more fairly tried in Dublin than elsewhere, where all the witnesses resided, and where all the Company's books were kept.

Mr. Whiteside, Q. C. contra.—This motion ought to be refused with costs. In the first place issue is not joined. [**Torrens, J.**—If that be so the motion must be refused I apprehend, unless there be clear authority on the other side. There may be a demurrer filed yet.]

Mr. Fitzgerald, Q. C.—Issue is joined on some of the counts, but not on others, although it might be more regular to have it so. **Boyce v. Smith**, before the Court of Exchequer, (2 I. L. R. 366,) decides that the venue may be changed before issue joined on all the counts.

TORRENS, J.—There must be a perfect record; and if issue be not joined on all the pleas, it cannot be perfect. We are of opinion that the motion must be refused with costs.*

EXCHEQUER OF PLEAS.

MANDEVILLE V. EYRE.—June 4th.

Practice—Service of Capias on Solicitor of a Person out of the Jurisdiction.

Where lands were by deed conveyed to a trustee resident in England, on certain trusts, and amongst others to receive the rents thereof, and out of the said rents to pay the headrents payable out of one of the denominations of lands comprised in that deed, called East Clonkilty, and by that deed power was given to the trustee to appoint a law and land agent in this country for the purpose of carrying out the trusts of the said deed, and of paying the said rents. The Court substituted service of the capias on the land and law agent.

This was an application to make absolute a conditional order that the service had been deemed good. The defendant was a trustee under a deed of trust vesting certain lands, the property of the Earl of Kingston, in Eyre, upon certain trusts. Eyre residing in England, the process was served on the Messrs. Sadlier, his solicitors in this country. The action was for the head-rent of a denomination of land contained in the trust deed, and was brought by the head landlord against Eyre. It was admitted in the affidavit of Sadlier, that he acted as the solicitor of Eyre, in respect to the estates of the Earl of Kingston contained in the deed, but it stated that this particular denomination had been always in the possession of Lord Kingston, and in answer to a statement in the affidavit on which the application was made, stating that he, Sadlier, had on a former occasion paid the headrent of this very denomination, he stated that he had paid it on account of Lord

* Doherty, C. J. absent.

Kingston. The proof that this denomination was included in the trust deed was this: the affidavit stated on belief that it was so, and a notice had been served to produce the deed, for the purpose of satisfying the Court that this denomination was not in the deed, and the deed was not produced.

Mr. John Pennefather moved that the conditional order should be made absolute. The case of *Phelan v. Johnson*, (8 I. L. R. 529,) is an authority for granting this motion. It must be taken that the very denomination for which this action is brought is included in the deed, and the Messrs. Sadlier have authority from Eyre to act in respect of those trust premises, and they have on a former occasion paid rent on this denomination.

Mr. Scully, Q.C., contra.—The case of *Phelan v. Johnson* has gone too far. [*Pennefather, B.*—The Court cannot allow you to argue as if *Phelan v. Johnson* were not law. You must shew, if you can, that this case does not come within its principle.] This case seeks to carry the principle much farther than *Phelan v. Johnson*. It was laid down there that the agent must be strictly one for the subject matter of the suit. The Court cannot presume that the Messrs. Sadlier have any authority from Mr. Eyre to do any act in respect to the denomination, which has been always in the possession of Lord Kingston. *Waterhouse v. Hatfield*, (9 I. L. R. 38;) *Fowler v. Hemsworth*, (10 I. L. R. 77;) *McCann v. Thomson*, (11 I. L. R. 201.)

Mr. Pennefather, in reply, referred to the notice calling upon the Messrs. Sadliers to produce the deed, which he now contended he was entitled to assume contained a power enabling Mr. Eyre to appoint a solicitor for those very lands, that deed authorizing the trustee to appoint both law and land agents for these estates, which appointment the Messrs. Sadliers confessedly held.

PENNEFATHER, BARON.—This case comes before us on a motion to have the service already had in this case deemed good, and it is made on this ground, that, by a deed executed in the year 1841, the estates of Lord Kingston were conveyed to Eyre as trustee, with certain powers, amongst them one to appoint a solicitor; and there is no doubt that the Messrs. Sadlier were appointed land and law agents for all lands in that deed, and to defend all actions relating to those lands. Now, if this action, which is brought by Mr. Mandeville, be brought indisputably respecting lands which the Messrs. Sadlier have authority to act for, there could be no question, either at the bar or on the part of the Court, as long as *Phelan v. Johnson* is law, that this motion should be granted. We are not now considering whether this action, in all its parts, can be sustained against Mr. Eyre. Now, as incident to the authority to defend the lands conveyed to the trustees must be an authority to defend every denomination contained in the deed. If the action were brought by a stranger, for the recovery by ejectment of that denomination of the land, surely the authority would extend to defend that ejectment. It is said that the lands of Clonkilly are in the possession of Lord Kingston, not that they are not included in the deed. It has been fairly argued that the monies paid by Mr.

Sadlier were paid out of the general moneys of the estate.

RICHARDS, BARON.—I concur in the judgment of Baron Pennefather, and I think this motion should be granted. Mr. Eyre has appointed Mr. Sadlier to act for him in the trusts of the deed, and not for Lord Kingston, and there is a provision in the deed that Lord Kingston shall remain in possession of a certain denomination of the land, and it appears that Messrs. Sadlier paid the headrent of this very denomination out of the general rents of the estate; and this is stated in the affidavit, and it is not denied; but, by way of denial, it is stated by Mr. Sadlier that this denomination is in the sole possession of Lord Kingston, and that any payments he made were on account of the Earl of Kingston. Surely they must have been made on account of the Earl of Kingston, but he does not deny that he made them as the agent of Eyre, or that they were not paid under one of the trusts of the deed. I think the facts of this case are clearly within the principle of *Phelan v. Johnson*.

LEFROY, BARON.—If I could satisfy myself that the inference which my brother Judges draw from the affidavit was correct, I should not differ from them on the subject of this motion; but I cannot come to the conclusion that the Messrs. Sadlier have authority to act in respect of the subject-matter of this action. The action is brought against a trustee, and thereby he will be personally liable; and by substitution of service on the Messrs. Sadlier, we should place them in a very difficult position; is it made certain that those persons are authorized to appear for Mr. Eyre? They must either appear or let judgment go by default. But it is said they have general authority, and this I think fair; but I think it is going too far, to infer that this extends to the land in the possession of Lord Kingston; but it is said that they paid rent in respect of this very land under the trusts of the deed. I think, giving a fair measure of interpretation to the affidavit of an officer of this Court, when Mr. Sadlier swears that he paid this rent for Lord Kingston, the negative must be inferred, that he did not pay it as the agent of Eyre. Now, do the facts of this case bring it within the authority of *Phelan v. Johnson*, where the rule was laid down strictly and properly? I think it is stretching the rule too far. The difference between us is, as to the interpretation of affidavit, not the law.

LESSEE LYONS v. WILKINSON.—June 9th.

Practice—Judgment as in case of non-suit—Lien of attorney for costs, proceedings being put an end to without his knowledge.

Mr. J. T. Ball moved for liberty to enter judgment as in case of non-suit. The action was in ejectment, and was at issue three terms.

Mr. James Kernan, contra.—The defendant in this action went to America, and left a herd in possession, who, by the authority of the defendant, gave up the possession. Under these circumstances, where the object of the suit was gained, the court

not permit the attorney to get a judgment for purpose of costs only.

Ball, in reply, contended that the pro-
g with respect to giving up the land having
without his knowledge, the attorney had a
to proceed.

PENNEFATHER, B.—The attorney has no lien
for judgment. Let the motion be refused
costs, to be paid by the attorney.

SEE DE CLIFFORD v. EJECTOR.—*June 11.*

Killer applied for liberty to amend the entry
rule for judgment in this case. The declara-
ejectment contained two demises—one in
me of the Baroness de Clifford, the other in
f Sir Josias Rowley. The practice in the
is to enter the rule in the name of the lessor
d in the first demise. By mistake the rule
een entered in the name of Lessee de Clifford
ey. On discovering the error, the officer re-
to allow judgment to be marked. The pre-
application was to amend rule entered.

A CURIAM.—Take a conditional order to be
d on all the parties served with the ejectment
se to be shewn in ten days.

DORE v. —

Practice—Money lodged in Court under plea
of tender.

*defendant bring money into Court under a plea
tender, and the plaintiff do not take it out of
ert until the defendant establishes a right to a
ss demand for the costs of a judgment in the
tion in his favour, the Court will direct the
ney to be paid to him in liquidation of that
mand.*

was an action of *assumpsit*. Pleas: Tender as
rt, General issue as to the residue. The sum
d in the plea of tender and lodged in court, plain-
attorney drew without any application, as if it
been lodged in discharge of the action generally.
defendant obtained judgment for want of a re-
tion to the plea of tender, and, as in case of
uit, on the general issue. On an application,
Court ordered the plaintiff to bring back the
ey he had improperly drawn, which being done,
fr. D.R. Kane, Q. C. now moved that it be ap-
d to the payment of the defendant's costs which
eded the sum lodged in Court. [He cited *Le
v. Cooke*, (1 Bos. & Pul. 332.)]
fr. Charles R. Barry, contra, cited *Callow v.
itt*, (Salk. 597; 2 Ferg. Pr. 932.)

THEOR, C. B.—The Court is of opinion that the
ndant should have this money. My hesitation
es from what appears to me to be the settled
et of paying money into Court under a plea of
ler, that the defendant is and always has been
ly to pay, and that admission the Court requires
e vouched by the lodgment of the sum tendered.
e defendant thereby admits the plaintiff to be
titled, and it is the same as if before action brought
had said, whatever be the fate of the action the

plaintiff is entitled to recover the sum tendered.
This proposition is distinctly stated in Arch. Prac.
204, Ed. 1826, that the lodgment of money under a
plea of tender is stronger than that of a lodgment in
discharge of the action; both admit the debt. I see
no reason for the distinction as to the mode of tak-
ing the money out of Court, but it is accounted for
by the rule of the judges, which considers the mo-
ney paid in discharge of the action as if it were
struck out of the declaration. This money having
been improperly drawn out of Court by the plaintiff,
must be considered as if never received by him.

PENNEFATHER, B.—In this case money was paid
in under a plea of tender, there is no sound distinc-
tion between this case and that of money paid into
Court after action brought in discharge of the action.
In both the plaintiff is entitled before the defendant
establishes his right to a cross demand. If the mo-
ney be paid in under a plea of tender, it must be
applied for by motion or notice; if lodged after ac-
tion brought, and in discharge of the action, it is
considered as if it were struck out of the declara-
tion, and the plaintiff is entitled to draw without
any notice. It appears to me, from the authorities
as well as from the practice of the Court, that if
the defendant brings in the money under a plea of
tender before action brought, the plaintiff has a
right to take the money until the defendant esta-
blishes a right to a cross demand by verdict or
otherwise, not because the plaintiff is not entitled,
but because the defendant has established a cross
demand; and the Court will distribute the money
in their possession in discharge of the defendant's
costs. The plaintiff has a right to take the money
out of Court, but if he lies by and waits till the
defendant establishes a title to what was previously
but a contingency, he loses that right. In *Le
Grew v. Cooke*, (1 Bos. & Pul. 332,) cited in ar-
gument, Buller, J., says, "I agree, that if the
plaintiff be negligent and do not take the money
out of Court until after a verdict be passed for the
defendant, that the Court will lay hold of it to se-
cure the defendant's costs; and if it could be shewa
that the plaintiff was now in that situation, the
Court would not let him take out the money with-
out doing justice to the defendant." *Cox v. Ro-
binson*, (Str. 1027,) and the other authorities were
cited in that case, and the deliberate opinion of
that learned judge was, that the Court would not
do justice by ordering the money to be paid to the
plaintiff, while the defendant had shewn an un-
doubted title to a cross demand. We have been
charged with importing equitable principles into
our legal decisions. Judge Buller is not liable to
a similar charge; he decided on the plainest prin-
ciples of justice and the strictest principles of law.
I hold this view with great deference to the con-
trary opinion of my Lord Chief Baron.

RICHARDS, B., concurred.

GREEN v. BLAKE.

Pleading—Venus—(10 Car. 1, sess. 2, c. 16, Ir.)
*In an action against the Sheriff of the county of
Galway for a false return, the venus being laid*

in the county of Wicklow—Held, on general demurrer, that the declaration was sufficient for that stage of the case, as non constat, but that the Sheriff might have made his return in the county of Wicklow.

The action was brought against the Sheriff of the county of Galway, for a false return to a writ of *fiat facias*. The declaration contained two counts. The venue was laid in the county of Wicklow. General demurrer, on the ground that from the facts appearing upon the face of the declaration, the venue should have been laid in the county of the city of Dublin, or, at all events, in Galway.

Mr. Francis Meagher for demurrer. By the 10 Car. 1, sess. 2, cap. 16,* in all actions against

* "For ease in pleading against many causeless and contentious suits which have been and daily are commenced and prosecuted against sheriffs, justices of peace, maiors, or haylifes of cities and townes corporate, head-burroughs, portreves, constables, overseers of the poore, tithing-men, collectors of subsidies and fifteenes, and church-wardens and other officers, who for due execution of their offices have been troubled and molested, and still are likely to be troubled and molested, by evil-disposed, contentious persons, to their great charge and discouragement in doing their offices; be it therefore enacted by our Sovereign Lord the King's Majesty, and by the Lords spiritual and temporal, and the Commons, in this Parliament assembled, and by the authority of the same, that if any action, bill, plaint, or suit upon the case of trespass, battery, or false imprisonment shall be brought after the end of this present session of Parliament against any sheriffs, justices of peace, maior, or bayliffe of any city or towne corporate, head-borough, portreves, constable, tithing-man, overseer of the poore, collector of subsidies or fifteens, church-warden, or any other officer or officers, executing his or their office or offices, and their deputies or any of them, or any other which in their ayde or assistance, or by their commandment, shall doe anything touching or concerning their office or offices, for or concerning any matter, cause, or thing by them or any of them done by virtue or reason of their or any of their office or offices, that the said action, bill, plaint, or suite shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere. And that it shall be lawfull to and for all and every person and persons aforesaid to plead thereunto the general issue, that he or they are not guilty, and to give such special matter in evidence to the jury which shall try the same, which special matter being pleaded, had been a good sufficient matter in law to have discharged the said defendant or defendants of the trespass or other matter laid to his or their charge, and that if upon tryall of any such action, bill, plaint, or suite, the plaintiffe or plaintiffes thereon shall not prove to the jury which shall try the same, that the trespass, battery, imprisonment, or other fact or cause of his, her, or their such action, bill, plaint, or suite, was or were had, made, committed, or done within the county wherein such action, bill, plaint, or suite shall be laid, that then in every such case the jury which shall try the same shall find that the defendant and defendants in every such action, bill, plaint, or suite, not guilty, without having any

sheriffs for or concerning any matter done by virtue of their office, the venue shall be laid in the county where the trespass or fact was done or committed. In the case of *Collins v. Singleton*, (Sm. & Batty, 251,) where an action was brought against the Sheriff of Meath, for an escape in meane process, the venue was held to have been improperly laid in the city of Dublin. The venue here ought to have been either in Galway, under the common law rule that a plaintiff may bring his action where any material fact occurred, or under the statute in Dublin, where the return is filed; and this is all that *Hennessy v. Synge*, (10 Ir. L. Rep. 184,) decides.

Mr. C. Coates and *Mr. J. S. O'Callaghan* contra.—The objection here if any, has been taken prematurely. In the case of *Griffiths v. Walker*, (1 Wil. 836,) it was held that an action against the sheriff for a false return is transitory, for he may make and deliver his return any where, and that which is false universally so. The averment in the declaration is, "That at the return of the said last mentioned writ, to wit on the 3rd day of November, 1848, to wit, in the county of Wicklow aforesaid, the defendant falsely and deceitfully returned to the said barons, &c., that the said, &c. had not, &c." The demurrer admits the facts as pleaded, and a return in Wicklow by the sheriff of Galway would have been good. [Counsel also relied on *Holier v. Hundred of Banhurst*, (Cro. Car. 211); *Carter & Croit's case*, (Godbolt, 38); *Hennessy v. Synge*, (10 I. L. Rep. 184); *Higgins v. Smith*, (1 Hud. & B. 469); *Elly v. Tottenham*, (Batty, 475.)]

PER CURIAM.—The objection to this declaration cannot be sustained on demurrer. The case in *Wilson* is express on this, that the sheriff may make his return in any county he pleases, and that case is maintained and approved of in *Hennessy v. Synge*, (10 I. L. Rep. 185.) We shall therefore overrule the demurrer, giving the defendant liberty to plead, and the plaintiff to amend his declaration.

Demurrer overruled.

regard or respect to any evidence given by the plaintiffe or plaintiffes therein touching the trespass, battery, imprisonment, or other cause for which the same action, bill, plaint, or suite is or shall be brought; and if the verdict shall pass with the defendant or defendants in any such action, bill, plaint, or suite, or the plaintiffe or plaintiffes therein become nonsuite, or suffer any discontinuance thereof in every such case the defendant or defendants shall have his or their double costs, which he or they shall have sustained by reason of their wrongful vexation in defence of the said action or suit, for which the said defendant or defendants shall have like remedy as in other cases where costs by the laws of this realm are given to the defendant.

COURT OF CHANCERY.

TER v. LORD LIMERICK; LORD LIMERICK v. HUNTER.—Feb. 17th & 18th, June 19th.

obit Bond—Incumbrance by Remainder-man.

Id horses at prices above their real value to G., young man, entitled to a remainder in tail, assistant on his father's life estate. G. gave security for the amount of these prices by judgment. A bill filed by a person claiming through G., judgments were ordered to stand as a security for the real value of the horses, although it appeared that the sale had not been merely colourable or for the purpose of raising money.

case came before the Court on pleadings and a. The original bill in these causes was an ordinary creditor bill, filed by R. J. Hunter against Limerick and others, stating a judgment of year 1812, to secure payment of the sum of £2 10s., Irish, obtained by R. Hunter, the father of R. J. Hunter, against Lord Glentworth, father of Lord Limerick, and afterwards assigned to R. J. Hunter by his father, and praying equal accounts and relief on foot of it.

The cross bill was filed by Lord Limerick against R. J. Hunter and Robert Hunter, to be relieved from this judgment, as being given by Lord Glentworth when tenant in tail in expectancy, for inadequate consideration. It appeared that Edmund Henry, Earl of Limerick, was in 1808 tenant for life, remainder to his first and other sons in tail. In year 1810, Lord Glentworth, his eldest son, and one of the plaintiff, attained his age, and was till year 1815 wholly dependant on his father for the means of support. Immediately after attaining his age, Lord Glentworth married, thereby much diminishing his father, who only allowed him about £100 per annum till 1815.

Robert Hunter was proprietor and publisher of the Irish Racing Calendar, and a man of experience in "turf matters."

In June, 1812, Hunter had three mares and a colt for sale, all of which animals the bill alleged were of very little value. The bill also alleged, that Lord Glentworth was a person of improvident extravagant habits, and easily imposed upon. It was also alleged, that Hunter, aware of Lord Glentworth's habits and character, and of his considerations, formed a design of selling these animals at an extravagant price. It appeared that, by some negotiation, Lord Glentworth purchased three mares and the filly for £2502 10s., and payment of that sum gave to Hunter his bond warrant of attorney, dated the 20th of June, 1812, in the penal sum of £5005, conditioned for payment of £2502 10s., on the day of the death of his father, with interest in the meantime. On the 20th of June, 1812, the judgment on which the original bill was founded. These horses formed the only consideration for the bond and warrant, and it appeared on the evidence that their value was very much below the price charged for them.

By a settlement of the 10th of December, 1814, the estates were re-settled, the new settlement making a provision for the payment of certain antient debts of Lord Glentworth, amongst

which, however, this debt was not mentioned. The plaintiff claimed under this settlement. Lord Glentworth died in the life time of his father.

In 1820, and subsequently in 1826, Lord Glentworth and Mr. Hunter entered into certain arrangements, which the plaintiff in the cross cause relied on as a merger of the judgment, and the defendant as a confirmation of it. But the Lord Chancellor was of opinion that they had no such operation.

The bill charged fraud, and that the horses sold were unsound, but the evidence on this part of the case was not satisfactory, and the Lord Chancellor's judgment did not turn upon it.

The answer of Hunter insisted that the horses were sold at a fair price, considering the mode of payment, and denied fraud.

Mr. Brewster, Q.C., (with him *Mr. F. Fitzgerald* and *Mr. Berkeley*,) for Hunter.—Inadequacy of value, where there is no fraud, is not a ground for setting aside a sale, even to an expectant heir. All the cases where expectant heirs have received relief, were sales of their estate, loans of money to them, or sales of goods for the purpose of their raising money. *Lampugh v. Smith*, (2 Vern. 77;) *Whitty v. Price*, (1b;) *Brooke v. Gally*, (2 Atk. 34;) *Gwynne v. Heaton*, (1 B.C. C. 1;) *Coles v. Trecothick*, (9 Ves. 234;) *Barney v. Beake*, (2 Ch. Ca. 137;) *King v. Hamlet*, (2 M. & K. 436, S. C. 3 Cl. & Fin. 218;) *Potts v. Curtis*, (Young, 548;) *Trye v. Aldborough*, (West P. C. 248;) *Scott v. Dunbar*, (1 Moll. 458.)

Mr. R. W. Green, Q.C. (with him *Mr. Christian, Q.C.*, and *Mr. Jeffcott*,) contra, contended that this came within the general principle, and cited *Gowland v. De Faria*, (17 Ves. 20;) *Evans v. Cheshire*, (Belt. Sup. Ve. 317;) *Chesterfield v. Janssen*, (1 Atk. 301, S. C. 2 Ve. 144;) *Davis v. Marlborough*, (2 Swans, 108;) *Twistleton v. Griffith*, (1 P. Wms. 310;) *Berney v. Pitt*, (2 Vern. 13;) *Cole v. Gibbons*, (3 P. W. 292;) *Shelley v. Nash*, (3 Madd. 235;) *Peacocke v. Evans*, (16 Ves. 513;) *Kendal v. Becket*, (2 R. & M. 90;) *Baugh v. Price*, (1 Wils. 320;) *Dean v. Jason*, (Finch, 439.)

Mr. Berkeley.—There was no fraud, nor any thing from which fraud could be implied in the transaction. It was a *bona fide* sale. A completed sale of this sort has never been set aside where fraud was not involved. *Barney v. Beake*, (2 Ch. Ca. 137;) *Freeman v. Bishop*, (Barnard, 15;) *Barker v. Vansomme*, (1 B. C. C. 149;) *King v. Hamlet*, (2 M. & K. 436, Story Eq. Ju. 274;) *Blennerhassett v. Dwy*, (2 Ba. & Be. 104;) *Roche v. O'Brien*, (1 Ba. & Bea. 336;) *Moth v. Attwood*, (5 Ves. 845;) *Hill v. Cailliovel*, (1 Ves. 122;) *Scott v. Dunbar*, (6 Moll. 458.)

Mr. Christian, Q.C. for the defendant.—The position of an expectant heir dealing with his expectancies, is almost like that of infancy. *Varnes's case*, (2 Freem. 63;) *Gwynne v. Heaton*, (1 B. C. C. 1;) *Edwards v. Brown*, (2 Coll. 100.) The case need not rest on fraud. *Hicksman v. Smith*, (3 Russ. 433;) *Bernal v. Donegal*, (3 Dow. 151;) *Mass v. Royal*, (12 Ves. 355.)

Mr. F. Fitzgerald, Q.C., in reply, relied on *Barker v. Vansomme*, *King v. Hamlet*. [*Lord Chancellor*.—In *King v. Hamlet*, it does not appear that the goods were sold above their value; they

were sold at ordinary shop prices. This is not a common *post obit* case; the security is for absolute payment, with interest in the meantime. If this had been a sum of money equal to the value of the horses, and such a security given, it could not stand one moment.] *Chesterfield v. Janssen*. The trade of horse-dealing is so hazardous, that the dealer is entitled to extraordinary profits.

LORD CHANCELLOR.—This case has been heard at great length. If the Court err, it will not be for want of argument. Some parts of it require further consideration; but I shall state my present view, so far as the case proceeds, on the ground that by the arrangement of 1821 this judgment was satisfied. I cannot accede to the argument of Lord Limerick's counsel, so far as it relates to that arrangement. I think the judgment was not affected, but I do not think it operated as a confirmation. Whatever was the position of Lord Glentworth in 1812, when he entered into this security, that remained till the latest period of his life. The arrangement of 1814 failed to rescue him from his embarrassments, for not long afterwards he was thrown into prison. He seems in 1820, and till the end of his life, to have been in the same position, and on the whole I do not think the transactions of 1820 and 1824 can operate as a confirmation. This is not a *post obit* bond; it is not like one; it is in form like a common money bond, the term of redemption not being measured by years, but by the life of Lord Limerick, with interest in the meantime. The question is, is the bond to stand for the sum agreed on, or for the real value of the horses? If it had been the case of a promissory note, given under the same circumstances and for the same consideration as this bond, few juries would give a verdict for more than a fair value for the horses. Am I, then, to take the price agreed on as the consideration, or can I go behind the bond to discover the true value?

June 19th.—**LORD CHANCELLOR.**—The original bill in these causes was filed to raise the amount of a judgment for £5005. Lord Limerick has filed a cross bill, the prayer of which is, "That it may be declared that the said judgment was only a security for the true and actual value of the said mares and filly, and that the said judgment has been satisfied, and that nothing now remains due thereon, and that the said R. J. Hunter may be ordered to cause satisfaction to be entered on the said judgment, or otherwise, if necessary, that the fair and reasonable value of the said mares and filly, at the time of the said sale thereof to the said late Lord Viscount Glentworth, and that what, if anything, is now justly due and owing on the said judgment in respect thereof, may be ascertained under the decree of this honourable Court;" and for consequential directions and general relief. The facts of the case are not many. Lord Glentworth appears to have attained his age in 1810; the precise time is not given; but he appears to have been a person of extravagant habits, finally reducing himself to embarrassment, and at last becoming a prisoner for debt. The plaintiff in the original bill is the son of Mr. Hunter, who in 1812 published the Racing Calendar, and was a dealer in racing

horses. In the cross bill it is charged, that Mr. Hunter, having horses which are there represented as being worthless, formed the design of selling them to Lord Glentworth at exorbitant prices, payable at the death of his father, Lord Limerick, with a provision for the payment of interest in the meantime. The allegation in the bill is, that Lord Glentworth, having just attained his age, embarked in the purchase of these horses, and that he was imposed on by Mr. Hunter, that the horses were not worth the money for which credit was given, and that, on the whole, the transaction cannot stand. No question was made on the general principle as to a person in Lord Glentworth's condition. He was in the position of an expectant heir, which from an early period has been held to give a right to the protection of this Court from his own extravagant dealings, whether in parting with or giving security on property in remainder, for inadequate consideration. The doctrine on that subject is spread over many cases, through which I need not now travel. The principle is stated in *Peacock v. Evans*, (16 Ves. 513,) where Sir William Grant says, "Though inadequacy of consideration between persons who stand upon a precisely equal footing is in this Court of no account, unless from its grossness it is of itself evidence of fraud, yet, under the circumstances in which Evans stood, anything that can be substantially considered an inadequacy is a ground for setting aside the contract." *Gowland v. De Faria*, (17 Ves. 20,) establishes this, that where it lies on the person dealing with an expectant heir to shew that he has given a fair price. In *Aldborough v. Trye*, (1 Ves. S. Cor. 298,) the Lord Chancellor, speaking of that case, says—"There are two propositions, one which was established, and the other supposed to be established, in that case. The one said to be established was, that in a transaction with an expectant heir, it was necessary for the party seeking the benefit of that transaction to shew that he gave a fair price;" and lower down in the same page—"Of the policy of that rule it is not my purpose to say anything. That rule has been established in the case of *Gowland v. De Faria*, and has been recognized since." In one part of the discussion in this case, it was contended that a special position was filled by Mr. Hunter with respect to Lord Glentworth, which disqualified him from having dealings of this sort with him; but nothing of this kind was suggested by the cross bill, and I do not think this case need rest on the position filled by Hunter. The principle which I must apply to this case is that which I have mentioned, if it apply to transactions like this, which is not a sale of a part of the inheritance, and which is not a loan of money, nor of goods to be converted into money. It was contended that a mere sale of goods was not within the principle, and that therefore the plaintiff in the cross bill is not entitled to any relief. The cases relating to loans of money are quite plain, and if I were to consider the value of the animals as so much money, this case would be clear. *Waller v. Dalt*, (1 Dick. 9, 1 Ch. Ca. 78.) The facts in *King v. Hamlet* were sufficient to free Mr. Hamlet, on the ground that Mr. King's father,

Lord Lorton, was aware of the dealing. That case went much on the doctrine of the protection given to young members of a family dealing behind the back of their parents, and the transaction was upheld for that reason, and because the goods were sold in the course of business, at regular shop prices. There was there nothing to warrant interference, the Court going on those principles, the father being a party, and no extravagant price charged. There are other cases where the dealing was in reality for a loan of money, coloured by an arrangement for the sale of goods. But the question here is, whether the doctrine applies to a case like this, conceding that an extravagant value was put on the animals, and a security taken for it. It was contended that it was justifiable that a security should be taken for them at four times the value of the animals, considering the time the vendor was to lie out of his money, and the risk which he was to run; and without doubt, if the parties stood on equal footing, it is not to be said that the vendor might not put a higher price on his goods for those reasons. But the question arises, whether behind that there is not a principle which will protect persons in the position of Lord Glentworth against circumstances like those. It is necessary to look at some of the early cases, to see whether they do not reach the circumstances of this case. The first to which I shall refer is, *Cole v. Gibbons*, (2 P. W. 294.) where Lord Talbot said, "That the policy of the nation was to prevent what was a growing mischief in ancient families, that of seducing an heir apparent from a dependance upon his ancestor, who probably would have supported him, and by feeding his extravagancies, tempting him in his father's lifetime to sell the reversion of that estate which was settled upon him, forasmuch as this tended to the manifest ruin of families, therefore the policy of the nation thought fit, though it at first prevailed with some difficulty, to put a stop to so mischievous a practice, by setting aside all these bargains with young heirs for reversions." There the doctrine is applied to sales, as it is in *Twissleton v. Griffith*, (1 P. W. 310,) where the Lord Chancellor said "he saw no inconvenience in the objection, that at this rate an heir without difficulty could not sell a reversion; this might force him to go home and submit to his father, or to bite on the bridle." *Shelly v. Nash*, (3 Mad. 232.) The Vice-Chancellor says, that in more modern times it has been considered "that it was a fit rule of policy, to impose upon all who dealt with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a re-conveyance of the property purchased." With regard to fraud, much of the case is founded on the alleged fraudulent design on the part of Hunter, but mixed with it is the question of extravagant price, and as the rule is stated in *Bowes v. Heaps*, (3 V. & B. 117,) "Mere absence of fraud does not necessarily decide the validity of the transaction." In 1 Story Eq. Ju., sec. 348, it is stated that "contracts of a nature nearly resembling *post obit* bonds have in the cases of young and inexperienced heirs been often relieved against upon similar principles. Thus, where tradesmen and others have sold goods

to such persons at extravagant prices, and under circumstances demonstrating imposition or undue advantage, or an intention to connive at secret extravagance and profuse expenditure, unknown to their parents or other ancestors; Courts of Equity have reduced the securities and cut down the claims to their reasonable and just amount." Now, with regard to the doctrine of *King v. Hamlet*, I think this transaction was not known to Lord Limerick; it is not alleged that it was, and it seems even to have been concealed from him, for when a family settlement made provision for the debts of Lord Glentworth, there was no mention made of this debt. In so far, therefore, as this case rests on the general doctrine, there is that distinction between these cases. *Bill v. Price*, (1 Ves. 467;) *Berny v. Pitt*, (2 Ves. 157,) are common cases of *post obit*. As to the parties who seek this relief, they are entitled to it if Lord Glentworth himself could have had it: that is established in *Evans v. Chesshire*, (Blet. sup. 317;) *Molony v. Lestrangle*, (Beat. 406.) *Barker v. Vansommer*, (1 B. C. C. 149,) was a case of goods sold to be turned into money, and therefore does not apply to the present case; but the Lord Chancellor says—"It is argued by one gentleman that this was a mere sale; that therefore the Court cannot look into it. I allow, that if it was in the common course of trade, it would be so. That was the reason upon which the Court of Exchequer refused relief in the Duke of Lancaster's case." In *Gwynne v. Heaton*, (1 B. C. C. 9,) it is laid down, that "the heir of a family dealing for an expectancy shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. This must be taken to be the established principle. But it is objected that here the son had no allowance. That circumstance occurred in many of the cases. *Nott v. Hill* had everything in its favour; the father was corrupt, it was clear of fraud, save such as arises from inequality only. In *Barnardiston v. Lingood*, (2 Atk. 133,) and *Chesterfield v. Jansen*, Lord Hardwicke treated inequality as a mark of fraud. *Curwyn v. Milner* was perfectly free from fraud; it was £500 to pay £1000 on the decease of either of the parents; he paid the money, and afterwards brought his bill, and was relieved on the same ground with the relief against marriage brokerage bonds. In those cases, fraud is not the ground of relief; it is the example and pernicious consequences." *Brooke v. Gally*, (2 Atk. 34,) may be distinguished from this case, for there the goods were advanced to an infant, who gave a promissory note for the amount, immediately on coming of age; but there Lord Hardwicke says—"The case the nearest to this is, the imposition upon young heirs in the lifetime of their ancestors, who, though of full age at the time of the fraud, yet, if his necessities, extravagancies, or the severities of his parents made him submit to the imposition, this Court will give relief merely to discourage attempts of this nature." There are, however, some cases very near the present case. Two are in Vernon, which, though not very fully re-

ported, bear on the alleged principle, that a mere sale is not within the general doctrine. The first is *Lamplugh v. Smith*, (2 Vern. 77.) "The plaintiff, with other young heirs, being drawn in to buy stockings and such like goods at an extravagant price, and to accept of assignments of bad securities, and jointly to enter into securities for the payment of the monies agreed on, the bill was to be relieved against those." There it was declared "that the plaintiff should be liable to so much only as came to his own hands, and should not be answerable for his companions, and therefore referred it to a Master to examine and certify what of the goods came to the plaintiff's own hands, and what was the real value thereof, and on payment thereof, and on re-assigning such of the securities as the plaintiff had, his security was decreed to be delivered up." *Whitley v. Price* is reported immediately after that case, and is to the same effect. It is stated that there "the plaintiff was likewise a young heir, and had been drawn in to buy ribbands and braided wares, &c., at an extravagant price, and the case being the same in effect with the case immediately preceding, had the like rule." There is nothing in either of these cases to show that it was a dealing to raise money under colour of buying goods; it is simply stated that the plaintiff was drawn in to buy ribbands, &c., at extravagant prices. *Freeman v. Bishop*, (Barnard, 15,) is reported in a book of little authority, but the facts are very fully reported. "Freeman, being between twenty-two and twenty-three years of age, became acquainted with Bishop, who was a jockey, and during the space of a twelvemonth's time, bought thirteen horses of him. His method was, not to buy above one at a time; but he used to ride them hard, soon grew tired of them, and then re-sold three of them to the defendant, at much lower prices than he contracted for. He paid no money down, but the whole was run upon credit, and at the time that a horse was bought, Bishop frequently lent him a little money too, and then a note was given for the price contracted for the horse, and for the money at the same time; but four of these horses were at high prices; 42 guineas was the price of some of them, and £40 the price of others; however, it was sworn that the horses were not sold to him at a higher price than they were really worth, except two of them, and even as to these, one of them was only sold at about two guineas above the market price, and the other about £8." "The whole money at last amounted to £300, and thereupon he consented to mortgage his reversion." "The bill was brought by Freeman against Bishop, to be relieved against this mortgage, on payment of what was due on account of the horses, and the money that was lent to him." "The Lord Chancellor was of opinion that the mortgage should only stand as a security for what was really due on account for the money lent, and on account of what was due for the horses. To ascertain what was due for the horses, the defendant was to have liberty to bring his *quantum meruit*; and so his Lordship was pleased to decree accordingly." It is true, that case is reported in a book of little authority, and one which Lord Mansfield said he would not allow to be

cited, (2 Burr. 1142;) however, it is also reported, (2 Atk. 39.) Now, there there is a clear admission of an important proposition by Lord Hardwicke, who takes no notice of anything, save that in such a case the Court will enter on an inquiry of the real worth of the goods. *Barry v. Beaks*, (2 Ch. Ca. 139,) was manifestly a colourable sale to raise money, and therefore I shall not lay any stress on it: but, considering the general principle, the position of Lord Glentworth, and the value of the goods, the Court would abandon a part of its duty if it did not put this transaction in the way of inquiry. Here is a man, reckless in expenditure wholly unwarranted by his then property, giving security of a most oppressive character, not for his necessary support, but for the purpose of indulging a wild disposition, without present means, encouraged by another party, who obtained from him securities for £2500, while I cannot discover actual value of more than £500 given for those securities. This Court would give up a valuable jurisdiction, if it refused to grant relief under such circumstances. I do not see why it should abstain from relieving the plaintiff here; the case is much like that of *Freeman v. Bishop*. It seems, then, that, looking at this part of the case, the plaintiff is entitled to relief, and that the Court, either by reference to the Master or by an issue, will inquire the real value of the animals, though that may be difficult to determine. The plaintiff has failed in sustaining that part of his cross bill which alleges that the new securities put an end to his debt; but I think that nothing which occurred can act as a confirmation of it. Lord Glentworth seems all his life to have been an expectant heir, to have been in the same pecuniary difficulties, and to have been many years a prisoner for debt. Everything relied on as a confirmation of these securities, occurred while he was in prison. The defendant cannot rely on any dealings under those circumstances as confirmation, as it is said in *Molony v. LeStrange*, (Beatt. 413,) "All acts, to have the effect of confirmation, must be purely voluntary, and done with the intent to ratify that which the party knows he is entitled to disaffirm." In the transactions here there is nothing like such confirmation. While on the one hand, therefore, the plaintiff has not shewn that this judgment was satisfied, on the other, Mr. Hunter has failed in proving that it was confirmed. I think it is a case for inquiry, either in the office or before a jury, as to the real value of the horses; and of course I must declare that the judgments can only stand as securities for the sum really due. This case is distinguishable from *Peacock v. Beaus*, for there the original bill, which was dismissed, was to carry into execution an incomplete contract.

Book 102, p. 22

QUEEN'S BENCH.—TRINITY TERM

LESSEE DE BURGH V. GABBETT AND ANOTHELL
May, 24, 26, 29, June, 1.

Ejectment—Leasing power—Clause of Surrender
—Liberty to cut turf for sale—What shall be considered waste.

Ejectment on the title for the lands of Derryharsna, Derrylusk, Burglashy, and Derreen—

The declaration contained seven demises, all laid on the 27th of March, 1848. The defendants claimed to hold the lands in question under a lease executed by Sir John De Burgho, the father of the principal lessor of the plaintiff, to Joseph Gabbett, bearing date the 23rd of August, 1817, for 999 years, at the annual rent of £100, late currency. The plaintiff impeached the lease, as not being within the leasing power contained in the marriage settlement of Sir John De Burgho. This settlement was dated the 6th of May, 1808, and by it the lands of Drumsally, Drumclogher and Dromalta, Coolready, Coolriery, Castleconnell, Derryusk, Clean Lackah, in the county of Limerick, and the lands of Fairy Hall in the counties of Limerick and Tipperary, were settled to the use of Sir John De Burgho for life, with remainder to his first and other sons in tail male. By this settlement, four distinct leasing powers were reserved as to the several denominations of lands contained therein, but the only power that was alleged to warrant the lease in question was the first leasing power, which related to the town and lands of Castleconnell, and to no other lands. That power was as follows:—"Provided always, and it is hereby agreed and declared, that it shall and may be lawful to and for the said Sir John De Burgho, during his life, by indenture or indentures, to be sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, to limit and appoint, by way of demise or lease, all or any part or parts of the said honours, manors, lands, hereditaments, and premises hereby agreed to be settled, with the appurtenances, as consist of the lands of Castleconnell, with the messuages, edifices, buildings and appurtenances, to any person or persons whomsoever, for any life or number of lives, or for any term or terms of years, absolute and determinable on any life or lives, and either in possession, reversion, remainder, or expectancy, so as there shall be reserved on every such limitation or appointment, by way of demise or lease, the best or most approved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof, and so as there shall be contained in every such indenture of limitation or appointment, by way of demise or lease, a condition of re-entry for non-payment of the rents thereby to be reserved, and so as the person or persons to whom such limitation or appointment shall be made, his, her, or their heirs, executors, and administrators or assigns, shall not, by any clause or words to be contained in any such indenture, be made disinclined for waste, or exempted from punishment for committing waste."

At the trial of the cause before Mr. Justice Ball, at the Summer Assizes for the county of Limerick, 1848, the plaintiff went into evidence to shew that the lands demised by the lease of 1817 formed no part of the town and lands of Castleconnell, and, consequently, that the lease could not be upheld under the leasing power, which related only to those lands. Several witnesses deposed that the demised lands were called and

known by the name of Portcrusha, and not Castleconnell, and that the lands of Cloon and Lacka separated the demised lands from the lands of Castleconnell. The plaintiff also gave in evidence ancient maps, and relied on them, as establishing that the lands demised formed no part of the lands of Castleconnell. This evidence was encountered, on the part of the defendant, by the production of several witnesses, who stated that they always heard the demised lands called Castleconnell. The plaintiff further contended that the lease in question was void, and called for a direction in his favour—first, because it contained a clause of surrender; secondly, because it gave permission to the lessee to cut and sell turf, thereby rendering him punishable for waste; and, lastly, because the number of years in the lease was absolute, and not determinable on lives; but the learned Judge refused so to direct the jury. The plaintiff then went into evidence to shew that the lease was made at an undervalue. At the close of the defendant's case, the learned Judge, with the concurrence of both parties, left the following questions to the jury:—

1st. Whether the entire of the premises comprised in the lease of 1817 were, at the time of the execution of the settlement of the 6th May, 1808, part of the lands of Castle Connell? The jury found in the affirmative.

2ndly. Whether the said lands, or any part thereof were, at the time aforesaid, part of the lands of Portcrusha? The jury found in the negative.

3rdly. Whether the lease of 1817 was made at the most improved yearly rent which could be reasonably had for the same, at the time of its execution? The jury found in the affirmative.

The learned judge then directed the jury to find a verdict for the defendants, reserving liberty to the plaintiff to move to set it aside, and to enter a verdict for himself, if the court above should be of opinion upon the whole of the case, that he was entitled thereto.

A rule nisi having been obtained in Michaelmas term last, to set aside the verdict for the defendant, and to enter one for the plaintiff, pursuant to leave reserved, or for a new trial,

Mr. Henn, (with him *Mr. J. D. Fitzgerald, Q. C.*) now showed cause.—The mere introduction of a clause of surrender into a lease does not render it void. *Lord Muskerry v. Chinnery*, (Llo. & Goo. Sug. 185; Sugden on Powers, vol. 2, p. 359—364; App. 629.) *Shesky v. Lord Muskerry*, (1 Cl. & Fin. N. S. 576.) With respect to the power to cut and sell turf, we have now a right to assume that the lands in question are part of Castleconnell, and, as it appears from the evidence, that those lands contained a large quantity of bog, it must be inferred that they could only be rendered valuable by cutting turf. Unless, therefore, a power like this was given, no beneficial rent could be received. A power to cut turf for sale may or may not be waste according to circumstances. If a bog be only useful as a bog, and forms the principal subject of the demise, the inference to be deduced from the authorities is, that a right to cut turf for sale shall be inferred. (See the cases collected in 1 Fur. L. & Ten. 313.) *Copinger v. Gubbins*, (9 I. Eq. R. 304.) The lease is

also impeached, because it makes the tenant punishable for waste, but the law will not allow that to be waste which is not any way prejudicial to the inheritance. *Barret v. Barret*, (Hetley, 35;) *Grubb v. Lord Burlington*, (5 B. & Ad. 507;) *Anon.* (1 Hog. Rep. 147;) *Saunders's case*, (5 Rep. 12). *Masey v. Gubbins*, (Longf. & Touns. 88,) is distinguishable from the present case, because there the bog was not the principal subject of demise.

Mr. Bennett, Q. C. and Mr. Napier, Q. C. contra.—The words of the leasing power require that the term shall be absolute, and that the lessee shall not be made punishable for waste. A lease with a clause of surrender cannot be considered an absolute term, for the rent is not continued until the end of the demise. *Muskerry v. Chinnery* does not settle this question, for in that case the tenant for life was empowered to take a fine to any amount. The lessee was made punishable for waste, when a right to cut turf for sale was given to him. The making and selling bricks was held to be waste, and an injunction granted, even though the lease was made without impeachment of waste. *Bishop of London v. Web*, (1 P. W. 527.) When the surface or soil is taken away it is an injury to the inheritance.

Mr. J. D. Fitzgerald, Q. C. in reply.—The case went to the jury upon a conflict of evidence. The provision enabling the tenant to cut turf is confined to the bog, and the strict construction of law with respect to what shall be considered waste, has latterly been relaxed. *Lawton v. Lawton*, (3 Atk. 14.) [*Perrin, J.*—Your difficulty is, that cutting turf for sale is *prima facie* waste, unless it be shewn that that was the manner of using the property, and you have not given evidence of that custom; at least no question was left to the jury upon the subject.] The evidence has established that the whole of thing demised was bog. [*Moore, J.*—I have very great difficulty in coming to the conclusion, that an unlimited power of cutting turf for sale, with a clause of surrender, would not have the effect of causing a great injury to the reversion.] The court ought to be liberal in the construction of leasing powers; the lessee can seldom know the nature of them. Assuming the verdict of the jury to be right, and that the bog forms part of the lands of Castle Connell, we have brought our case within the words and intention of the first leasing power.

BLACKBURNE, C.J. (stopping him). We will not trouble you any further, for we are satisfied, after a careful examination of the evidence, that, without violating any principle of law, or interfering with any decided authority, justice requires the subject should be again considered by a jury, and I shall therefore say no more upon this part of the case. On the part of the plaintiff, it was sought to enter a verdict for him upon legal objections of very considerable importance, which have been taken to this lease as not being an execution of the leasing power. We are called upon, however, to consider these objections on hypothetical statements of a fact, and considering the difficulty of the questions which have been argued, we are of opinion that we ought not now to pronounce a final decision upon them, but should let the case go to another trial, thereby affording an opportunity either by a special verdict, or a bill of exceptions, of having the opinion

of another court taken upon the subject. Under these circumstances, we think that the verdict ought to be set aside without costs upon either side.

Rule absolute for a new trial.

COURT OF EXCHEQUER CHAMBER.*

SAMUEL LINDSAY, ASSIGNEE OF WILLIAM O'CALLAGHAN v. SAMUEL M. GOING.

Insolvent Act, 3 & 4 Vic. c. 107.—Sale by sheriff after arrest, and before vesting order.—Title of assignee under vesting order.

The sheriff seized, on the 23rd of April, under a writ of Fi. Fa., founded on a judgment on a bond and warrant of attorney. A. B. the insolvent, was arrested at his own request, at the suit of another creditor, before the sale, which took place on the 23rd of May. On the 15th of June he presented his schedule to the Insolvent court; on the following day the order was made vesting his property in the plaintiff. In an action of trover against the sheriff by the assignee, Held, that the sheriff was not liable under the 48th sec. of the 3 & 4 Vic. c. 107, and that the vesting order had no relation to the date of the arrest.

This was a writ of error from the judgment of the Court of Exchequer. The action was trover against a sheriff for an illegal seizure under an execution against the goods of W. O'Callaghan, an insolvent. The declaration stated, "that William O'Callaghan, before he became insolvent, and before the making of the court for the relief of insolvent debtors of an order vesting the real and personal estate and effects of the said William O'Callaghan in the provisional assignee, to wit, on the 23rd day of April, in the year of our Lord, 1846, at Clonmel, in the southern riding of the county of Tipperary, was lawfully possessed as of his own property of, [stating it fully], and being so possessed, he, the said William O'Callaghan, afterwards, and before the making of the said vesting order as aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, and before the making of the said vesting order as aforesaid, to wit, on the 23rd day of April, in the year 1845, there came to the possession of the said defendant by finding; yet the said defendant, well knowing the said goods and chattels to be the property of the said William O'Callaghan, before the making of the said vesting order as aforesaid, and of right to belong to him and appertain to the said plaintiff as assignee as aforesaid, since the making of the said vesting order as aforesaid, but contriving and fraudulently intending to injure the said William O'Callaghan before the making of the said vesting order as aforesaid; and the said plaintiff as assignee as aforesaid, since the making of the said vesting order as aforesaid in this behalf, hath not, though often requested so to do, as yet delivered to them, or either of them, the said goods and chattels, or any part thereof, but hath hitherto wholly neglected and refused so to do, and afterwards, and after the commencement of the imprisonment of the said

* *Coram* Blackburne, C.J., Doberty, C.J., Pigot, C.B., Pennefather, B., Torrens, J., Crampton, J., Perrin, J., Richards, B., Ball, J., Jackson, J., and Moore, J.

iam O'Callaghan, to wit, on the 21st day of the year 1845, converted and disposed of same to his own use, to wit, at Clonmel, in the western riding of the county aforesaid, to the charge, &c." Plea, Not Guilty. At the trial the jury found a special verdict—"That William O'Callaghan was, in the year 1843, a shopkeeper in business in the town of Tipperary—that said William O'Callaghan, on the 13th day of May, in the year 1844, executed to a person of the name of Jane Ryan, a bond and warrant of attorney, to confess judgment thereon, which bond and warrant of attorney bore date respectively the day of June, 1843, upon which bond, judgment entered up in the Court of Common Pleas, on 21 days after the execution of the said warrant—that the said Jane Ryan proceeded to and gave the said judgment in Easter Term 1845, but a writ of *fi. fa.* founded on the said judgment issued against the goods of the said William O'Callaghan, at the suit of the said Jane Ryan, which writ of *fi. fa.* the said defendant on the 3rd day of April, 1845, seized the stock in the shop of the said William O'Callaghan after the seizure, and on the 16th day of May, 1845, and before the sale which took place on the 23rd day of May in said year, 1845, the said William O'Callaghan was arrested under a writ of *ad satisfaciendum*, which writ was issued at the suit of one John Millner, and the creditor of the said William O'Callaghan, and was lodged in the gaol. And the said jurors upon their oath say, that said arrest under said writ of *ad satisfaciendum*, was made under and by the process of the said defendant himself—that after arrest, and while said William O'Callaghan was in custody under said writ of *ad satisfaciendum*, and upon the 23rd of May, 1845, the said defendant did, under the said writ of *fi. fa.*, sell, and did sell the said stock in trade and goods so seized, and convert the same into money, which the said defendant received. And the said jurors upon their oaths further say, that said William O'Callaghan afterwards, on the day of June, in the said year of our Lord 1845, while he continued in custody under the said writ of *ad satisfaciendum*, petitioned the court for the relief of Insolvent Debtors in Ireland, for discharge; upon which petition a vesting order was afterwards made, and bears date on the 16th of June, 1845—that by the said vesting order, the estate of the said William O'Callaghan was assigned to the plaintiff, who was appointed his assignee, and that the said William O'Callaghan was himself regarded as an insolvent. And the said jurors, upon their said oaths further say, that the said defendant had in his hands before and at the time of the said sale, certain civil bill decrees, and certain writs of *fi. fa.* founded upon judgments in adverse proceedings and which civil bill decrees, and last mentioned writs had been issued against the goods of the said William O'Callaghan. And the said jurors further say, that some of the said last-mentioned judgments had been delivered to the defendant on the 1st of May, 1845, and others on the 21st of May, 1845, and that the said civil bill decrees were delivered to the said defendant on the 22nd

of May, 1845." The jury then found the value of the goods on the declaration, and concluded in the ordinary form. The court below, having given judgment for the defendant, the plaintiff brought his writ of error, to reverse that judgment. The principal point for argument noted was, "That inasmuch as the sale by the defendant was had under an execution which issued upon a judgment obtained on a warrant of attorney to confess judgment, and inasmuch as said sale took place after the commencement of the imprisonment of the insolvent, the plaintiff, as assignee of such insolvent, as the law stands, especially referring to the statute 3rd and 4th Victoria, chap. 107, sec. 48, was entitled to sue the defendant in tort for such sale and conversion."

Mr. Ryan, with him *Mr. Napier, Q.C.*—The question in this case arises upon the true construction of the 48th section of the 3 & 4 Vic., c. 107, and to give effect to that section, this action must be upheld. I fully concede that the vesting order vests the property in the assignee. Under the 48th section the insolvent is prevented giving a bill of sale. Suppose a bill of sale had been given to this creditor, after the imprisonment, and before the vesting order, will it be contended that the assignee could not bring trover to recover the goods transferred by the bill of sale? When a party goes into prison, that is an intimation to his creditors to stay their proceedings. [*Pennfather, B.*—Suppose he chose to lie in prison for six years, are the creditors to stay their hands for that time? Or suppose a writ was put into the hands of the sheriff, and he held it for a considerable time, and a *venditioni exponas* sued out, how long is the creditor who has his execution to be tied up? *Perrin, J.*—The bankruptcy cases go on the principle that the sheriff seizes the property of one which belongs to another.] *Cooper v. Chitty*, (1 Burr. 20, S. E.; 1 Sm. L. C. 239.) I rely entirely upon the construction of the 48th sec. [*Pennfather, B.*—In *Groves v. Cowham*, (10 Bing. 5,) the property was changed, and Mr. Smith appears to me to draw a conclusion from that case which is not warranted.] The 48th sec. sets aside the writs of execution, so as not to act upon the property. *Becke v. Smith*, (2 Mee. & W. 191); *Burris v. Towsey*, (3 Nev. & Per. 88). You must put the same construction upon the 47th and 48th sections. This case is not to be distinguished from *Kelcey v. Minter*, (1 Scott, 616.) The assignment has reference to the imprisonment, *Guy v. Hitchcock*, (5 Nev. & Man. 660,) and has the effect of a vesting order. *Squire v. Huetson*, (1 Q. B. Rep. 308.) [*Perrin, J.*—Suppose the creditor applied for a *venditioni*, and the sheriff suggested that the insolvent was in prison, would the court grant a *venditioni*? Or if the sheriff returned that the goods were on his hands for want of buyers, would the court compel him to sell?] The execution creditor would be prevented from taking the goods of the party in prison, and the sheriff is equally bound to take notice of that fact. [*Crampton, J.*—It was conceded that *Kelcey v. Minter* would be exactly in point, if the action in that case was against the sheriff. I doubt that, because in the present case the sale took place before the vesting order, where-

as in that case the sale was after the property vested in the assignee by assignment.] There is nothing in *Kelcey v. Minter* about the assignment; the essential part of the action in trover is the possession. [*Crampton, J.*—They were not the plaintiff's property at the time of the conversion. *Perrin, J.*—According to your argument, at the time of the sale the right of action was vested in the insolvent, and there was then a conversion; is there any clause transferring that right of action to the assignee?] The 30th sec. of 3 & 4 Vic. c. 107, gives the assignee a power to recover.

[They cited *Whitmore v. Green*, (18 M. & W. 104); *Lord Ashton v. Burks*, (Longf. & T. 338); *Jones v. —*, (Hard. 111, 7 Bac. Ab. Trover).]

May 22, 23.—*Mr. Lynch, Q. C.*, with *Mr. J. Pennafather*.—The plaintiff's pleading precludes him from recovering. The allegation is, that up to the time of the vesting order, the goods were in the possession of the insolvent. The argument on the other side is founded on a mistake as to the law of bankruptcy and insolvency. In the former, the property vests in the assignee from the time of the act of bankruptcy. In *Balme v. Hutton*, (9 Bing. 471,) the actual property was in the assignee at the time of the seizure. The sheriff did not obey the exigency of the writ, for he took the goods of B. as if they were those of A. It is admitted there is no vesting by relation in insolvency. *Woodland v. Fuller*, (11 Ad. & El. 859); *White v. Bartlett*, (9 Bing. 378); *Sims v. Simpson*, (1 Bing. N. C. 313.) [*Blackburne, C. J.*—The plaintiff's counsel do not go upon the question of relation; they allege the property to be in the assignee.] The case of *Groves v. Cowham*, (10 Bing. 5,) is an authority in our favour. *Tyndal, C. J.*, who decided that case, presided in the Court of Error which decided *Balme v. Hutton*, (9 Bing. 471.) *Notley v. Buck* shews that the sheriff is liable, because he was in the same position with the execution creditor. *Kelcey v. Minter* shews that the sheriff is liable not only for the proceeds of the sale, but for the value of the goods. The party is in this dilemma—if they succeed at all, it must be by showing that the property is in the assignee, and they have averred the contrary.

[They cited *Garland v. Curllise*, (2 Cr. & Mee. 69); *Barnard v. —*, (1 Bing. N. C. 306.)

Curr. ad vult.

June 16.—*BLACKBURNE, C. J.* delivered the judgment of the court. [After stating the pleadings, and the facts as set out in the special verdict, he proceeded]—The court are of opinion that the plaintiff had no right to sue the sheriff. The cause of action stated in the declaration is the partial conversion of the property of the insolvent; the facts afford *prima facie* evidence that that was not so, because the vesting order was not made until after the sale by the sheriff; and as the insolvent himself could not sue, neither could his assignee. It is contended that, according to the true construction of the 48th section of the Insolvent Act, 3 & 4 Vic. c. 107, this sale was avoided, and that the act entitles the assignee to bring his action in this form. That construction would amount to this, that an action of trover is maintainable, not by the person whose property is converted, but by a person hav-

ing no property whatever in the goods at the time of the conversion. If that be the effect of the 48th section, a conversion has taken place, and the plaintiff must succeed. (Having read the section.) The words plainly mean the creditor issuing the execution. "No person shall, after the commencement of the imprisonment of such prisoner, or himself or herself of any execution." That can mean the sheriff. Taking the language of the legislature, according to its literal interpretation, to the plaintiff, the sense clearly is to prevent interference of creditors, and put the specialty in simple contract creditors on the same footing. The construction fulfils all the requisites of the act, and leaves the sheriff every necessary protection; it would be unjust to deprive him of it, and there can only effectuate that object by holding the act of the sheriff to be lawful. No answer being given to the objection that obvious injustice would be done by holding to the contrary. It was the duty of the sheriff to sell the property of the insolvent; he could make no return to the extent that the property was otherwise than in the insolvent; he could have no pretext for refusing to execute the writ. Is there to be any limit as to date at which the debtor must file his petition? need not do it for ten years, or at all, and in the meanwhile is nothing to be done? If compelled by the express words of the act to hold that it is so, we must. The authorities cited by the plaintiff may be the policy of those decisions, it is not settled that the assignee has a title by relation under the insolvent statutes there is no such title. Up to the time of the vesting order, the legal title to the property is in the insolvent. The case of *Cooper v. Chitty*, (1 Burr. 20), has no application to the present, and shews only, that after assignment a right in the bankrupt's property vests in the assignees from the date of act of bankruptcy. Two cases were strongly relied upon to shew that when the execution issues on a judgment on a bond or warrant of attorney, that the right is suspended from the time of the imprisonment, and that therefore the sheriff and execution creditor are equally liable. The first is *Groves v. Cowham*, (10 Bing. 5) the facts show that the creditor was in prison previously to the issuing the execution, and the assignment to the plaintiff was prior to the sale. In the other case—*Kelcey v. Minter*, (1 Scott. 68) that was pressed upon the court, to shew the liability of the sheriff and the creditor, the language of *Tyndal, C. J.*, was relied on to shew that the act of the sheriff was tortious. The report does not say when the sheriff's sale took place. I have considered it due to the importance of the case, to procure a copy of the pleadings; in which it appears that in this case, as in that of *Groves v. Cowham*, the property vested in the assignee before the conversion, and, consequently, does not apply to the case before us. If the sheriff's liability is co-extensive with that of the creditor, and that the creditor is not responsible, the sheriff incurs none, unless he acts after the property becomes vested.

Judgment of the court.

COURT OF CHANCERY.

MATURIN v. WILSON.—June, 20, 21.

To remove temporary bars—Evidence of outstanding leases—Form of prayer.

a plaintiff by his bill states a legal title, and the existence of outstanding terms, it is at a matter of course for the Court to remove temporary bars, for the purpose of enabling him to bring an ejectment. When the bill stated leases outstanding terms and the answer admitted a fact of their existence, but ignorance as to where they were, or by or to whom granted. Held to be sufficient evidence of their existence to enable the plaintiff to grant relief.

Maturin, the plaintiff, filed his bill on the 2nd of February, 1847, stating that Edmond Wilson, deceased, at the time of making his will, seized in certain ground in the city of Dublin, on which several houses were erected, "subject to certain leases thereof which are still subsisting." That the said Edmond Wilson was also seized to him and his heirs of certain lands in the county of Antrim, held under leases for lives renewable for ever, and of freehold premises. That the said Edmond Wilson duly made and published his last will in writing, dated the 29th day of June, 1839, and duly proved, and thereby devised all his property, both real and personal unto his wife, Maria Wilson, for the term of her natural life, and after her decease unto the plaintiff. That the testator died in 1840, without having revoked or altered his said will, leaving behind him said Maria Wilson, his widow, and the defendant, John Oldham Wilson, his heir at law, and the said Maria Wilson died in 1845. The bill prayed that the whole or considerable portions of the said estates were held under leases granted by the said testator previous to the execution of the will, or by the persons through whom he derived title, for terms of years and for lives, several such leases are still subsisting. That he was unable to discover among the title deeds of said estates the counterparts of said leases, and therefore unable to state whether the whole, or what part of said estates was in the possession of tenants, at what terms were outstanding, and in whom the same were vested. That by reason of the said outstanding terms he was unable to proceed by ejectment, and that the defendant would not consent to his right to set up at the trial of the ejectment these outstanding terms or temporary bars. That the title deeds of the said estates were in the possession of the said defendant, and that the defendant was also in possession of the estates, under an order issued on a judgment in ejectment of the High Bench, but he stated that the said will was read up on in that ejectment, and that he was bound by the said ejectment, to which he was not a party. The bill prayed that an issue should be directed to try whether the freehold estates of the said testator were well devised to the plaintiff, and if it should be found that the said estates were well devised by the said will, then that the defendant might be directed to deliver up to the plaintiff all title deeds, leases and writings relating

to the said freehold estates, and to come to an account with the plaintiff of the rents and profits of the said estates, which were received by him or by any person for him since the death of the said Maria Wilson, and to pay the same to the plaintiff, and that the plaintiff might have the aid of the Court in order that he might assert his legal title to the said estates, and for that purpose that the defendant should be restrained from setting up on the trial of any issue to be directed by the Court, to try the validity of the said will, any outstanding terms to prevent the plaintiff from recovering at law, and for the purpose of having such issue tried as aforesaid, that all necessary directions might be given, the plaintiff offering to give every facility consistent with his title to have the question tried expeditiously and prayed general relief.

The defendant, by his answer, admitted the title of the testator; stated in respect to the leases, that none of them were in his hands, or in the possession of his agent; that he was unable to set forth by whom, and to whom, and at what rents the said leases were granted; but he believed that the said premises in the city of Dublin were underlet to several tenants for their lives, renewable for ever; and that the premises in the county of Antrim were let to tenants for various terms. The answer impeached the validity of the will.

Mr. Brewster, Q.C., Mr. Martley, Q.C., and Mr. James C. Lowry for the plaintiff.

Mr. Whiteside, Q.C., Mr. McDonough, Q.C., and Mr. Sterne B. Miller for the defendant, contended that the plaintiff had failed to make any case by his bill to entitle him to the relief prayed. This is an ejectment bill, and not the ordinary bill to remove temporary bars. The bill prays an issue; no case has been made for such relief; no trust has been stated, and the court will not grant an issue unless a trust exists. There has been no evidence given of the existence of temporary bars; and the statement in the bill, and the vague admission in the answer, in respect to outstanding leases, is not sufficient. The plaintiff ought to have given proof of the existence of those leases or outstanding terms. The death of Maria Wilson has not been proved. One witness says he believes she is dead, and this witness is not a member of her family. [The following cases were cited and commented on in support of the arguments on this branch of the case: *Crow v. Tynell* (3 Mad. 179); *Jones v. Jones* (3 Mer. 169); *Blenerhasset v. Day* (2 Ball and B. 127); *Lord Fingal v. Blake* (1 Mol. 116); *Keogh v. Keogh* (2 Mol. 92); *O'Connor v. Malone* (6 C. and F. 591); *Short v. Lee* (2 Jac. and W. 496); *Corporation of Arundell v. Holmes* (4 Bea. 381).] It was also further contended that the plaintiff having acquiesced in the former trial, ought not to be assisted now *Pike v. Hoare* (1 Anst. 421); *Lord Lorton v. Lord Kingston* (5 C. and F. 343); and that relief could be obtained at law, which was the proper tribunal to determine questions on wills of real property; therefore this court should not grant an issue, on the trial of which, the defendant would be placed in a less advantageous position, than in an action of ejectment in a court of law.

Mr. Lowry in reply, cited Hamilton v. Lyster (7 I. E. R. 560.)

LORD CHANCELLOR.—As to the removing of the temporary bars in this case, the only difficulty arises on the evidence of their existence; where they exist it is a matter of course for this court to give relief, unless the conduct of the plaintiff has been so improper as to afford ground for the court to refuse its aid. I have not heard anything that could lead me even to suppose that there is anything against conscience in Mr. Maturin setting up this will; and I think he is in no way implicated in the former action which has been tried. That was upon a different will. He was, in fact, interested in that will being set aside, and the plaintiff was interested in its being established. That will gave her the absolute estate; while this will gives her but a life estate in the testator's property. I have been strongly urged to look into the merits of this case; but I do not think I am at all bound to do so, and on them I give no opinion, one way or the other. The question is simply this: is a devisee entitled to the assistance of this court, who files his bill, stating that he claims under a legal devise, and that he is hindered by the existence of temporary bars, or outstanding terms, from asserting his right in an action at law? I think it is a matter almost of course to give him this assistance. I do not think it is necessary for the plaintiff to bring his action of ejectment first, and then to come to this court; I think it is more convenient to come to this court first, to have the impediments removed, and then to bring his action. There is some difficulty here as to the evidence of the existence of temporary bars. I shall examine the evidence offered by the plaintiff. First, it is said, that there is no evidence of the death of the tenant for life. Now I think that is a question to be tried in the action; and for the proper trial of that action, the temporary bars must be removed; then the plaintiff must shew that the tenant for life is dead before he can make out his title. The bill states that there are leases and outstanding terms, and the answer admits that the defendant believes there are leases; but states he cannot set out the particulars; which shews that the leases were not made by him. I think the fair inference is, that they were made by the testator, or by some one under whom he derived the estates in question. The prayer is inaccurate; but I think it is substantially a prayer to have temporary bars removed. The case of *Keogh v. Keogh* is a very plain case. It seems it had been the practice to file bills praying for an issue, and that was improper where no trust existed; but even in that case the court removed temporary bars, by making that a part of the order dismissing the bill. I shall retain this bill until the plaintiff shall bring his ejectment, restraining the defendant from setting up temporary bars; but I shall reserve the question of costs for further directions.

"Let the bill be retained for twelve months, with liberty to the plaintiff to bring such action of ejectment as he may be advised, the defendant to be restrained from setting up any outstanding legal estate in bar of any such action. Reserve further directions and costs until after the trial of the said action, with liberty to the parties to apply as they may be advised.

Note.—By consent of the parties, the ejectment be brought in the Court of Common Pleas within a fortnight, and the defendant's solicitor to accept service of the ejectment."—*Reg. Lii* 102, fo. 202.

ROLLS COURT.

ROCHE v. COLLINS.—April, 27th.

Attachment—Receiver—Notice upon tenant to pay Rent.

Where the order to pay rent has been served by a Receiver on all the tenants of lands, and subsequently entered into possession of part of the lands, to obtain an attachment for non-payment of rent against A., it is not necessary but it should have been served with the order to pay rent.

In this case, a conditional order for an attachment for non-payment of rent had been obtained by the receiver against G. D. Lynch, and this was motion to shew cause. From the affidavit of Lynch it appeared that his father had been tenant of the lands for several years, and after his death his mother remained in possession as tenant until 1847, when she died. The affidavit said that Lynch derived no benefit from the lands; that he never paid any rent, or was served with an order to pay rent, and that he endeavoured to use said lands to the best use for the benefit of his family, as a trustee for them.

From the receiver's affidavit it appeared that since his appointment in 1837, he had frequently received rent from said G. D. Lynch.

Mr. O'Hea, for G. D. Lynch, contended that Lynch was not liable as a tenant to an attachment, as he had not been served with any order to pay rent to the receiver.

Mr. Leahy, contra.—This case comes under the rule laid down in *Southwell v. Armstrong*, (Cr. & Dix. E. R. 603.) (S. C., 1 I. E. R. 32,) where it was held, that if a receiver on his appointment serve the order to pay rent upon all the tenants, a party who subsequently becomes a tenant in the place of one who has been served, may be attached for non-payment of rent, without any further service of the order.

MASTER OF THE ROLLS.—I will follow that of *Southwell v. Armstrong*, which I think is rightly decided; for where a tenant has been served with the order to pay rent, and another person afterwards comes into possession, I do not think it necessary that the successor should also be served; and as this person has been in possession of the property, and taken upon himself the management of it, I will disallow the cause shewn, with costs.

Lii. 284, fo. 21

ALSTON v. ALCOCK.—April, 2th.

Practice—Minor matter—Motion for reduction of rent.

Mr. Burke moved for a reduction of rent.

Mr. Berwick, Q. C. for the receiver.—This being a minor matter this application is quite unnecessary.

The Master has authority to make the order required.

Mr. Foley appeared for the inheritor.

THE MASTER OF THE ROLLS said that in this case he would have no difficulty in granting a reference, but the motion was unnecessary; he would, however, allow the motion to stand over until an application was made to the Master.

HARVEY v. LAWLER.—April 28.

Practice—Promissory note—Purchase.

Mr. Lawless moved to make a consent a rule of court. The consent was, that the National Bank, the purchasers of part of the lands sold under the decree in this cause, might be at liberty, with the privy of the Accountant-general, to lodge in the Bank of Ireland, to the credit of this cause, the promissory note of C. Fitzsimon, one of the public officers of said bank, for the sum of £200—one-fourth of the purchase money of said lands; and also a promissory note for £600, the residue of said purchase money. There was a sufficient sum lodged in court to pay all the incumbrances, except about £200, and the consent that his promissory note be taken, was signed by all the parties having any interest in the matter.

MASTER OF THE ROLLS.—I will not allow parties on consent to vary the practice of the court; it may create the greatest embarrassment. I will make no rule on the motion.

ROBERT J. WEIR, *Petitioner*, J. ORMSBY,
Respondent.

WILLIAM WEIR, *Petitioner*, SAME, *Respondent.*
April, 28th.

Receiver—Continuing proceedings—Judgment Acts.

The Court has authority to permit the assignee of a judgment creditor to continue proceedings in his own name; but where the original proceedings have been taken by a trustee, and an assignment has thus been rendered necessary, the Court will not give the costs of the motion to continue.

In this case, W. Weir, the petitioner in the second matter, together with the respondent, and as a surety for him, executed a joint and several bond to one K. D. Lloyd, to secure the sum of £1200, upon which judgments were entered. Lloyd having required payment, W. Weir was compelled to pay the amount, and thereupon the judgment was assigned to R. J. Weir, as a trustee for said W. Weir. On the 11th of January, 1848, a petition was presented by said R. J. Weir, and a receiver appointed over part of the lands of the respondent. R. J. Weir being in declining health, at the request of W. Weir, by indenture of the 22nd day of January, 1849, assigned said judgment to W. Weir. Shortly afterwards, R. J. Weir died.

Mr. W. D. Ferguson, on behalf of W. Weir, moved that the proceedings already had might stand and be revived and be continued for and in the name of the said W. Weir, and that he might

have the benefit of same, and that certain lands in the possession of the respondent might be let. In the case of *Daly v. Blake*, (10 I. E. R. 36,) an order was made similar to that which I now seek; also in the Court of Exchequer.

MASTER OF THE ROLLS.—You may take an order to continue the proceedings, similar to that in *Daly v. Blake*; but I will not give any costs, for the petitioner might have proceeded without the intervention of a trustee, and these costs have been incurred entirely by his own act.

GURRY v. O'LOUGHNANE.—April, 29th.

Practice—Examination—Notice—Irregularity.

The Court is not bound to suppress depositions in all cases of irregularity, and where by accident the defendant's solicitor gave but two days' notice of examining a witness, instead of four, as required by the 87th general order, the Court permitted the depositions to stand, with liberty to the plaintiff to cross-examine the witness.

The bill in this cause was filed to restrain the defendant from issuing execution on foot of a judgment, and to set aside some deeds, as being fraudulent and void. The replication was filed on the 6th of January, 1849, and was served on the 8th. The rule to pass publication with a week's respite, was entered on the 13th of April, and was served on the 14th. On the 18th of April, notice was served on behalf of the defendant, of his intention to examine a witness named J. Fahey, who was examined on the 20th; publication passed on the 23rd of April. This was an application on behalf of the plaintiff, that the deposition of J. Fahey be suppressed, on the ground that same was taken irregularly, and contrary to the general order of the Court, and notice pursuant to the 87th general order had not been served four days before the examination of said witness, and publication had passed before the time for his examination had regularly arrived. From the affidavit of the defendant's solicitor, it appeared that the bill was filed for an injunction to set aside certain deeds, as being fraudulent; that J. Fahey was the only witness examined on behalf of the defendants, and he was subscribing witness to the execution of the deeds which were sought to be set aside. The affidavit also stated, that the defendant's solicitor was unacquainted with the residence of the said J. Fahey, which was not discovered until late on the 17th of April, and notice of his name as a witness was transmitted to plaintiff's solicitor on the 18th; and that up to the time of making the affidavit, defendant's solicitor had not read, nor did he know what evidence Fahey had given.

Mr. Hughes, Q. C., and *Mr. Murphy*, for the plaintiff. Four clear days are given by the general order, for the purpose of enabling the other party to ascertain who the witnesses are, where they reside, and to prepare for their cross-examination. In the present case, no opportunity was given for inquiry or cross-examination, and the depositions of this witness ought to be suppressed.

Mr. Lynch, Q. C., and *Mr. Sherlock*, contra.—

The defendant served notice of the name of this witness as soon as he was able to discover where he resided. It is not imperative on the Court to suppress depositions in every case of irregularity. *Attorney-General v. Ball*, (9 I. E. R. 463, 2 Dan. Ch. Practice, 580.)

MASTER OF THE ROLLS.—The 87th general order is quite distinct in its terms, and under it "The notice of witnesses intended to be examined shall describe the witnesses by name, place of residence, and addition, and before whom the witnesses are to be examined, and such notice shall, in all cases where a witness is to be examined before the examiner in Dublin, be duly served four days, &c., before the examination of the witnesses shall be commenced." Nothing can be more precise. In the present case there has been an irregularity, which appears, however, to have been accidental. The notice was served on the 18th of April, and the witness was examined on the 20th, and publication passed on the 23rd, clearly in violation of the rule, the object of which was, to give time for inquiry. The case nearest to the present is that of *Cholmondeley v. Clinton*, (2 Mer. 81,) where, however, no notice was served, which makes it somewhat stronger than the present case; and the Chancellor, Lord Eldon, gave the defendant the option, either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty to cross-examine the witnesses; and I will follow the course adopted in that case.

"The Court having offered to the plaintiff the option of suppressing the depositions of J. Fahey, giving the defendant liberty to re-examine said J. Fahey, or permitting the depositions to stand, with liberty to plaintiff to cross-examine, let said depositions stand, and let plaintiff be at liberty to cross-examine the said J. Fahey, and let such cross-examination close within one week, and let the defendants produce said J. Fahey for cross-examination, and give 24 hours' notice thereof, and let defendant pay plaintiff £5 for his costs of this motion."

Lib. 284, fo. 373.

MURDOCK v. MURDOCK.—May, 15th.

Writ of Ne exeat granted—Not prayed by Bill.

Where a defendant's intention to go abroad arises or is first discovered in the course of a cause, a writ of Ne exeat will be granted, although it is not prayed by the bill.

The bill in this case was filed to administer the assets of Robert Martin, deceased, and prayed for an account. The defendant had been served in Scotland with a subpoena to appear and answer; but although the time had expired, no appearance had been entered. From the plaintiff's affidavit it appeared, that, on the day before the application, the defendant went to Belfast, and there stated that it was his intention to return to Scotland forthwith.

Mr. Gibbon now moved for a writ of *Ne exeat*. The bill does not pray for the writ, but where the matter on which the application is grounded has

occurred subsequently to the filing of the bill, the Court will grant the application. (3 Dan. C.P. 886.)

Mr. W. Smith, Am. Cur., mentioned the case of *Beale v. Jacob*, where Sir E. Sugden granted a writ of *Ne exeat* in chamber, and held that the bill need not pray the writ in that case. There, however, the matter on which the application was grounded arose subsequently to the filing of the bill.

THE MASTER OF THE ROLLS made the order.

VANCE v. RANFURLEY.—June 8th.

Practice—Amendment—Under 49th general order, striking out plaintiff not allowed.

Mr. Trevor applied that the deputy Keeper of the Rolls might be directed to amend the bill of revivor filed in this cause, by striking out the names of two of the co-plaintiffs, and making them defendants, and introducing amendments to make the bill a bill of revivor and supplement. There had been no answer, and no order to revive; the officer had declined to make the amendments required, as it had not been the practice to strike out plaintiffs by amendments under the 49th rule. Counsel contended, that under the terms of the 49th order, which provides "that the plaintiff, until an answer, plea, or demurrer shall be filed, shall be at liberty to amend the bill as often as he may be advised, without any rule or order for that purpose." In any case where the Court would allow the amendments to be made, the plaintiff, under the 49th order, might before answer make the amendments necessary; and in order to shew that the Court would allow the amendments required, he cited the case of *Smith v. Walsh*, (1 I. E. R. 167,) where a bill was filed by a widow to raise the arrears of a jointure charged on lands by her marriage settlement. The defendant having by answer denied the husband's power to jointure, alleging that the husband was only tenant in tail, and that the estate tail had not been barred; an amended bill was then filed, praying for dower in case the plaintiff was not entitled to jointure. The defendant neither answered nor appeared at the hearing, and the Court decreed the plaintiff entitled to dower, and directed an account of the arrears. This amended bill was held to be in continuation of the original suit. The alteration made in that case was much greater than what is required in the present case; also in the case of *Ring v. Nettles* (3 I.E.R. 58), after the defendants had answered in a suit by husband and wife, relating to the wife's separate estate, leave was given to amend the bill, by striking out the husband's name as a co-plaintiff, as he had become insolvent; and by substituting in his stead a party to sue as next friend of the wife; and also by inserting the names of the husband and his assignee as defendants. The amendments should be inserted in the bill of revivor. (White on Supplement and revivor, 104.)

The MASTER of the ROLLS said, that the Deputy Keeper of the Rolls had communicated with him on the subject of this case, and stated that it was not the practice to amend a bill by striking out plaintiffs under the 49th general order, as there was a side-bar rule enabling plaintiffs to dismiss the bill with costs against them; and that he would follow

ctice, whatever it might be. On the following s Honor directed notice to be served, specifying amendments sought, in order that there be a document to send to the officer to de-: the practice.

EQUITY EXCHEQUER.

LEVINGE v. MONTMORENCY.—June, 4th.

Plaintiff, Petitioner, BILLING, Respondent.

Issue—Lien of solicitor—Bringing deeds in order of the Court—Taylor v. Gorman, (6 I. L. 330, S. C.)—On appeal, (7 I. E. R. 259,) Blunden v. Desart, (2 D. & W. 405,) and Boszon Bolland, (4 My. & Cr. 354,) considered.

a solicitor has a general lien upon papers of his client, which are required for the purposes of the suit, the Court has the power of forcing him to bring in the deeds, and of preserving his rights if they existed on the papers.

On the 4th, on behalf of the petitioner, William the receiver in the cause of Levinge v. Montmorency, moved that James G. Billing and Theophilus Billing do hand over to the petitioner, or in Court, subject to their lien thereon, all deeds and tenants' leases, subject to such order as the Court shall seem proper. The petition was that previously to the appointment of the petitioner as receiver in 1847, the defendant, W. Montmorency conveyed the estates in the names mentioned to the respondents, upon condition to sell and dispose of the same for the payment of the debts affecting the estate, and apply the proceeds to the use of the defendant; that, the deeds not being registered, the respondents were not parties to the cause; that it was arranged that the costs and expences of the preparation of deeds in respect of the intended sale were in the defendant's instance to be paid to the respondents; that the remembrancer having directed the petitioner to bring ejectments against the defaulting defendant, he applied by notice to the Messrs. Billing, who in reply alleged that they held the papers as trustees for the sale of the estates, which was known to be so by the plaintiff's solicitor, and the parties to the cause, and as such trustees had incurred certain expences and costs, for which they claimed a lien on the said estates, and particulars of which claim they had furnished to the solicitor for the defendant, De Montmorency.

Rolleston for the respondents, relied on Blunden v. Desart (2 Dr. & W. 405), and Taylor v. Gorman, (6 Ir. Eq. Rep. 330, S.C. 7 I. Eq. Rep. 259.)

Boszon v. Bolland (4 My. & Cr. 354), and added that bringing the deeds into court would deprive the solicitor of his lien; that according to those authorities, the lien was not transferable to the fund, and he consequently preferred his right to retain the deeds in his possession.

[Lefroy, B.—Lord Eldon frequently held that the court would make an order, that the deeds should be brought in without prejudice to the lien. The whole question in Blunden v. Desart was, whether the solicitor had not waived his lien; and in Boszon v. Bolland, Lord Cottenham decided that

the solicitor having voluntarily brought in the deed was entitled to his lien, for the costs in the cause only.] [Richards, B.—I think the court should have the power of preserving for the solicitor the same rights he had upon the deeds themselves. It would be monstrous to say, if a solicitor have a lien against a subsequent creditor, that a prior creditor is not to have any means of reaching the papers, and that the whole cause is to be stayed.]

PENNEFATHER, B.—I do not see what objection can exist to the solicitor's bringing in the deeds by order of the court, without prejudice to his lien. The question is, whether the court cannot order in the deeds in invitum, reserving to the party such rights as he would have had if they were not brought in. Lord Chancellor Sugden decided Taylor v. Gorman on grounds different from those upon which the Master of the Rolls acted. I do not understand him as deciding that if the order was made in invitum, the lien of the solicitor would not still exist. He thought the Master right upon another point; but he decided that the solicitor, having executed the deed, and voluntarily brought the deed into court, had waived his lien. We will grant the motion in the terms of the notice; we will take care of the rights of the solicitor by a special direction; but I am far from saying such an order is necessary; I think the ordinary order to bring in the deeds without prejudice to the lien would be quite sufficient.

"Let said J. T. Billing, and T. Billing, deposit on oath forthwith in the office of the Chief Remembrancer, the several title-deeds, &c. in their hands, power, or custody, without prejudice to the lien, if any they have, against any of the parties, or against the fund, reserving to the court the consideration of such order as they may hereafter think fit to make against the parties or the fund, and declare the receiver entitled to the costs of the motion to be allowed him in passing his account."

QUEEN'S BENCH.—EASTER TERM.

CARMICHAEL v. WATERFORD AND LIMERICK RAILWAY COMPANY.—May, 3rd & 4th.

Action on the case—Overmarking execution—Principal and agent—Malice—Corporation—Attorney and client—Reasonable and probable cause.

In an action on the case for MALICIOUSLY and INJURIOUSLY over-marking a writ of CA. SA., and causing the plaintiff to be arrested thereon, it is not sufficient in order to prove malice in the defendant to show that his attorney or agent was actuated by malicious motives.

Held also that a mere mistake on the part of the attorney was no proof of malice in him, and that the facts relied on by the plaintiff in the present case amounted to nothing more.

Semble that the same rule would apply equally to the cases of an individual and a corporate body.

Action on the case. The declaration contained four counts, in the first and second of which the defendants were charged with having falsely, maliciously, and injuriously caused and procured a certain writ of ca. sa. issued against the plaintiff to be marked at foot with the sum of £585. Os. 2d., whereas £280,

16s. only was due. The third and fourth counts substituted the words *wrongfully and injuriously for wilfully and maliciously*. The damages were laid at £2000. The general issue had been pleaded and a sum of money, consisting of over-levy and interest, together with £50 to answer damages, had been paid into Court. The action had originally been tried at Cork Summer Assizes of 1848, before Moore J., when a verdict was had for the plaintiff for £500 damages, and in Hilary Term last a rule was made absolute to set aside the verdict on the ground of misdirection by the learned judge who had charged the jury, that in his opinion proof of actual malice *in fact* was not necessary, and that such malice as would sustain the action might be inferred from gross neglect. The arguments and judgment on that occasion have been reported at pp. 186-8 of this vol., where also is given a full statement of the pleadings in the suit, and of the evidence adduced at the trial. The cause came on to be tried a second time at the Cork Spring Assizes of 1849, before Richards, B., where evidence having been gone into similar to that given on the former trial, the learned judge told the jury, that in case they were of opinion that the execution had in fact been over-marked, the next question for them was, whether the evidence in the case warranted the inference that the execution was so over-marked maliciously or not; that it was not necessary to enable the plaintiff to recover that he should shew that each or any one of the managing body of the Company had exhibited enmity towards the plaintiff, or had been influenced by malicious motives in the issuing and overmarking of the writ against the plaintiff, but that if the *person professionally employed by the defendants against the plaintiff acted so in the transaction as to warrant the inference that the overmarking had been malicious on his part, the defendants were responsible in this action for the consequences of his act*; that a mere mistake, however, was no foundation for an action like the present, and that it was for the jury to draw their own conclusion from the facts in evidence. The jury found again for the plaintiff with £600 damages. A conditional order was obtained in the course of this Term to set aside the second verdict on the ground of misdirection and of its being contrary to the weight of evidence. Cause was to-day shewn against making the same absolute by

Mr. Bennett, Q. C. (Mr. J. D. Fitzgerald, Q. C. with him.)—This action is not founded on the statute but at common law. It is absurd to draw a distinction between the acts of an individual and those of a Company. Here the Company gave instructions for the commission of a certain act which caused the arrest of the plaintiff, and that notwithstanding the positive assurance on the part of their attorney that he should have notice of any proceeding on foot of the judgment against him. There was abundant evidence in this case to warrant an inference of malice in the defendants. *Nicholson v. Coghill*, (4 B. & C. 21); *Ravenga v. Mackintosh*, (2 B. & C. 693, per Holroyd, J.) The other side may rely on *Sinclair v. Eldred*, (4 Taun. 7,) but all that that case decided was that the mere fact of a defendant having been *non prosequi* in an action in which he had held the plaintiff in the principal case to bail was not *per se* evidence of malice. *Austin v. Deb-*

nam, (3 B. & C. 139,) is an authority in our favour. *Sason v. Castle*, (6 Ad. & El. 652, per Littledale, J.) The arrest here was calculated to injure not only the character of the plaintiff but also his mercantile credit.

Mr. Serjeant O'Brien, and Mr. Martley, Q. C. contra.—Even assuming the learned judge's charge to have been right, there was no evidence of malice to go to the jury. The verdict is clearly against the weight of evidence. With respect to the authorities cited by the other side, in *Sason v. Castle* the question of malice did not arise at all, it not having been even averred in the declaration, and for this the verdict was set aside. In *Ravenga v. Mackintosh*, Lord Tenterden, C.J. left it to the jury to say whether the defendant had acted *bona fide*, and believing that he had a good cause of action or not. In *Nicholson v. Coghill*, the question of malice was left to the jury, and Holroyd, J., in that case says, that "two ingredients are indispensably necessary to the maintenance of an action of this kind, malice and want of probable cause, and the plaintiff must produce such evidence of both as will enable the jury fairly to infer them." In *Sinclair v. Eldred*, the plaintiff was ultimately nonsuited, and in *Austin v. Debnam* malicious notions were clearly chargeable to the defendant. We rely on the cases of *Gibson v. Cheaters*, (2 Bos. & Pul. 129.) *De Medina v. Groves*, (10 Q. B. 152.) The reasoning of Lord Denman in the last case strongly applies to the present. *Moore v. Gardiner*, (16 M. & W. 595.) In this case we have given distinct evidence that the overmarking complained of originated in a mistake. There is a definition of what constitutes malice in the notes to 1 Wms. Saunders, 130. Our next objection is, that the malice to ground the present action should have been on the part of the individual who is sought to be made responsible, and not of his attorney. There are certainly cases of trespass in which the principal has been held answerable for the acts of his agent or servant, acting within the scope of his authority. [*Crompton, J.*—Take the case of a client directing his attorney to issue execution for the exact sum due, and the attorney maliciously inserting in the writ a larger sum. Would the client be liable therefor?] We admit that an action will lie against the attorney or client, or both, in case malice be brought home to them individually. *Crozer v. Pelling*, (4 B. & C. 26.) The test of a principal's liability for the act of his agent is, whether such be within the scope of the authority of the latter. *McManus v. Crickett*, (1 East. 106.) *Crofts v. Oliver*, (4 B. & C. 590.) [*Crompton, J.*—Where the act of a servant is lawful, the master is liable, if it be done within the scope of the servant's authority; not so, however, when the servant's act is unlawful.] *Thynne v. Russell*, (1 J. & S. 161.) *Story's Law of Agency*, 456.) [*Blackburne, C.J.*—One man's malice cannot be the malice of another.] There is a third question in this case, as to whether a corporation can be liable in such an action. [*Blackburne, C.J.*—If an individual can be held liable for the acts of his agent, so can a corporation. *Perrin, J.*—This question appears on the record.] *Mr. J. D. Fitzgerald, Q. C.*, in reply. That which is, in the cases referred to, called "express malice,"

means nothing more than malice in fact as distinguished from malice in law. The jury were at liberty to infer malice in fact from the absence of probable cause, *Mitchell v. Jenkins* (5 B. & Ad. 693); *Arbuckle v. Taylor* (in D. P. 3 Dow. 180); *Purcell v. Macnamara* (9 East. 361); *Parrott v. Fishwick* (9 East. 362, note.) Gross and culpable negligence affords a presumption of malice, 3 Starkie on Evidence, 725. [Crampton, J.—The overmarking here would appear to be a mere mistake.] In all the precedents there is no averment in cases of this kind to be met with, of want of probable cause, and the form of the present declaration was borrowed from Chitty on Pleading (Ed. 1831.) We, nevertheless, proved the absence of probable cause. We admit the principle laid down with respect to the liability of a principal for the act of his agent, with this qualification, that it must either be an act done by the express direction of the principal, or subsequently adopted by him, as in the present case, *Jarman v. Hooper* (1 Dowl. & C. 769). The judge did not tell the jury that they were to consider the company liable for the intentions of their attorney. In every case, the issuing of a writ is the act of an attorney, and so is its overmarking, and yet the statute renders his client liable, *Raid v. Mitchell* (4 Ir. L. R. 322.) With respect to the liability of a corporation, *The Queen v. The Great North of England Railway Company* (9, Q. B., 315), is in point.

BLACKBURN, C. J.—In this very important argument three questions have been raised for our consideration, with respect to one of which, the court is not called upon to pronounce any opinion, namely, as to the absence of probable cause, and whether the learned judge would have been justified in telling the jury that from want thereof, they were at liberty to infer malice in the defendants. We do not find any averment of the want of probable cause in a single count of the declaration, and no allusion thereto is made in the charge of the learned judge. Therefore, even though, in point of fact, no probable cause existed, the question is not now properly before the court. We are now simply reviewing the charge. It is impossible, however, to leave this subject without observing, that the judgment was entered in May, 1847, and though the plaintiff was apprized of proceedings having been taken against him, and though the fullest opportunity was allowed him of shewing that he was unjustly charged with a larger sum than was really due, yet for a period of six months, he never availed himself thereof, even after a notice, on the part of the Company, of their intention of enforcing their demand, with the particulars of which he must have been perfectly cognizant. If, therefore, the question of probable cause had properly been before the jury, and I had been the presiding judge, I should have been slow in arriving at the conclusion that there was not abundant evidence of the existence of probable cause. But with respect to the proposition which we have chiefly to consider, it is quite plain that the learned judge told the jury that to sustain the present action, it was not necessary for the plaintiff to shew that the defendants *hemselves* were actuated by malice, but that it was sufficient to prove that malice existed on the

part of the agents or persons employed by them: in other words, that the malice of one man might *constructively* be deemed that of another. No authority has been cited to maintain such a proposition, which is repugnant both to reason and common sense. Where one person is employed by another, his acts, as agent, by authority derived from his principal, whether express or implied, are to be considered as the acts of the principal; but it is quite a distinct question, whether malice, which is a mental operation, an act of the mind can, by implication, be extended from one man to another. In my opinion, it is impossible that such a proposition can be maintained. We now come to the third question, as to whether there was evidence of malice on the part of the persons professionally employed, and who issued the execution. The learned Baron, as stated in his report, told the jury, that if the persons professionally employed by the defendants to conduct the action against the plaintiff, acted in such a way in that transaction as to warrant the inference, that the overmarking of the execution was malicious, the defendants in the present action were responsible. Now, the person who issued the execution was Mr. Newman, and he states in his evidence, as it appears on the report, that so far from being actuated by malice, he was not at all aware of the payment which had been made, and accordingly any intention to impute malice to Mr. Newman, was fairly disclaimed at the bar. Then with respect to Mr. Tandy; can it be presumed that he was actuated by malice? He was employed by the Company, and appears faithfully to have discharged his duty. The bank gave notice to the agent of the Company, and that officer gave notice to Mr. Tandy. A letter was certainly written to him containing such notice, which is alleged to have miscarried, and on search cannot be found. Here was a casualty—and to the miscarriage of that letter, and to that alone, are to be attributed all the subsequent occurrences. Whatever blame, therefore, exists, if any there be, arises solely in respect of the loss of that letter; but the sum total of the evidence, so far from shewing malice, proves the contrary; and I am clearly satisfied, that there was not a *scintilla* of evidence that any person was actuated by malicious motives in the transaction, or that the overmarking originated in anything save accident or mistake.

CRAMPTON, J.—I entirely concur in the judgment of my Lord Chief Justice. I am at a loss to discover a *scintilla* of evidence to go to the jury from which malice in the defendants, or those employed by them, could be inferred. Undoubtedly the Company are answerable for the acts of their agents; but as it is conceded that it is impossible to fasten malice on Mr. Newman, it is necessary for the plaintiff to go beyond the evidence which affects him. If it had been proved, that a person acting for the Company had said to Mr. Newman 'We have been paid £300 on account of the judgment which was obtained for £600; but the Company does not wish to give credit for such payment,' and that gentleman in consequence had issued execution for the whole amount, this might be a circumstance from which malicious motives might be inferred. So far however from this, the Company do everything

which is fair and just: they write to inform Mr. Tandy of the payment of the money; and if a casualty occurred respecting the letter, that does not raise a presumption of malice either in Tandy or the Company. Suppose, on the other hand, that he *did* receive the letter, but forgot it, or from *negligence or carelessness* omitted sending it to his Dublin partner—is that evidence of *malice*? There is not, therefore, any ground, in my opinion, for imputing malice either to Mr. Tandy or Mr. Newman. But grant (however absurd and incredible it may appear) that both these gentlemen were influenced by malicious motives, in what way are the defendants, who are responsible for the *acts*, not the *motives*, of their attorney, connected therewith? I think, therefore, that the judge should either have non-suited the plaintiff, or at all events have told the jury that there was not any evidence of malice, instead of directing them that although they should acquit the company, collectively and individually of malice, nevertheless, in case such could be inferred from the acts of the agents, they should find for the plaintiff. Such would, in my opinion, be no less than to impute to one man the guilt of the other, in a way not warranted by principle, authority, or common sense. I think, therefore, that the order for the new trial should be made absolute, without costs.

PERRIN, J. concurred.

Rule absolute.

EXCHEQUER OF PLEAS.

GRUBB and ANOTHER, v. M'KENNA.—May 24.

Pleading—Charter-party—Condition precedent insufficiently averred.

A Declaration on a Charter party, set forth a stipulation that the ship should proceed to Dublin, or as near thereto as she should safely get, and deliver the cargo on being paid the freight as therein mentioned; and that one-third of the freight should be paid in cash on the unloading and right delivery of the cargo, and the rest by approved bills, payable in London at four months following, &c. The declaration contained an averment that the said ship did therewith proceed to Dublin, and did then and there deliver her cargo, &c. Special demurrer on the ground that the unloading and right delivery was a condition precedent, and that there was no averment of the unloading. Held, that the declaration was bad in not averring an unloading as well as a delivery of the cargo.

Assumpsit on a charter party. The declaration contained four special counts on the charter party: a count for freight, and the common counts. The first count was, as far as it is material to the case, as follows:—For that whereas, &c., by a certain charter party, &c., it was witnessed that the said ship, &c., and that being so loaded she should forthwith proceed to Dublin, or so near thereto as she might safely get, and deliver the same on being paid the freight as follows:—For timber, &c., one-third of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by good and approved bills, payable in London at 4 months

following, &c.; and that the said ship being so loaded did therewith proceed to Dublin, and did then and there deliver the said cargo to the said defendant, to wit, at the place aforesaid. Averment of general performance and breach.—That the defendant did not pay one-third of the freight of the said cargo in cash, on unloading and right delivery of the said cargo, &c., &c.

The 2nd, 3rd, and 4th counts were substantially the same as the first. Special demurrer to the 1st, 2nd, 3rd, and 4th counts, on the ground that as well the unloading, as the right delivery of the cargo was a condition precedent, and that the performance thereof had not been averred.

Mr. J. D. Fitzgerald Q. C. and *Mr. Donohoe* for the demurrer.—The averment in the declaration is, "That the said ship, being so loaded, did there, with proceed to Dublin, and did, then and there, deliver the said cargo &c.; and the contract was to unload and deliver; and that was clearly a condition precedent. [*Pigot, C. B.*—The only question is, whether the delivery does not imply the unloading. There is no doubt that otherwise it is a condition precedent, and performance of it must be averred.] There might have been a delivery on board ship before the cargo was unloaded; yet the charter party does not contemplate payment of the freight until the duty of unloading is fulfilled. In practice it is usual to deliver the goods, and direct the property therein, before any unloading of them has been effected.

Mr. David Lynch, Q. C., and *Mr. Harris* for the declaration.—If a plaintiff shews a substantial performance of a matter of a general nature, it is frequently sufficient to state it in general terms, without alleging particularly how he performed it, (*Chitty on Pleading* i. p. 338.) In *Comyns Dig. Title Pleader*, (c. 60), it is laid down, "but to allege performance in words, which in evidence import it is sufficient, as, if a promise be to receive A. and B. *ut hospites*, and to find necessities; if he alleges that he received them and found necessities, it is sufficient without saying *ut hospites*." The case of *Gould v. Stephens* (1 Salkeld 25) is an authority for that proposition, so is *Wallace v. Scott*, (Strange 88.) In the latter case, the plaintiff declared that the defendant in considerations would make him a set of sails worth £45, promised to pay so much for them upon request, and averred that the plaintiff made the sails. A demurrer on the ground that it was not averred that the sails were worth £45 was overruled. On this point counsel cited *Chitty on Contracts* (567); *Chitty on Pleading* (l. 362), and relied particularly on *Alsager v. St. Katherine's Dock Co.*, (14 M. & W. 794); *Yates and others v. Raitson*, (2 Moore, 294); but here at all events the delivery involved unloading. This is a contract with a carrier, and in such a case an actual delivery is necessary, *Boulter v. Arnott* (1 Cr. & M. 334.)

PER CURIAM.—We are of opinion that the unloading of the cargo was a material element in this contract, and a condition precedent, the performance of which should have been averred. We must therefore allow the demurrer.

Judgment for the defendant.

COURT OF CHANCERY.

LYND SAY V. LYND SAY.—June 26, 27, 28; July 3.

to perpetuate the testimony of witnesses stated in 1838 *J. L.* made a will; that in 1845 he made another will, by which the former was revoked; that in 1846 the second will was destroyed to the direction of the said *J. L.* In 1848 *J.* died, without making any further will, and plaintiff, as his heir at law, entered into possession of his real estates. The bill then stated that the widow of *J. L.* made some claim under the will of 1838, and prayed that the evidence of the witnesses to the will of 1845, and of the person who destroyed same might be perpetuated. Plea, that there were tenants in possession of part of the real estate, who had not paid rent to, or acknowledged the title of the plaintiff, and that the matters in dispute could be immediately tried by action at law against the tenants. Held, that the plea was bad, as the tenants might not set up the plea in defence, and even if they did, there was nothing to show that the defendant would be bound by the proceedings in that action; also the plea was bad in not negating the existence of any tenants, such as a mortgagee being in possession, which, independently of the existence of the tenants, might be an answer to the action against the tenants.

There was an appeal from the decision of the Master of the Rolls. The facts of the case will be found on page 218.

Mr. Acheson Henderson for plaintiff—*Dorset v. Bland*, (Prec. Ch. 531); *Angell v. Angell*, (1 Sim. 110, 83); *Dew v. Clarke*, (Ibid. 108.) The object of the plea is, that the plaintiff could try the matter by an ejectment against the tenants. The plea, however, is bad, both in substance and form. It is bad for duplicity, (Mitf. Plead. 341); *Story v. Indor*, (2 Atk. 630, Sto. Eq. Pl.); *Whitbread v. Rockhurst*, (1 B. C. C., 404.)

Mr. Dobbs in support of the plea.—The plaintiff pleads that he is in possession of the whole of the estates. The plea contradicts that statement. *Clarke v. Hoare*, (14 Ves. 59.) A recent case before Lord Langdale, shows that mere matter of evidence, all leading to one point, does not make a plea double. *Kirkman v. Andrews*, (4 Beav. 1.) The substance of the plea is that a party is entitled to file a bill of this sort, till he has tried every means to have his evidence sifted at trial.

That rule is to be deduced from two or three authorities. *Brandlyn v. Ord*, (1 Atk. 571); *Parry v. Jones*, (1 Vern. 441); *Dew v. Clark*, (1 Sim. & Stu. 89.) What we have pleaded is the power to try the right at law. *Angell v. Angell*, (1 Sim. & Stu. 89.) A witness cannot be punished for perjury, for his statements cannot be published in their life time. *Wadale v. Lowe*, (2 R. & M. 192.) On principle, the court will not give such aid, till the right has been tried at law.

Mr. Longfield, Q.C. with *Mr. Dobbs*.—If action is brought against the tenant for rent, he would be obliged to file his interpleader bill. [Lord Chancellor.]—The difficulty which I feel is, that this plea is only an attempt to adopt the old Irish prac-

tice to force the party to contend with the tenant. In *Dew v. Clarke*, the action was with the trustees, and must have raised the question; there the plea separates the tenant from the defendant. We say he refuses to acknowledge the plaintiff's right. [Lord Chancellor.]—You do not say how.]

Mr. F. Fitzgerald in reply.—*Foulds v. Midgley* (1 V. & B. 138.) *Dew v. Clark* does not apply.

July 3. LORD CHANCELLOR.—This case has come before me on appeal from the Master of the Rolls. The bill was filed to perpetuate testimony, and the plaintiff claims to be heir-at-law of John Lyndsay, deceased. The bill states that John Lyndsay, being seized in fee of the house and demesne of Laugboy and other estates in the bill mentioned, on the 3rd of April, 1838, made his will, by which he bequeathed to his wife Helen H. Lyndsay, and her heirs, all the estates of which he should die seized. The bill then states that John Lyndsay, being still so seized, on the 5th of December, 1845, made another will in writing, which is also set forth in the bill, the effect of which was to alter the former will, and to revoke the provisions thereby made for Mrs. Lyndsay; different other matters are then set forth, and the bill states the attestation of the will, and several matters to shew that the will was afterwards destroyed, and by that means the plaintiff, who was his heir at law, became entitled to the estates upon the death of John Lyndsay, which occurred in August, 1848; that after the death of John Lyndsay, the plaintiff entered into possession of the house and demesne, and the other estates, and is now in possession thereof, and hoped he would enjoy same without opposition. It then charges that Helen H. Lyndsay, the widow, claims under the will of April, 1838, which she contends is not revoked; that she refuses to try whether that will has been destroyed or revoked, until after the death of the witnesses to the subsequent will, and of White, the witness to its destruction, whereby the plaintiff will be deprived of the benefit of their testimony; and the bill prays that the witnesses may be examined, and that their testimony may be preserved. To this bill a plea has been put in by the defendant, which, not disputing that the plaintiff is heir of John Lyndsay deceased, states that on the death of J. Lyndsay, in August, 1848, she entered into possession of the mansion house and demesne, under the will of 1838, and took possession of the title-deeds, and remained in possession of the house and demesne, and title-deeds, until the 27th of October, 1848; that the plaintiff came upon that day with several persons and turned her out of possession of the house, and took the title-deeds, which he still retains; that the remainder of the real estates are in the occupation of tenants, some of whom held by lease, and some as tenants from year to year; that they all pay rent; that those in occupation have not paid rent to plaintiff since the death of said J. Lyndsay, and have not acknowledged him by attornment, or otherwise; that therefore complainant is not in possession of all the real estates; that one of the tenants holds, &c., at the rent of £32, and refused to pay rent to, and did not acknowledge the plaintiff; two or three other persons are also specified as holding part of the lands as tenants, and

similar averments are made concerning them. The plea then states that defendant is advised that the plaintiff could proceed by action at law against the tenants named, and can thereby assert his right to the real estates of which J. Lyndsay died seized, and the court ought not to perpetuate the testimony of the witnesses.

This is the substance of the plea, that the complainant is in a condition to proceed at law against some or one of these parties named in the plea, and that this court is not called on to interfere. From the way in which the statements in the plea are made, it would appear that they are all tenants for terms of years, or from year to year. The defendant admits that J. Lyndsay died seized, and the tenures are also mentioned.

The first question is, whether this case falls within the principles and reason of the authorities, and is the plaintiff in a condition to try the matters stated? or, in order to sustain the plea, is it sufficient merely to show that there are third persons who may dispute the title in the manner alleged? The authorities are nearly uniform, and show that if there be a means of trying the legal title stated in the bill, this court will not interfere to perpetuate testimony until the plaintiff produces his witnesses in a court of law to establish the truth of what he states, and submits them to a cross-examination; the authorities go to that extent. Thus in Mitford's Equity Pleading, page 52, 4th ed., it is laid down that in such a case "the bill ought also to shew that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate, cannot be immediately investigated in a court of law, as in the case of a person in possession without disturbance;" and in Wyatt's Pr. Reg. 73, "If a matter be properly triable at law, as a title, and the plaintiff can have an opportunity to try it there, this bill is not to be brought here till the party has affirmed his title at law; if he does it will be dismissed upon a demurrer." In *Bechinall v. Arnold*, 1 Vern. 354, there was a "bill to prove a will and to perpetuate the testimony of witnesses; the defendant pleaded himself a purchaser without notice of any such will, and insisted that unless there had been a verdict in affirmance of such will (nothing hindering the plaintiff but that if he had a title he might recover at law,) the plaintiff ought not to be admitted to examine his witnesses, thereby to bring a cloud over a purchaser's estate, and upon debate the court allowed the plea;" and in the same book, page 441, in the case of *Parry v. Rogers*, there was "a bill to examine witnesses to preserve their testimony touching the title of certain lands in the bill mentioned. The defendant demurred, because there was no impediment that hindered plaintiff from trying his right at law, and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed." And in the case of the *Duke of Dorset v. Girdler*, (Finch. 531,) the bill was for a commission to examine witnesses and perpetuate testimony. The defendant demurred that the plaintiff had not verified his title at law, and therefore had no right to bring his bill in the first instance; but the demurrer was overruled, and the difference taken by the Court, "that if one is out of possession having only right to fishery common rentcharge,

(it should be, "or rentcharge,") he who brings such a bill ought never to be allowed to do so, but a demurrer to it will be good, because he may and ought first to enter his action and establish his title at law; otherwise, publication not being to pass till after the death of the witnesses, (as in those cases it never does, without special order of the Court,) they may be guilty of the grossest perjury, and yet go unpunished; besides that, the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering the truth." These cases, on the whole, establish this principle, that if the plaintiff has an opportunity of bringing the matter before a Court of law, this Court will not assist him; but the proceeding at law must be such as that the matter will be tried in it; it must be of such a nature, that the plaintiff will have an opportunity of trying the title at law, and in which the question will be tried, and it is not enough that the plaintiff may have an opportunity of going to law with third persons, who make no title as against him, and who may or may not set up the claim on which the defendant relies, who are not in privity with the defendant, so as to make the proceedings evidence against the defendant.

It is important to see the real bearing of the plea in this case; it states that the plaintiff entered into possession of the house and demesne; and, so far, there was no necessity for the plaintiff to try the title at law; he has obtained possession, legally, it must be assumed, although the statement is, that by force, &c. that must be taken to be the same as the statement of *vi et armis* in trespass, and means that the plaintiff found an intruder in the house, and turned her out of possession. So far, the plea would seem to sustain the statement in the bill. It is difficult to say, that the plaintiff is to be deprived of relief in this Court because he could bring an action of trespass against this lady, for the momentary possession from the time of his entering and turning her out. Indeed, that part of the case appears to have been abandoned, and the substantial part of the plea is the allegation, which is wound up by the averment at the conclusion, that part of the land is in the occupation of tenants who hold at rents payable to the defendant; it is plain, that if the plaintiff was to bring an action against any of these parties, there is nothing in the plea to shew that the defendant would be bound by what might take place in that action. The plaintiff might go on against every tenant on the estate, without having advanced one step farther. Whether these tenants would set up the will on which the defendant relies, is unknown, and whether they did or not, it would be the same to the plaintiff, so far as the question between him and the defendant is concerned. I do not see how it has been shewn that the question of title can be tried between the plaintiff and defendant, or that the actions against the tenants would necessarily raise that question. The authorities are to the effect, that until a party has tried his title at law, he cannot proceed in a suit such as the present; but it must be shewn, that by proceeding at law the title will or will not

be affirmed. It is not enough to shew that proceedings may be taken, by the evidence in which the defendant will not be bound, and the plaintiff might have to begin over and over again. There are no averments in the plea to shew that the tenants acknowledged the defendant's title, the only averment is, that they held by rents payable to her, and there is no averment to shew that any such proceedings would be binding on the defendant. The plea admits possession of the house and demesne taken by the plaintiff, and that puts him in privity with all the estate, and that is a possession in him of the entire. Also the plea should conduce to a single point; the point here is, that the plaintiff can adopt proceedings at law, which will determine the question, and the statement in the plea is, that the tenants refuse to pay the plaintiff their rents; but that is quite consistent with the fact of a mortgagee being in possession, and that the tenants are bound to pay their rents to him. There may be leases in reversion, also there may be many other similar cases, and they should be all negated, in order to reduce the matter to a simple point. The plea itself should do so, and shew that the plaintiff not only may try, but has, an opportunity of trying that single question in a Court of law. By following the course pointed out in the plea, the plaintiff may be driven to try the question, not with the real defendant, but with a number of tenants, many of whom appear, from the amount of their rents stated, to be within the jurisdiction of the Civil Bill Courts, and which would have the effect of harassing them; and although that is an objection more on the ground of convenience, still it is deserving of some consideration. The case of *Dow v. Clarke*, (in 1st Sim. & Sta.) which was so much relied upon in argument, when examined, will be found not to be an authority in support of this plea, and must be considered with regard to the special circumstances of the case. It is plain that the proceedings at law in that case, if successful, not only might, but would, have established the right of the party. There was but one tenant, and he had paid rent to one of the devisees in trust. There was privity between the tenant and defendants, and a verdict against the tenant would be admissible evidence against the defendants. The observations of the Vice Chancellor must be considered as having regard to the circumstances of the case, and are to be taken *secundum subjectam materiam*. The case was totally different from that now before me, in which there is nothing to shew that if the plaintiff proceeded against every one of these tenants he could ever obtain a verdict which would establish his title as between him and the defendant. As I have said before, there may be many circumstances which will prevent the real question in this case from being tried in an action against the tenant, and the plea should have negated the existence of these facts. Upon that part of the case there is a very late authority, *Rawlins v. Moss*, (6 Hare, 601); there was bill of revivor, and a plea was put in by the representatives of a deceased defendant that the party whom they represented was never served with a subpoena to appear and answer, and did not appear nor answer the original bill. The plea was overruled as

bad in substance, for it did not exclude the fact that the deceased person might, by other means, have been bound by the proceedings in the original cause. The Vice Chancellor, in giving judgment in that case, said, "That in order to sustain a plea, the defendant should have shewn not only that the deceased defendant had not entered an appearance, but that there had been neither act nor acquiescence on her part nor any other circumstance by which she was bound in the former suit; the averments in this respect were very imperfect." I think the plea in this case is imperfect in not negating the existence of any facts which would prevent the title from being tried in an action against the tenant; it does not reduce the case to a single point. For these reasons I consider the plea is bad, and the order of the Rolls must be reversed.

ROLLS COURT.

STEWART v. HASSARD.—May 1st.

Lease set against assignment—Waiver.

Lease in 1819 containing a covenant, that the lessee his heirs and assigns should not set, sell, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the lessor, and in case of breach a penal rent was reserved; in 1824 lessee assigned with consent, in 1835 there was another assignment without consent. HELD, that the consent to the first assignment was not a general waiver of the covenant, and the lessor was entitled to the penal rent.

By indenture of the 1st day of May, 1819, and made between George Hassard of the one part and Andrew Staples Clarke, said G. Hassard demised the lands of Skea to the said A. S. Clarke, at the yearly rent of £34 2s. 6d., late currency, to hold for a term of three lives and sixteen years, and said lease contained the following covenant, "and it is further agreed upon by and between the said parties, their heirs and assigns, that he, the said A. S. Clarke, his heirs and assigns, shall not set, sell, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the said G. Hassard, his heirs or assigns, under the penalty of ten guineas additional yearly rent to be recovered over and above the said reserved yearly rent of £34 2s. 6d." In the year 1824, A. S. Clarke, the lessee, being desirous of disposing of his interest in the premises, wrote to said G. Hassard upon the subject of the clause against subletting, above-mentioned, and received the following letter:

"DEAR SIR—I am aware of what you say of the clause in your letter prohibiting letting without my consent; although I regret your leaving my neighbourhood, yet if it is advantageous to your family I will give my consent. As to my signing any deed I consider there is not any necessity, &c.

(signed) GEORGE HASSARD."

After the receipt of this letter, by indenture of the 26th of October, 1824, the said A. S. Clarke conveyed his interest in said lands to John Joyce, and to this deed G. Hassard, the lessor, was a subscribing witness. For several years John Joyce sublet a part of said lands without any further permission

from the lessor, and without being called on for the penal rent. In the year 1835 J. Joyce advertised his interest in the premises for sale by auction, and Thomas Beresford became the purchaser thereof. Previous to the appointment of the receiver in the cause the penal rent of ten guineas had been reduced by G. Hassard, the lessor, to the sum of five guineas, and same was paid by T. Beresford to Mr. Hassard and to the receiver for several years. The receiver having laid a statement of facts before the Master, from which it appeared that said T. Beresford did not reside in said premises, but had sublet same without any consent, and that the sum of £42 7s. 2d., including the penal rent of five guineas per annum, was due up to the 1st of November, 1848. On the 13th of February, 1849, a conditional order for an attachment for non-payment of said sum was issued against Beresford, and

Mr. J. Brooke, Q. C. now moved to shew cause.—In this case the receiver has no right to the increased rent of five guineas a-year, as the condition against assigning or under-letting is wholly gone and determined, the lessor having once consented to an assignment, and the condition being entire when once dispensed with, is destroyed. *Dumpor's case*, (4 Rep. 119; Furlong, L. & T. 556, and cases there referred to.)

Mr. B. Lloyd, and Mr. Hassard, contra.—In this case there was a license given by the lessor to alien once, but that does not destroy the condition; there is a material difference between waiving the covenant or condition altogether, and the waiver of a particular breach. "In modern times the courts have generally considered that a waiver of the breach is not, as was held in *Dumpor's case*, a waiver of the covenant." *Doe v. Pritchard*, (2 N. & M. 495.) The omission of the landlord to avail himself of a forfeiture at one period does not waive his right to avail himself of a continuing breach at a subsequent period. (Furlong, 1221.)

MASTER OF THE ROLLS.—The original lease in this case bears date in 1819, and the assignment to which the lessor consented was in 1824. The Amended Subletting Act of William 4, was passed in 1832, by which it is provided that any matter *thereafter* to be done shall not be construed a waiver of any covenant, therefore, if the waiver took place after this Act of 1832 there would not be any doubt, and *Dumpor's case* would not apply. In this case, however, I do not think there was a general waiver, for where there is a covenant such as the present, and, in a particular instance, the lessor says, "you may assign," I do not think that is to be considered a general waiver of the covenant. I consider that was only a particular agreement—a waiver of the covenant as between these parties. The covenant provides that the said A. S. Clarke, his heirs and assigns, shall not set, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the said G. Hassard, his heirs or assigns, under the penalty of ten guineas additional yearly rent, to be recovered over and above the said received yearly rent, &c. I do not think that in this case there has been any general waiver of the covenant, and what took place with regard to the assignment to Joyce was only a particular agreement between the parties. I must, therefore,

disallow the cause shewn against this attachment; and in this case it is to be observed that a similar construction has been put on the matter by the parties themselves.

Lib. 284, fo. 212.

QUEEN'S BENCH—TRINITY TERM.

KELLY, ADMINISTRATRIX OF ELEANOR KELLY v. SHAW.—May 25th and June 1st.

Covenant—Demurrer—Cessation of interest—Under-lease of a term of years by an administratrix—Her personal representative entitled to sue for the rent. Drue v. Baylis (1 Freeman, 402) considered and approved of.

Covenant for rent by administratrix of lessor against assignees of lessee. Plea, that the lessor had nothing in the premises, except through M. K., deceased; that M. K. was possessed of the premises for the residue of the term until his death. That administration was granted to the lessor, whereby she, as administratrix, and not otherwise, became possessed of the premises for the said term; that the lessor died, "whereby all her estate in the premises ceased and determined." Replication, that the lessor was not, at the time of making the said lease, possessed of the premises for the said term, as administratrix of M. K., as in the said plea alleged. HELD, upon special demurrer, First, that the plea was bad, as it alleged that there was a TOTAL cessation of the estate in the premises. Secondly, that the personal representative of the lessor was entitled to sue for the rent.

Covenant. The declaration stated that Eleanor Kelly was lawfully possessed of a message and tenement for a term of 100 years, whereof 60 years and upwards were then unexpired; and that being so possessed thereof by an indenture made between her of the one part, and Michael Doyle of the other part, she demised the said message and tenement unto the said M. Doyle, his executors, administrators and assigns, from the 1st December, 1830, for a term of 60 years, yielding to the said E. Kelly, her executors, administrators, and assigns, during the said term, the yearly rent of £30, payable quarterly. And the said M. Doyle thereby covenanted for himself, his executors, administrators and assigns, to pay the said reserved yearly rent to the said E. Kelly, her executors, administrators and assigns, on the days and times appointed for the payment thereof. By virtue whereof the said M. Doyle entered upon the demised premises, and was possessed thereof for the said term. Agreement, that afterwards, to wit, on the 31st October, 1831, the said E. Kelly died intestate, and that letters of administration of her chattels and effects were, on the 13th August, 1833, granted to the plaintiff. By reason whereof the plaintiff became possessed of the reversion, and being so possessed thereof, and the said M. Doyle being so possessed of the demised premises, afterwards, and during the said term, to wit, on the 1st January, 1840, all the estate and interest of the said M. Doyle in the demised premises, by assignment, came to and vested in the defendant; whereupon the defendant entered, and became possessed thereof for the resi-

he said term: Further averment, that after andant so became possessed of the demised by assignment, and after the death of the Kelly, to wit, on the 1st of September, 1847, rent became due and was still unpaid to the as administratrix, contrary to the tenor of the said indenture, and of the said copy of the said M. Doyle, and to the damage of plaintiff, as administratrix, of £50.

actio non, because he says, "that the said had nothing in the said message and pre- save and except through and under one Kelly, deceased, and before the said E. as possessed of the said message and pre- o wit, on the 1st of January, 1820, the said y was possessed thereof for the residue then and unexpired of and in the said message, e appurtenances, and then continued pos- hereof, until, and at the time of his death, ng so possessed, afterwards, to wit, on the uary, 1823, the said M. Kelly died, and after th, to wit, on the 1st December, 1823, ad- ation of all and singular, the goods and s, rights and credits of the said M. Kelly ly granted to the said E. Kelly, whereby the Kelly, as such administratrix, and not other- hen and there became, and was possessed, of d message and premises, with the appurten- for the said term, and continued, and was sed thereof, as such administratrix, and not rise, up to and until, and at the time of the g of said indenture of lease. And the de- nt says, that after the making of the said in- re of lease, and before the breach of covenant e declaration mentioned, to wit, on the 1st ry, 1834, the said E. Kelly died, and there- and thereby, all her estate, term, and interest l in the said message and premises, with the tenances, ceased and determined, and this fendant is ready to verify."

plication. "That the said E. Kelly was not, time of the making of the said indenture of possessed of the said message and premises, be appurtenances, for the said term, as admi- natrix of all and singular the goods and chattels, and credits of the said M. Kelly, in manner orm as the said defendant has in his said plea t behalf alleged, and this the plaintiff prays be inquired of by the country."

murrer to the replication. For "that the re- ion attempts to put in issue, to be tried by the ry, mere inference, and matter of law, viz. whe- he said E. Kelly was possessed of the said mes- and premises, as administratrix of M. Kelly, e time of the making of the said indenture of the replication admitting all the facts from that inference results, as alleged in said plea; or that the replication is ambiguous, and leaves certain whether the plaintiff intends to deny on the death of the said M. Kelly, the said E. became and was possessed of the said mes- and premises, as his administratrix, or whe- admitting that she became so possessed, the iff intends to allege that before the making of lease, such possession, as administratrix deter- d." Joinder in demurrer.

Mr. Meagher, with him Mr. O'Leary, in support

of the demurrer.—The court will have to consider, upon this pleading, whether, where an administra- trix makes an under-lease of a term of years, which belonged to the intestate, reserving rent to herself, her executors, administrators, and assigns, the personal representative of the administratrix, or the administrator *de bonis non* of the intestate, shall have the rent. *Drue v. Baylie* (1 Freem, 392-402), will be relied on at the other side, to shew that the personal representative of the administratrix, the plaintiff in the present action, is the party entitled; but the authority of that case has been very much shaken by subsequent decisions, *Catherwood v. Chabaud* (1 B. & C. 150); *Hirst v. Smith* (7 Term R. 182.) [*Blackburne, C. J.*—Have you an authority to shew that the administrator *de bonis non* can sue upon a contract of the administrator?] The administrator *de bonis non* is entitled to the reversion (Saund. 370, note), and the rent when recovered, becomes assets; but if the reversion passed to the personal representative of the administratrix, the rent would cease to be assets. [*Perrin, J.*—Have you a case, where an administrator *de bonis non* recovered in the name of the administrator? The only way the administrator *de bonis non* could recover, would be as assignee.] One of the state- ments in the plea is, that E. Kelly was possessed as administratrix, and not in her own right. [*Moore, J.*—Why is the plaintiff not at liberty to traverse that averment?] The replication is, that E. Kelly was not, at the time of making the lease, possessed as administratrix, and not otherwise. This is a traverse of a conclusion of law. *Perrin, J.*—It traverses a matter of fact.] The replication is also bad for ambiguity. It is uncertain whether it is a denial of possession as administratrix, or that, be- fore the making of the lease, such possession deter- mined. It would be open to the plaintiff to make either case at the trial. [*Moore, J.*—It is but one issue, though capable of being proved in two ways. The traverse of the words, "and not otherwise," appears insensible. *Perrin, J.*—*Taylor v. Need- ham*, (2 Taunt. 278), is an authority to shew that the assignee of a lease by indenture is estoppel by the deed which estops his assignor.]

Mr. Hayes and Mr. Napier, Q.C. contra.—*Drue v. Baylie* has been approved and confirmed. *Sk-f- fington v. Whitetrust*, (3 Y. & Coll. 1); *Skeffing- ton v. Budd*, (9 Cl. & Fin. 219); *Elliott v. Kemp*, (7 Mee. & W. 306); Williams on Ex. 783, note; Latch. 266. The administratrix appropriated this lease to herself, and made it in her own right. *Barber v. Lemon*, (12 Jur. 246). There is an affirmative allegation on the one side, and a nega- tive denial on the other; the plea says that E. Kelly was solely possessed as administratrix, and the re- plication denies that. *Curbois v. Brereton*, (2 Jones 397); *Grissell v. Robinson*, (3 Scott, 829.)

The court desired to hear

Mr. O'Leary, in support of the plea.—The action is by the assignee of the reversion, against the assignee of the lessee. The word assigns in the covenant must mean assignee of the estate, and not a mere personal representative. (Co. Lit. 210, a.) The plaintiff claims as assignee of the estate, and we say that the estate of the lessor ceased at the death of the lessor. *Brudnell v. Roberts*, (2 Wils.

143.) The true question raised on the pleading is, whether the plaintiff, upon taking out letters of administration, was entitled to the reversion. We allege that the person claiming the reversion is not entitled to the reversion. The declaration should either have stated, that the term vested in E. Kelly and came to the plaintiff, as her administratrix, or, admitting that E. Kelly took, as administratrix, it should have shewn something whereby she acquired the possession in her own right.

Cur. adv. vult.

June 1st.—BLACKBURN, C. J. now delivered the judgment of the court.—This case comes before the court upon demurrer to the replication; and it has been argued by the plaintiff that the plea is bad. It is an action of covenant for rent, brought by the administratrix of the lessor, against the assignee of the lessee. The declaration states, that E. Kelly, the intestate, was possessed of the demised premises for a term, whereof sixty years and upwards were then unexpired; that being so possessed, she made the indenture of demise therein set forth; it then states her death, and that letters of administration of her chattels and effects were granted to the plaintiff, by reason whereof the plaintiff became possessed of the reversion. The plea, which is very inaccurately framed, and on special demurrer would be held bad for uncertainty, says, that E. Kelly has nothing in the same premises, except through Michael Kelly deceased; that said M. Kelly was possessed thereof for the residue then to come, and unexpired, not saying what residue, and continued so possessed until his death; that administration was granted to the said E. Kelly, whereby she, as administratrix, and not otherwise, became possessed of the premises for the said term, no term being mentioned in the plea. The plea then avers the death of E. Kelly, whereby all her estate in the premises ceased and determined. The replication is, that the said E. Kelly was not, at the time of making the said lease, possessed of the premises for the said term, as administratrix of M. Kelly, as in the said plea alleged. If the right of the plaintiff to recover in this action, depended upon the result of whether E. Kelly was possessed of the premises, *suo jure*, or as administratrix, it would be necessary to consider and determine, whether the issue tendered by this replication, was a proper one. But the defence made by the plea is, that the title of E. Kelly is at an end, and that, therefore, the plaintiff, who sues as her representative, cannot maintain this action. If this argument be well founded, it would follow, though the lease is still subsisting, and there is a covenant to pay the rent during the term, that no rent could be recovered from the original lessee or his assignee, by any one, as the plea does not allege that there is an administrator *de bonis non*, and *non constat* that there will be; so that if this be a proper and well-founded allegation, there is a total cessation of the estate and interest of E. Kelly in the term. Such a proposition is not maintainable in point of law. A specific rent was reserved by the lease, to continue during the term, and, whoever may have the right to recover it, beyond all question, that rent belongs to some one. To say, then, that the estate

in the premises has totally ceased, is repugnant to the plainest principles of law. *Drus v. Baylis* is, however, an express authority in support of the plaintiff's right to recover. I have taken down the particulars of that case. It was an action of debt on a bond to perform covenants in a lease, and from the report it appears that the only question was, whether or no the executor of the lessor had a right to the rent, it being admitted that if the rent was gone, so were the bond and covenant; it was argued that the rent went with the reversion to the administrator, *de bonis non*, and not to the executor of the lessor; and that if the lessee was liable in that action to the executor, he would be doubly charged, for the administrator *de bonis non* would also sue him for the rent; but Hale, C. J., in giving judgment, says, "the administrator had a double capacity in him when he made this lease; one in his own right, and the other in right of his intestate; and though he had the term wholly in right of the intestate, yet, by making a lease of part, he appropriated that to himself, and had the rent in his own right; and so having the rent in his own right, the administrator *de bonis non* could not claim it, because he came in paramount." And again he adds—"The administrator having power to dispose of the term which he had in right of the intestate, the rent which is reserved to him and his executor, is a continuing interest in them in the same right." That passage is a complete answer to the allegation in the plea, that there is a total cesser of the right to recover this rent. It also has a direct application to the case we are now considering, for there is in this lease, an express covenant to pay the rent, while the estate continued—and that covenant binds the assignee. *Drus v. Baylis* must be considered a decision of very great authority, and I do not find that it is impugned by any subsequent case. Mr. Williams in his work on executors, at page 783, cites it, without reference to any case questioning its validity, and the doctrine established by it has been followed in *Skeffington v. Budd* (9 Cl. Fin. 219), and *Curtis v. Brereton* (2 Jones, 397.) For these reasons, we are of opinion that, the plea being bad, the demurrer to the replication must be overruled.

Demurrer overruled.

COMMON PLEAS.—TRINITY TERM.

CLARKE v. KELLY.—May, 25th.

Act of Union—Taking plea off the file.

The court will not permit a plea, calling into question the power of the Imperial Parliament to bind Ireland, to be argued; but will direct it to be taken off the file, although no motion for that purpose has been made by the opposite party.

Declaration in replevin. The defendant pleaded three avowries, each to the effect that the defendant was collector of poor rates for the electoral division of Drumlane, within the Cavan union, and, as such collector, distrained the lands in the declaration mentioned, being parcel of such electoral division for arrears of poor-rate due thereout. To each of these avowries the plaintiff filed several pleas, all to the same effect. The second and principal plea was

llows:—"Because he saith that long before
me when, &c., to wit, in the year of our Lord,
the kingdom of Great Britain, and the king-
of Ireland were separate and independent
oms, and being so separate and independent,
ain international compact was entered into,
d upon by and between the said kingdoms,
e purpose of uniting the said kingdoms, at
ime separate and independent kingdoms, in
corporate union, and the said William saith,
he said international compact was set out and
l in a certain treaty, which treaty was entered
concluded, and ratified by and between the
kingdoms, then independent and separate as
aid, long before the time when, &c., to wit,
year of our Lord, 1800; and the said Wil-
mith, that by the said treaty it was stipulated,
anted, and agreed, that the said kingdoms of
Britain and Ireland, up to that time inde-
nt and separate kingdoms, should be united
ver in an incorporate union, upon certain
and conditions set out in said treaty, and
l thenceforth and for ever form one kingdom,
e styled the United Kingdom of Great Britain
eland; and the said William saith, that the
treaty so entered into as aforesaid, was em-
d in a certain act of Parliament of Great
in, then a separate and independent kingdom
ressaid, to wit, in an act made and passed in
session holden in the 39th and 40th years of the
of his late Majesty King George the Third,
entitled 'An Act of Union between Great
in and Ireland,' and was also embodied in an
f the parliament of Ireland, then also a separate
ndependent kingdom as aforesaid, to wit, in an
ade and passed in the session holden in the
year of the reign of his late Majesty, George
hird, and entitled, "An Act of Union between
Britain and Ireland;" and the said Parliament
eat Britain and the said Parliament of Ireland
ach separately confirm, ratify and establish for
he said treaty so as aforesaid entered into and
uded; and said William saith that by force and
of said treaty and of the said several acts of
parliaments of Great Britain and Ireland then
ressaid separate and independent kingdoms, the
international compact set out and stated in the
reaty of Union became and is the written con-
nion and supreme fundamental law of this coun-
and the rights, privileges and immunities se-
l to the subjects of this kingdom by the said
became and are fundamental rights, privileges
mmunities of the said subjects of this kingdom,
no Parliament or other authority whatsoever
ally competent to alter or destroy. And the
William saith that by the said treaty of Union
tain parliament was created and constituted, to
led, "The Parliament of the United Kingdom
eat Britain and Ireland," and that to the said
ament so created, constituted and styled, cer-
egislative powers for the government of the
United Kingdom and the several portions
of were given by the said treaty, which had so
ressaid created and constituted it. And said
am further saith that said legislative powers so
to the said Parliament by the said treaty as
said were marked out, and limited, and defined

by the articles of the said treaty; and that the said
Parliament hath not any power, jurisdiction, or au-
thority in this country other than such power, jurie-
diction and authority as have been given to the said
Parliament by the said treaty of Union, whereby
the said Parliament was as aforesaid created and
constituted. And said William further saith that
the powers of taxation which the said Parlia-
ment should be legally authorized and empowered
to exercise over the said United Kingdom and the
several portions thereof were stipulated, covenanted
and agreed upon by and between the said kingdoms
of Great Britain and Ireland, at that time separate
and independent kingdoms as aforesaid, and were and
are set forth in the seventh article of the said treaty
of Union. And said William further saith, that by
the said 7th article of the said treaty, it was cove-
nanted and agreed, by and between the said king-
doms, at that time separate and independent as afore-
said, that the said parliament of the United King-
dom should be authorized to impose and levy,
within that part of the United Kingdom of Great
Britain and Ireland, called Ireland, an amount of
taxes, which should bear to the entire taxation of
the United Kingdom, the proportion of 2 to 15,
provided such amount could be raised without im-
posing, upon any article in Ireland, a tax greater
than was borne by a similar article in Great Britain.
And said William further saith, that by the said
article it was further stipulated and agreed upon,
that if at any time the separate debt of Ireland
should bear to the separate debt of Great Britain,
the proportion of 2 to 15—then, and in that case,
the said parliament of the United Kingdom should
be authorized and empowered to pass an act con-
solidating the revenues of the two kingdoms. And
that after the passing of such act, said parliament
should no longer be bound to regulate the taxation
of the United Kingdom, and of the several parts
thereof, by and according to the proportion above-
mentioned; but by and according to another ar-
rangement, stipulated and agreed upon, by and be-
tween the said two kingdoms as aforesaid, and set
out in the 7th section of the 7th article of the said
treaty. And the said William further saith, that by
the said 7th section of the said 7th article of the said
treaty, it was covenanted and agreed upon, by and
between the said two kingdoms, that, after the pas-
sing of the said act last-mentioned, the said parlia-
ment should be authorized, empowered, and bound
to defray all future expenses thenceforth to be in-
curred, together with the interest and charges of all
debts contracted previous to the passing of said act,
indiscriminately, by equal taxes imposed on the
same articles in any other country; and should be
authorized and bound to impose and levy, with
equal or uniform taxes only, subject to such par-
ticular exemptions or abatements, in Ireland or
Scotland, as circumstances might appear from time
to time to demand. And the said William further
saith, that afterwards—to wit, in the year of our
Lord 1816, the said debt of Ireland bore to the
said debt of Great Britain, the proportion so as
above required, in order to authorize the said par-
liament to consolidate the revenues of the two
countries. And that thereupon the said parliament
being by virtue of the said covenants in the said

7th article above-mentioned, competent so to do, passed an act in the session holden in the 56th year of the reign of his late Majesty King George the Third, entitled "An act to consolidate into one fund, all the public revenues of Great Britain and Ireland," and thereby carried into effect, the provisions and purposes of the said 7th section of the 7th article of the said treaty of Union. And said William saith, that thereupon, and since the passing of the said last-mentioned act, the powers of taxation possessed by the said parliament, extend only to the imposing or levying of equal and uniform taxes upon the subjects of the United Kingdom; subject to the exemptions and abatements aforesaid. And the said William saith, that the said parliament is not legally competent to impose any other taxes, save and except such equal or uniform taxes, subject to said exemptions and abatements; and that the subjects of this kingdom are not legally bound, or compellable to pay any other taxes, save such equal or uniform taxes, subject to such abatements and exemptions as aforesaid. And the said William further saith, that the said parliament is bound by said treaty, out of the entire produce of said equal or uniform taxation, as from a common fund, to defray indiscriminately all expenses to be incurred from the time of passing the said last-mentioned act; and which are to be defrayed by taxes laid on by parliament. And the said William saith, that parliament has not power, under the said treaty, or at all, to allocate a particular tax to the payment of a particular and specified expense; and that no subject of this kingdom is legally bound or compellable to pay any tax so allocated. And the said William saith, that the said powers of taxation so above, stated to be delegated by the said treaty to the said parliament, must be exercised directly by said parliament; and cannot be again delegated legally by the said parliament to any person or persons whatsoever. And that no subject of this kingdom is legally bound or compellable to pay any tax, except such tax shall have been directly imposed by the said parliament, according to the covenants and provisions of the said treaty. And the said William saith, that the tax described in the said first avowry of the said John, as a rate for the relief of the poor of 3s. in the pound upon the rateable property, within the electoral division of Drumlane, in the said Cavan Union, therein stated to be leviable under and by virtue of certain acts of parliament, in that behalf made and provided, and on account of the non-payment of which the said William was taken as aforesaid, is not an equal or uniform tax as aforesaid; but an unequal tax, and one which the said parliament of the United Kingdom is not legally competent to impose or levy, on or from the said William; and which the said William is not legally bound or compellable to pay. And the said William further saith, that the produce of the said tax described in the said first avowry of the said John, as a rate for the relief of the poor, is not applied indiscriminately, in the manner and form appointed and directed in that behalf, as above stated, by the said treaty of Union in discharge of all expenses; but is appointed by the said parliament to pay a certain specified expense, to wit, the support of the poor of the Union of Cavan, and

none other, contrary to the express covenants and provisions in the said treaty of Union, above stated. And the said William further saith, that the said tax described above, as a rate for the relief of the poor, has not been imposed directly by the said parliament, according to the covenants and provisions of the said treaty of Union above stated; but by certain persons, called Guardians of the poor of Cavan Union, to whom the said parliament has attempted to delegate the said power of taxation, so as above stated, to have been delegated to the said parliament by the said treaty of Union; which delegation of its power of taxation, by the said parliament to the said guardians, the said William saith, is contrary to the said covenants and provisions of the said treaty of Union, and is insufficient to authorize the said guardians to legally impose or levy the said rate; or make the said William legally bound or compellable to pay the same; and this the said William is ready to verify, &c.

The remaining pleas differed from the above, only in the manner in which the same objection was put forward. To these pleas the defendant demurred.

Mr. J. C. Lowry, with whom was *Mr. Brooke, Q.C.*, was about to open the demurrer, when the court interposed, and intimated, that unless the opposite side shewed some grounds for such a plea, they would direct it to be taken off the file.

Mr. Hercules Ellis, with whom was *Mr. O'Hagan, Q.C.*, contended, that the articles of Union constituted an international treaty, which no subsequent act of parliament could vary; and cited *Sutton v. Sutton*, (1 Russ. & My. 63.) [*Jackson, J.*—We cannot listen to such an argument. [*Doherty, C. J.*—The general impression of the court is, not only that we ought not to listen to this plea; but that it ought to be taken off the files of the court. Can you show any grounds why we should not adopt that course?] *Marriett v. Wilson* (8 T. R. 31, S. C. 1 B. & P. 430), decided before Lord Mansfield, is an authority that the court may control an act of parliament. [*Doherty, C. J.*—Here is a plea, that for the first time in the course of 49 years, calls in question the power of the Imperial legislature to bind Ireland.] If the court feels such a strong opinion on the subject, let this demurrer be allowed, in order that there may be an appeal. [*Ball, J.*—We cannot allow the demurrer without hearing it; and to do so, would be to violate our duty.] The authorities prove this to be a good plea. If the court persist in the course that has been intimated, they will deprive the plaintiff of all means of trying the question. [*Torrens, J.*—We do, of trying a question which ought never to have been raised, and which we cannot for a moment hear argued.

DOHERTY, C. J.—For the reasons which have already been mentioned by each member of the Court, and which do not require to be enforced, we order these pleas to be taken off the file. They ought never to have been there, and the Court will not permit them to remain one second after it has heard them.

COURT OF CHANCERY.

BARRY v. CRONIN.—June 7.

tice—Varying report—Legacy, general or specific.

atrix bequeathed the sum of £2,800 sterling, of her funded property, Held to be a general leg.

urt on the hearing, though there be no exception, can vary a report the error being apparent on the face of it.

cause came on to be heard on report and Johanna Fitzpatrick, by her will dated the 27th of February, 1842, bequeathed all her property to executors upon trust; as to "the sum of £6000, part of her funded property," for the use of her niece Elizabeth Cronin, with power over ultimately to the children of her son Philip Barry; "and as to the sum of £1000, part of her funded property, in trust for the benefit of the children of her said nephew." The will directed the usual accounts, and an order was made as to the persons entitled to the legacies decreed by the will. The Master found that the testatrix, at the time of her death, possessed the £10,665 7s. 8d. stock, equivalent at the price of the day next after the day of her death to £6,000 sterling. He also found that the above-named legacies of £6,000 and £2,800 were in cash, and that the legatees were entitled to so much stock set apart for them as, at the time of a stock, at the day next after the day of the testatrix's death, would produce those sums. The price of stock having fallen considerably, the legatees claimed to have the sums of stock, equivalent to their legacies at the price of the day of the testatrix, set apart. No exception had been taken. *R. C. Walker, Q.C. (Mr. Jenkins with him) v. Barry.*—Although no exception has been taken, an error apparent on the face of the report may be rectified now. *Brodie v. Barry*, (W. 471.) This is a demonstrative not a specific legacy, (1 Rep. Leg. 192, cases there cited.) *F. Fitzgerald, Q.C. (Mr. R. Longfield with him) v. Bird*, (3 Ves. 628,) shews that this is a legacy of so much stock. It has been brought into court and appropriated to the legatees, which is equivalent to payment to them, and they have no need to require further payment.

Deasey, Q.C., in reply.—We only ask the court to correct an error on face of the report. Bringing into court is not equivalent to payment to legatees. *Rock v. Hardman*, (4 Mad. 253.)

LORD CHANCELLOR.—I do not think this can be rectified by a specific legacy. The Master has not found that there was any appropriation of the sums named of the legacies, and bringing the fund into court cannot be equivalent to payment. It is clear that the legacies are bequests of £6000 and £2800 cash. Declare that the legatees are entitled to be paid the sums in cash out of the stock, or out of the other personalty of the testatrix."

SCOTT v. SCOTT.—June 16th.

Practice—Receiver.

The court having, on the hearing, expressed a strong opinion in favor of the plaintiff had, however, at the request of the defendant, left the plaintiff to bring an ejectment, in which the defendant obtained a verdict which was set aside by the court in which it was tried as against evidence. The Lord Chancellor subsequently granted a receiver unless the defendant secured the rents to be received by him.

This was an action on the part of the plaintiff. The bill was filed to carry into execution the trusts of a certain deed of 1807, and for a receiver. At the hearing the court was of opinion that the plaintiff was entitled to the relief prayed by his bill to an account of the rents and profits of the lands for six years previous to the filing of the bill, but the defendant so requiring, the cause was directed to stand over with liberty for the plaintiff to bring an ejectment, the defendant being restrained from setting up temporary bars. The plaintiff brought his ejectment; the jury found for the defendant, but the plaintiff, by an order of the Queen's Bench, set aside the verdict as against evidence. The affidavit in support of the motion stated that the defendant Scott was in possession and receipt of the profits of the lands, and that in case the plaintiff ultimately succeeded the defendant would be unable to pay the mesne rates, and had no property in this country. The affidavit further stated that the jurors in the county of Clare where the lands lay were prejudiced against the plaintiff, and that the defendant resided in that county and was most popular amongst them.

Mr. Brewster, Q.C., and Mr. W. W. Brereton for the motion.—Where there is a strong probability of title in the plaintiff, and the rents be in danger, the court will appoint a receiver. *Mordaunt v. Hooper*, (Amb. 311,) *Stillwell v. Williams*, (6 Mad. 49; S. C. Jac. 280;) *Lloyd v. Passingham*, (3 Mer. 697;) *Huguenin v. Basby*, (13 Ves. 105.)

Mr. Christian, Q.C. and Mr. F. Fitzgerald, Q.C. contra.—There is a distinction between an issue directed to a court of law and giving leave to bring an ejectment. *E. of Fingal v. Blake*, (2 Moll. 50;) *Lloyd v. Trimblestone*, (ib. p. 81.)

Mr. Brereton, in reply.

LORD CHANCELLOR.—The court has jurisdiction to appoint a receiver where there is a strong probability of title in the plaintiff, and there is danger to the rents which he seeks to preserve by the aid of the court. Cases where this relief is given between heirs at law and devisees are common, and I cannot see the distinction between these cases and the present. So far as probability of title goes, we have the opinion of the Court of Queen's Bench and of this court, which, I apprehend, amounts to this, that so far as shown by the defendant he has no title. The peculiarity of this case is that the plaintiff has been authorized to try his title by ejectment, an issue not having been directed. However, I do not think that of much consequence; suppose this receiver had been granted on the answer instead of being sought for after the hearing, I apprehend that the court would not be embarrassed in giving leave to bring

an ejectment. This case is the converse of that. *Buckland v. Souther*, (reported in a note *c*, 4 Y. & C. Ex. 373,) is not quite the same, as there an issue was directed. In *Clark v. Dew*, (1 Rus. & My. 103.) the principle did not apply, as there was not a strong probability of the plaintiff's success; the Prerogative Court having decided against the will under which the plaintiffs claimed. The Lord Chancellor rests also on another ground, "I would ask besides if the property is exposed to any danger in the mean time while it remains in the possession of the defendants? The plaintiff is already bound to pay over a considerable sum to the defendants under an order of this court, and so long at least as he retains that sum in his hands he has a sufficient security for the rents and profits should it ultimately appear that he is justly entitled. On both these grounds the motion must be refused." The principle is also shown in *Mordaunt v. Hooper*, (Ambler, 311); and the only question to be determined is, whether the facts come within it. In my opinion they do, but if the defendant can prevent the expense of a receiver, he should as I have already suggested, be allowed to do so by giving security by recognizance within a fortnight.

Ch. Motion Book, 4, 266.

ROLLS COURT.

BRYAN v. RICHARDSON.—May 1st.
Practice—Receiver in Courts of Chancery and Exchequer.

On the 5th of February, 1848, an order was made in the Court of Exchequer, referring it to the Remembrancer to appoint a receiver over certain lands. On the 30th of June following, an order was made in this Court for the appointment of a receiver over the same lands. This order was set aside, it not having been stated to the Court that the order in the Exchequer had been made.

In the year 1832, by order of the Court of Exchequer, a receiver was appointed over the property of the defendant, in a suit in which Jane Richardson was plaintiff. This receiver continued in possession till March, 1846, when the defendant undertook to pay the arrears of jointure to recover which the bill had been filed. On the 5th of February, 1848, an order of the Court of Exchequer for the appointment of another receiver was obtained by William Long, a creditor of the defendant who refused to act. On the 14th day of June, 1848, an order was made in the Court of Chancery, in the cause of *Bryan v. Richardson*, for the appointment of a receiver over the same lands as the receiver in the Exchequer cause had been appointed. On the 5th of Feb. 1848, an order was made in the Exchequer referring it to the Remembrancer to appoint a new receiver in the place of William Long.

Mr. Stokes, on behalf of Jane Richardson moved that the receiver in this Court might be discharged, or restrained from receiving the rents until the claims of the said Jane Richardson were paid.

Mr. J. W. Carleton, contra, for the petitioner referred to the case of *Marchioness of Downshire v. Tyrrell*, (Hayes, 354.)

MASTER OF THE ROLLS.—Where there are suits in the Court of Exchequer and this Court, the

proper course is to apply to the Exchequer for the discharge of the receiver, and that Court will probably make the order, if satisfied that the suit in this Court will afford relief to all parties. His Honour made the following order:—

"And it appearing to the Court that when the order of the 30th of June, 1848, was made in this Court, the Court was not informed that an order had been made by the Court of Exchequer, on the 5th of February, 1848, referring it to the Remembrancer to appoint a receiver, let said order of the 30th of June be set aside, so far as it refers it to the Master to appoint a receiver over the lands over which the Exchequer receiver had been appointed, and let each party abide their own costs of this motion."*

Lib. 284, fo. 240.

STAMER v. NESBITT.—May 10th.

A decree of the Court of Chancery in Ireland directed that the plaintiffs, who resided in England, should pay to a defendant her costs of suit. This defendant, previous to exemplifying the decree, issued a subpoena out of the Irish Court of Chancery, and caused it to be personally served on the plaintiffs.

Held, that this proceeding was unnecessary, and the costs of this personal service should not be allowed to the defendant.

Semble, that the 41 Geo. 3, c. 90, s. 6, which provides for the exemplification of Irish decrees in the Court of Chancery, applies to decrees or orders which direct payments of costs generally, as well as those in which a particular sum is named.

By the decree in this cause, bearing date the 6th of December, 1848, it was ordered that the plaintiffs do pay to the defendant, Mary E. Nesbitt, her costs of this suit; on the 28th of February, 1849, the costs were taxed to a sum of £762 9s. 9d. All the plaintiffs being resident in England the defendant's solicitor considered that previous to the exemplification of the decree, which was for costs alone, to the court of Chancery in England it was necessary that a personal demand should be made under a subpoena, and, accordingly, on the 5th of March a subpoena was issued for the sum of £762 9s. 9d. and 19s. 5d., post costs, and a special messenger was sent from Dublin to Warwickshire, London, and Somersetshire, to serve the subpoena upon the plaintiffs, and to make a personal demand. The costs not having been paid, on the 7th of April the defendant was entitled to exemplify the decree.

There had been an agreement that the plaintiffs, George Wheildan, F. W. Tomlinson, and the Rev. W. Stamer, as trustees for the other plaintiffs, were to pay the costs out of trust funds in their hands, but they had been advised not to do so unless under the pressure of legal proceedings. On the 17th of April the sum of £762 9s. 9d. was paid, being the amount of the taxed costs, and an undertaking was given by the plaintiffs' solicitor to pay any sum they were legally bound to pay for the costs of the sub-

* Vide *Mills v. Mills*, (9 I. E. R. p. 1,) and *Daly v. Daly*, (ibid. 461.)

, and serving same in England, these costs, as ed, amounted to £16 ls. 11d., but the plain- refused to pay same unless directed to do so by urt. This was an application on behalf of the ant that the plaintiffs, in pursuance of the un- ting do pay the sum of 19s. 5d. being the post marked at foot of the subpoena in the cause, so the sum of £16 ls. 11d. being the costs of pies of said subpoena and of the personal ser- d same in England, and of the affidavit of ser- and demand.

Hughes, Q. C. and Mr. C. Andrews for the ant.—The 41 Geo. 3, c. 90, s. 6* points out ethod of exemplifying decrees in the court of ury in England, but this statute only applies where there is a sum named in the decree, ot such a one as this, which is for payment of merely. Service of subpoena is the proper : to be taken before exemplifying the decree. erson demanding costs should have authority eive the money. (Dan. C. P. 1025.) The na, by the terms of it, gives that authority; it s that the party “shall pay or cause to be paid said — or the bearer thereof the sum of —.” Smith’s Orders, Appendix 37, and 30th al Order provides that it shall be in the form Appendix, the subpoena should be served per- y. (Seton on Decrees, 419; Beame’s on Costs, dition, p. 249.)

F. Fitzgerald, Q.C. and Mr. W. F. Darley, a—It cannot be contended that this statute applies to cases in which the decree directs a xlar sum to be paid; a demand was proper ight have been made by letter; there was no ility of incurring the expense of sending a over to England to serve this subpoena;

And be it further enacted, that in all cases where in it between party and party, any decree shall be pro- d, or any order made for payment of or for account- r money by the High Court of Chancery, in that the United Kingdom called Ireland, the Lord Chan- Lord Keeper, or Lords Commissioners for the cus- of the Great Seal of Ireland, for the time being re- ly, shall, upon application made to him or them tively, cause a copy of such order or decree to be lifed and certified to the Court of Chancery in that f the United Kingdom called England, under the Seal of Ireland, and the Lord Chancellor, Lord ., &c., of England, shall forthwith cause such order ee, when it shall be presented to them respectively, mplied, to be enrolled in the Rolls of the High of Chancery in England, and shall cause process of nent and committal to issue against the person of rty against whom such order or decree shall have ade respectively, in order to enforce obedience to rformance of the same, as fully and effectually, to all and purposes, as if such order or decree had been ly pronounced in the said Court of Chancery in ; and it shall and may be lawful to and for the Chancellor, &c., of England for the time being, from e time, to make orders on petition, as the occasion quire, for payment of money levied under such pro- aforesaid into the Bank of England, with the privy Accountant-General of the said Court, to the credit r the benefit of the party who shall have obtained order or decree, and the Governor and Company of ank of England are hereby authorized and required to and hold all such moneys, subject to the orders of id Court of Chancery, provided always that no such s shall be charged with or subject to poundage, when shall be paid out by order of the said Court.

with the subpoena there should have been a power of attorney to receive the money.

MASTER OF THE ROLLS.—Previous to the 41 Geo. 3, c. 90, s. 6, when a decree of the Court of Chancery in Ireland was affirmed or reversed on appeal, the practice was, to enter a side bar rule, and the decree of the House of Lords became decree of the Court of Chancery in Ireland. In the case of *Ferrall v. M'Cann*, (Fl. & K. 635,) Sir M. O’Loghlen directed the clerk of appearance to issue a subpoena for the costs of an appeal; but in other cases, where process of the Court of Chancery in this country could not be issued, the 41 G. 3 provided a summary remedy, which enables a party to enforce the order of this Court, which, by means of exemplification, also becomes an order of the English Court. There is no advantage to be gained from issuing an attachment out of this Court against a person in England, and out of the jurisdiction. I think the expense of serving this subpoena upon the plaintiffs in Eng- land, where process of this Court could not be enforced, was unnecessary, and this motion must be refused.

STANNUS v. FRENCH.—June, 15th.

Receiver—Tenant under the Court.

A receiver will not be permitted to become tenant under the Court of the lands over which he is appointed, even upon consent of the parties in the cause.

Mr. Blackburne moved to make a consent a rule of Court, that the receiver in the cause might be declared tenant under the Court.

From the affidavit of the receiver it appeared that in pursuance of the Master’s report an ejectment had been brought against the tenant of part of the lands, consisting of about 46 acres, and possession obtained; shortly after notice was given requiring any person wishing to become tenant of the land to come in and make proposals, but no proposals were made. The receiver also obtained possession of other lands adjoining which were similarly circum- stanced. The affidavit stated that the receiver had a large farm adjoining, and was willing to become tenant under the Court of these lands at a fair rent. The consent was signed by all the parties in the cause except a trustee of a term.

The MASTER OF THE ROLLS, in the absence of any authority in support of the application, refused to make the consent a rule of Court.

EXCHEQUER OF PLEAS.

MACEVERS & ANOTHER v. BERKELEY.—May 27th.

Notice of dishonour—Competency of witness, Hart v. Hopkins (6 Q.B. Rep.) affirmed.

On the trial of an action against the drawer of a bill of Exchange, a witness proved that he had served the defendant with an account of the plain- tiff’s demand, amongst the items of which was the amount of the bill in question; and that the de- fendant had objected to several of the charges made, but had passed over in silence the item re- lating to the bill. No direct evidence of present-

ment and notice of dishonour was adduced. Held—That there was a *prima facie* case to go to the jury, that the defendant had due notice of dishonour of bill.

The son of the testator, whose executors the plaintiffs were, was examined as a witness and objected to, on the ground that he was directly interested in the result of the trial. Held, that his evidence was admissible.

Assumpsit.—The declaration contained two special counts, and the money counts. The first count was a bill of exchange, of which the testator of the plaintiffs was drawer, and the defendant acceptor. The second count stated another bill, made payable in the body at a particular place, of which the same testator was holder, and the defendant was drawer. Plea, 1st general issue, 2nd statute of Limitations, to the first count, and on the latter issue there was a finding for the defendant. The case was tried at the sittings, after last Hilary Term, before the Lord Chief Baron. A son of the testator, John Burke, was produced on behalf of the plaintiffs. This witness proved, that on his applying to the defendant for payment of the account claimed by the plaintiffs, which account comprised the bill, the subject matter of the action, the defendant objected to several items of the account, amongst others, to being charged with the premiums of a certain policy of insurance mentioned therein. A notice to produce the original account had been served on the defendant at 10 o'clock on the Wednesday preceding the trial, the defendant residing at Derrynane, in the county of Kerry. A witness, Wilson, also proved, that on being served with the account, the defendant objected to the items of the account relating to the premiums on a certain policy of insurance, and for the costs of the proceeding on the bill in first count mentioned. On the case of the plaintiffs being closed, the counsel for the defendant called for a nonsuit on the following grounds: 1st, that the testator's son was an interested witness, and his evidence was inadmissible. 2nd, that the notice to produce the original account was not served in sufficient time before the trial, to authorise the admission of secondary evidence of its contents. 3rd, that there was no proof of presentment or notice of dishonour of the second bill to defendant. The learned judge, reserving liberty to the defendant to move to enter a nonsuit, sent the case to the jury, telling them that they must take that what passed between the defendant and the witness Wilson, amounted to an admission that the defendant was liable for the amount of the bill, provided they thought him liable for it, on the ground of consideration. The jury found for the plaintiffs on the second bill.

Mr. T. Fitzgerald, Q.C., and Mr. J. Reeves now moved to set aside the verdict, First, as to whether there was a sufficient notice of dishonour in this case. To dispense with such a notice there must be an express promise to pay, or a distinct admission of the debt. In *Read v. Reynolds* (1r. Term Reports 85), it was held, that an offer to give security, did not dispense with the want of notice in due time; and *Burke v. Molloy* (ibid. 145) decides, that directions given by the indorser to a

third person, long after the bill was due, to make the best terms he could with the holder did not amount to notice. So a mere offer to give a bill by way of compromise, for the sum demanded, does not obviate the necessity of proving notice. *Cumming v. French* (2, Camp. 106, n.) Counsel also relied on *Borradaile and others v. Lowe* (4 Tau. 93), as to the competency of the witness Burke, he was son of the testator, and therefore interested in the recovery of the assets of his father, as one of the next of kin. It comes within the principle of *Carr v. Dunne*. (1r. E. Rep. 202.)

Mr. J. D. Fitzgerald, Q.C. and Mr. Lecky, contra.—The question is, whether a party reading over an account, and objecting to certain items, passing the others over *sub silentio*, among which latter is a dishonoured bill of which he is drawer, is a *prima facie* case for a jury. *Lundie v. Robertson* (7 East. 231), decides that a promise by an indorser to pay the amount of a note is, *prima facie*, an admission that it had been duly presented and dishonoured, and that the defendant had notice thereof. The case of *Dixon v. Elliott* (5 C. & P. 437) went on the same principle; *Campbell v. Webster* (2, M. G. & S. 258) goes farther, and decides that any acknowledgement by the drawer of a bill, of his liability to pay, is evidence to be left to the jury, of a due notice of dishonour, *Leslie v. Lockhart* (1 E.R. 89), affirms the same principle. *Pepper v. Quenby* (10 I. E. R. 274.) As to the competency of the witness Burke. The only ground of objection, since the 6 & 7 Vic., c. 85., must be, that the son being the testator's next of kin, the plaintiffs are only trustees for him, and he is necessarily interested in the proceeds of the action. Now in *Hart v. Stephens* (6 Q. B. 937), the same objection was made to the competency of a husband, in an action brought by his wife's administrator, and on the same grounds—and the objection was overruled; *Dunne v. Scott* (1 Camp. 100.)

PIGOT, C.B.—This case is perfectly free from doubt. It was left to the jury on the principle stated in the authorities, of the propriety of which there is no doubt. The principle is plainly this, that where there has been such conduct on the part of the defendant, from which the jury may infer that he admitted his liability, a liability dependant on the circumstance of presentment and notice—that is tantamount to an admission of the facts on which such liability arises. No rules are more familiarly known than those which regulate bills of exchange: every one knows that to make a drawer or indorser of such liable, presentment and notice of dishonour are necessary. In the present instance, there was a specific demand of payment, in writing, made on the defendant. The merits of the demand were discussed in his office; the written document comprised a demand on foot of the bill of which defendant was the drawer. He disputes some of the items, but offers no objection to those which have reference to the bill. Independently of those circumstances it was proved that the bill was drawn by the defendant, payable at his own house, on his own brother-in-law. It was also in evidence that that brother-in-law tried the defendant's house when he had occasion to go to Cork. It is perfectly clear, that on all these grounds the verdict was a

proper one. As to the inadmissibility of the evidence, I refer only to *Hart v. Stephens*—that is a clearly analogous case. There the plaintiff was administrator of the witness's late wife; it is plain that as husband the latter was entitled to the wife's pay—in point of law he was solely interested in it—that case distinctly rules the present. Here is a person examined, who is interested in the assets of the intestate. There is no suggestion even how his debts were not satisfied and paid off. When that case does arise, it will be time enough to deal with it.

PENNEFATHER, B.—I concur in the judgment of my Lord Chief Baron, and in the reasons which he assigns for it. The case of *Hart v. Stephens* is even stronger than the present one; for there the witness objected to was sole next of kin. As to the other point, the cases go to shew that no express promise, or no express admission are necessary to dispense with notice.

COURT OF EXCHEQUER CHAMBER.*

GRAYDON v. THE MARQUIS OF CLANRICARDE.

May, 28th and 30th.

Grand Jury rate—Liability of Crown property—Post Office.

The property of the Crown can be only made liable by express enactment and not by implication, and is therefore not liable to Grand Jury cess.

The General Post Office is not a public building within the meaning of the Police valuation acts, and even if it were it would be liable to Police tax alone.

This was a writ of error from the judgment of the Court of Common Pleas on a demurrer to the defendant's replication. This case was not argued in the court below, the same question having been previously decided on similar pleadings after full argument in the case of the *Earl of Lonsdale v. Wilson*, (reported in 8 Ir. Law, 412,) and which the Grand Jury had intended to bring before this court, had not the defendant died. A new distress was then made by the defendant in the present action, the pleadings in which are similar to those in that of the *Earl of Lonsdale v. Wilson*.

Replevin. The declaration contained two counts. The first count set forth the taking of the goods and chattels of the Post Master General in a certain house called the General Post Office in the city of Dublin. To each count the defendant filed three avowries respectively similar, and in the first avowry the first count avowed as collector of grand jury cess in the parish of St. Thomas in the county of the city of Dublin under the 33 George 3, c. 56. The second avowry, because he was collector of public rates to be levied by grand jury presentment in the parish of St. Thomas, in the county of the city of Dublin, and that as such collector he took the goods, and by virtue of the statute in such case made did provide, and for a certain cess, to wit, £95 creed payable and in arrear out of the premises were the same were taken. The third avowry—because he was collector of public money to be levied

by grand jury presentment in the parish of St. Thomas in the county, &c., and as such collector he took the goods, &c., under the statute in that case made, &c. To each of these avowries the plaintiff filed two pleas, the first plea to the first avowry—that the *locus in quo* was in the bounds, possession, and occupation of her Majesty, in right of her crown, concluding with a verification; the second plea to the first avowry was, that the *locus in quo* was her Majesty's Post Office in the county of the city of Dublin in the possession and occupation of her Majesty's Post Master General, in trust for her Majesty, in right of her crown for the purposes of her Majesty's Post Office, concluding with a verification; to these pleas respectively the defendant filed the following replication: "That the house called the General Post Office was and is situate in the parish of St. Thomas, within the police district of the Dublin metropolis, and was and is assessed to a certain sum, viz. £1200 in the police valuation or assessment for police district of Dublin metropolis, pursuant to the statute in that case made, &c., whereby and by force of the statute in such case made, &c., it became and was liable to grand jury cess in the parish of St. Thomas;" to each of the replications the plaintiff filed a general demurrer.

Mr. Perrin for the plaintiff in error.—This case arises on a demurrer to the defendant's replication, and is, whether the Post Office is liable to this rate. The former mode of applotting the grand jury cess was regulated by the 33 Geo. 3, c. 56, s. 2, 4, 5, and now by the 1 & 2 Vic. c. 51. The question depends upon the construction of this act. The first section enacts, "That after the commencement of this act all sums to be raised by the grand jury presentments in the county of the city of Dublin, &c., shall be apportioned and applotted according and in proportion to the value of each and every such house, &c. as contained in the valuation made under the 3 Geo. 4, c. 118, and the 1 Vic. c. 25, (the statutes by which the valuation of the police tax is regulated) and that such apportionment and applotment shall be liable to be varied according as such police valuation shall be altered or varied." Section 2 enacts, "That the grand jury cess shall be chargeable on the tenements liable according to their value respectively in such police assessment, and recoverable as it is." And the third section enacts, "That the treasurer of the county of the city of Dublin shall demand of the justices of police a copy of the declaration which is to be laid before the grand jury, who are to class the several sums to be raised, &c. according and in proportion to their respective valuation in such general valuation and assessment." The Post Office is a tenement within the meaning of the Police act, 7 W. 4, c. 25, s. 1, and the 1 Vic. c. 25, ss. 4 & 5; render all such tenements liable to grand jury cess. But the Post Office is said to be exempted upon the general right of the Crown. Although the Crown may not be within all the provisions of an act it may come within the beneficial provisions of an act. The Post Office is a public building within the 47 Geo. 3, c. 109, & 54 Geo. 3, and all public buildings liable to be assessed under the provisions of these acts are made liable to police tax by the 2 & 3 Vic. c. 78, s. 10. An answer can be given to all the cases which may be relied upon at the other side that in none of

* Coram Blackburne, C. J., Doherty, C. J., Pennefather, B., Torrens, J., Crampton, J., Perrin, J., Richards, B., H. J., Jackson, J.

the statutes was a right to distress given, but here a right is given. It appears on the record that these premises were within the police valuation, we contend that they are liable to be assessed.

Mr. Orpen, (with Mr. Greene, Q. C.) contra.—The Crown cannot be charged unless the act contains express words to that effect. The Crown cannot be distrained. In *Ros v. Darley*, (1 Hud. & R. 442.) Bushe, C. J., p. 448, says, "As it was suggested by my brother Vandeleur, in the course of the argument, it appears by the record that the *locus in quo* was the King's Custom House, and, therefore, by virtue of the King's prerogative, not at any time liable to be assessed for taxes." *Moade v. Warburton*, (Al. & N. 287.) Lands in possession of the Crown cannot be distrained. *Gibbon v. Moran*, (6 Law Rec. N. S. 141.) Both these cases were confirmed. 3 & 4 Vic. c. 58, s. 7, (private act,) regulates how the Castle of Dublin is to be taxed, and how paid; (Moore's Compendium of Poor Laws, 51.) If the intention was to charge the Crown, it should be done in express terms. The fact of there being a power to distrain, is an argument to shew that it was not intended to charge the Crown. The property of the Crown is not liable by implication. *Smith v. Blythe*, (1 B. & Ad. 509.) It is the duty of the Grand Jury to omit out of the valuation of each parish the valuation of the Queen's buildings. The 2 & 3 Vic. c. 139, s. 20, and 5 Geo. 4, c. 118, (private act,) expressly exempted premises in possession of the Crown. [*Blackburne, C. J.*—Your argument is, that the premises are exempted by the act under consideration.] The 2 & 3 Vic. c. 78, s. 6, refers to the 20 s. of the 5 Geo. 4. The 3 & 4 Vic. c. 96, expressly enacts, that the Post-master General is a body corporate and a trustee for the Queen. The cases cited show that the property of the Crown is not liable, unless by express enactment. The only question is, is there any Act of Parliament which expressly makes the Crown liable? The 33 Geo. 3, c. 56, regulates the assessment upon the solvent inhabitants of the parish; is there anything in this Act to make the Crown liable? The 1 & 2 Vic. c. 25, regulates, not the Grand Jury cess, but the Police of Dublin. The 1 & 2 Vic. c. 51, s. 1, appears to be an Act for the levy of Grand Jury cess, but leaves the matter where it was before. It is said that the effect of the 2 & 3 Vic. c. 78, is inferentially to enact, that all the property of the Crown is made liable, not to the police tax, about which the Act is conversant, but for the Grand Jury cess; but there is no express enactment in this Act to that effect. Even suppose it was bound to say that the Crown was liable under this Act for the police tax, what is there to shew the Crown was bound to pay the preceding Grand Jury cess? That argument does not even amount to implication.

Mr. Napier, Q. C., in reply.—The whole question turns upon the construction of the three acts, the 2 & 3 Vic. c. 78, 47 Geo. 3, c. 109, and the 54 Geo. 3 c. 221. I admit, the Post-office is a public building, but there is a great difference between the public buildings and a palace for the residence of the Crown. Under the 5 Geo. 4, c. 118, the policy was to make the police assessment and grand jury

cess commensurate. There is no reason why public buildings should be exempted. I admit, the latter could not be distrained. 1 & 2 Vic. c. 25, s. 5, give a power to appeal. Whatever was the arrangement under the Police Act, that was to regulate the Grand Jury cess.

Cur. suit ad.

May 30th. BLACKBURNE, C.J., now delivers judgment.—It appears to have been admitted, the course of the argument in this case, and not seem to be the fair result of the authorities, that the Post-office, being a property in the hands of the Crown, cannot be liable to a tax or rate, unless by some plain and specific enactment of the Legislature. The plaintiff in error has contended that the Acts of Parliament to which he alluded amounted to such an enactment; and the proposition which he relied on was, that the Post-office was liable to be rated for the support of the police of the metropolis of Dublin, and that all property so rated was liable to the payment of Grand Jury cess. In support of this proposition, he relied, in the first instance, to the 1 Vic. c. 25, which provides for the support of the police, and rates all houses, lands, and tenements included in the general valuation of the city under the Geo. 4, c. 118. The assessment under this Act was to specify the names of the several owners or occupiers of the premises assessed, and it has been contended by him that this Act authorized the rating of the property of the Crown. The matter referred to relates to the levy of Grand Jury cess. It is the 1 & 2 Vic. c. 51: and this Act, after citing the 5 Geo. 4, c. 118, and the 1 Vic. c. 25, which have been already referred to, provides that the Grand Jury cess shall be chargeable on the like tenements, and payable by the like persons, and recoverable in the same manner as the police tax, under the provisions of the said recited Acts. These provisions merely extended to the assessment and recovery of the Grand Jury cess, the provisions and powers relating to the police tax. So far, there was no pretext for saying that the property of the Crown was made liable for the cess, but the plaintiff has contended that the 2 & 3 Vic. c. 78, s. 10, made it liable to the police tax, as a consequence, to the Grand Jury cess. We are, however, of opinion, that it has not been made liable to the police tax by the above sections: we think the Post-office is not a public building within the meaning, and liable to be rated for purposes of the 47 Geo. 3, c. 109, and 54 Geo. 3 c. 221; and that even if it were, it would be liable to the police tax alone, and could not be made liable, by construction or inference, to any other tax, without a violation of the established rule of construction. Though my brother Perrin dissenting in this judgment, he has directed me to say that he has some difficulty in assenting to the opinion of the rest of the Court, and the ground of that difficulty is, that this is not Crown property for the immediate use and purposes of the Crown, in the sense which ought to exempt it from the imposition of taxes, which enure to the benefit and accommodation of the property itself.

Judgment affirmed.

S. v. BELFAST AND BALLYMENA RAILWAY COMPANY.*—April 25.

mus—Companies Clauses, (8 & 9 Vic. c. 18) Lands Clauses (8 & 9 Vic. c. 20)—Accommodation works—Right of owner to compensation for consequential injury.

the prosecutor was possessed of a piece of land on the sea-shore, on which he erected a dwelling house for the purpose, among others, of fishing, of which enjoyment he was deprived, in consequence of a railway embankment raised between the dwelling-house and the sea.

y a majority of the judges, that a man is lay against the Company under the provisions of the 68th section of the 8 & 9 Vic. c. 20, Lands Clauses Consolidation Act), and that is not a subject for compensation under the provisions of the 94th sec. of the 8 & 9 Vic. c. 18, Lands Clauses Consolidation Act.)

as error from the judgment of the Court en's Bench, on a demurrer to the return to a mandamus issued at the suit of the plaintiff against the Company, to compel them to do certain accommodation works which the defendant contended they were bound to perform, in conformity to the provisions of the Lands Clauses Consolidation Acts. The error was brought into Court under the provisions of 9 & 10 Vic. c. 118.

writ of mandamus stated, that whereas, by an Act of Parliament made and passed in the 8th of Parliament held in the 8th and 9th years of our reign, intituled an Act for making a railway from Belfast to Ballymena, in the county of Antrim, with branches to Carrickfergus and Randals (and hereinafter, for the sake of distinction, referred to as the special Act,) it was amongst other things enacted, that the several Acts of Parliament relating to the Railways Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, should be incorporated with, and form part of the special Act now in force. And whereas, by a certain other Act made and passed in the session of Parliament held in the 8th of our reign, (being the Railways Clauses Consolidation Act, 1845, above referred to,) it was amongst other things enacted, that the same should apply to every railway which should by Act of Parliament be authorized to be constructed, and that the Act now in force should be incorporated with such special Act, and all the provisions of the Act now in force should so far as they should be expressly varied or excepted by such special Act, should apply to every undertaking authorized thereby, so far as the same should be applicable to such undertaking, and should form part of such special Act, and be construed together therewith, as forming one Act. And whereas, by the 68th section of the said

Railways clauses consolidation act, 1845, which is incorporated with and forms part of the said special act, and which same section is not, by the said special act, varied or excepted, it is (amongst other things) enacted, that the company shall make and, at all times thereafter, maintain the following works for the accommodation of the owners and occupiers of land adjoining the railway, that is to say: such and so many convenient gates, bridges, arches, culverts and passages, over, under, or by the sides of, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway, to the use of the lands through which the railway should be made, and such works shall be made forthwith after the part of the railway passing over such lands, shall have been laid out, or formed or during the formation thereof; also, all necessary arches, tunnels, culverts, drains, or other passages, either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands, lying near or affected by the railway, as before the making of the railway, or as nearly so as may be, and such works shall be made from time to time, as the railway works proceed. That the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works, with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation instead of the making them. And whereas we have been informed in our court here, by James O'Neill Falls, of Greencastle, in the county of Antrim, attorney at law, that he is in the occupation of a piece or parcel of ground, adjoining the said railway, lying within the sea-mark, and adjoining on the west on the road leading from Carrickfergus aforesaid, and on the east adjoining Belfast Lough, and situate in the townland of Greencastle, otherwise Cloughcastle in the county of Antrim; and also that the said James O'Neill Falls is in the occupation of another piece or plot of ground, strand, or slob, adjoining the said railway on the east side of the road leading from Belfast to Carrickfergus, next adjoining on the north thereof the property of the said James O'Neill Falls, and running back to low water-mark in the Belfast Lough; and is also in the occupation of another piece or plot of ground, strand, or slob adjoining the said railway, on the east side of the said road leading from Belfast to Carrickfergus aforesaid, next adjoining on the south thereof, the property of the said James O'Neill Falls, and running backwards to low water-mark in the Belfast Lough, and in the townland of Greencastle, and county of Antrim. That within the last ten years he erected a dwelling house, offices, and other improvements on the said pieces, or parcels of land, and expended thereon from £1500 to £2000, and that his principal inducement in expending such money was the situation of said property so contiguous to the sea, affording facilities to the said James O'Neill Falls, and the members of his family, to enjoy sea-bathing, fishing, and boating; and further, that there is a

nam Blackburne, C. J., Pigot, C. B., Pennefather, J., Crampton, J., Perrin, J., Richards, B., Lefroy, B., Jackson, J., Moore, J.

small rivulet running at the south side of his premises, from which a gut has been formed by the said rivulet and the sea ebbing and flowing thereto, and through which almost at all times of the tide before the erection of the embankment hereinafter mentioned, a boat could have passed to and from the sea, close up to the lawn at the rear of the said James O'Neill Falls's premises; and further, that the said rights of sea-bathing, boating, and fishing have been constantly exercised by the occupiers of the said premises for the last 50 years, and have been continually exercised by the family and servants of the said James O'Neill Falls, from the period of his becoming possessed of the said premises, up to the period of the erection of the embankment by you hereinafter mentioned, upon and through the said lands in the occupation of the said James O'Neill Falls. That you have raised an embankment upon a portion of the lands in his occupation, and that by reason of the erection of the said embankment, the said James O'Neill Falls, and his family and servants, are now completely excluded from access to the sea, and that the said embankment is about 20 feet high from low water mark. That you the Belfast and Ballymena Railway Company, have, by the raising of the said embankment for the purposes of the said railway, caused great interruption to the use of the lands in his occupation through which the said railway has been made. That on the 29th day of September last, he caused a notice in writing to be served on your Secretary, specifying the accommodation works required by the said James O'Neill Falls to be made by you, in consequence of the interruption to the use of the said lands caused by the said embankment; and that he caused to be annexed to the said notice, and to be served at the same time, a plan of the said accommodation works which he so required. That the accommodation works so required by him are necessary for the purpose of making good the interruption caused by the said railway to the use of the lands in his occupation, through which the said railway has been made, and that accommodation works can be made in such a manner as will not prevent or obstruct the working or using of the said railway; and further, that the said required accommodation works are not works with respect to which the said James O'Neill Falls has agreed to receive, or has been paid compensation instead of the making of the said works. That you, the said Belfast and Ballymena Railway Company, in reply to the demand for such accommodation works by the said James O'Neill Falls, declined, and positively refused to make any accommodation works whatever.

The return of the Company stated, that on or about the 13th day of March, 1846, and long previous to the issuing of the said writ of mandamus, a notice bearing date the 13th day of December, 1845, was served on the said James O'Neill Falls, by and on behalf of us, the said Company, and in said notice we, the said Company, stated the particulars of the lands required by us, the said Company, to be purchased from the said James O'Neill Falls, and by said notice he was informed that we, the said Company, were willing to treat and agree with him for the purchase of the pieces or portions

of land, and premises, and of his estate or interest therein, which were required for the purposes of the said company, and which are parcel of the premises in the said writ of mandamus mentioned, and parcel of the premises which the said railway company were authorised to purchase by virtue of said statutes, in said writ of mandamus mentioned; and also to treat and agree with him as to the compensation to be made for any damage or injury that might be sustained by him by reason of the execution of the works, which by the said acts of parliament, in the said writ referred to, or some of them, we, the said company, were authorised to execute. And by said notice the particulars of the estate and interest of the said James O'Neill Falls in said lands, and of the claims made by him in respect thereof, were demanded from him. And the said James O'Neill Falls was, by said notice, further informed that if, within 21 days from the service thereof, he neglected or refused to treat, or should not agree with us the said company, that then we, the said company, would proceed as by law we were entitled. That James O'Neill Falls having failed to state the particulars of his claim in respect of said lands, or to treat with us the said company in respect thereof. And the said James O'Neill Falls and the said company not agreeing as to the amount of the compensation to be paid by us the said company to the said James O'Neill Falls for the interest in said lands belonging to him or which he was by this or the special act enabled to sell or for any damage that might be sustained by him by reason of the execution of our said works for twenty-one days after the service of said notice. We, the said company, more than twenty-one days after the service of said last-mentioned notice, to wit, the 27th day of December, 1847, caused another notice to be served upon the said James O'Neill Falls by and on behalf of us the said company offering him the sum of £85 for the interest which he was able to sell in the said lands, slob or strand, and as a compensation for all damages to be sustained by him by the execution of our said works, and said last-mentioned notice further stated that if within ten days after the service of the same he did not accept the said offer, we, the said company would, at the expiration of that time, issue our warrant and cause a jury to be summoned to inquire into and assess the sum or sums of money to be paid for the purchase of the said land, slob or strand required for the said works, and the sum to be paid by way of compensation for all damages to be sustained by him by reason of the execution of the same.

That by the 94th section of the Lands Clauses Consolidation Act, 1845, it is provided as to interested lands that if any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge culvert or such other communication between the lands so divided as the promoters of the undertaking are, under the provisions of this or the special act or any act incorporated therewith, compellable to make, and if the owner of such lands have not other lands adjoining such piece of land and require the promoters of the undertaking to make such communication, then the promoters of

ertaking may require such owner to sell to each piece of land, and any dispute as to the of such piece of land or as to what would be ease of making such communication shall be ned as therein provided for cases of disputed sation, and on the occasion of ascertaining ie of the land required to be taken for the s of the works, the jury or arbitrators, as : may be, shall, if required by either party, n by their verdict or award the value of any ivered piece of land, and also what would expense of making such communication. ie part of the land of said James O'Neill ived by the said embankment as in said intioned, and which part lies between said ment and the sea, or Lough of Belfast, was of much less value than the expense of mak- ridge, culvert, or other communication be- the land so divided as the promoters of the ertaking are compellable to make by virtue statutes in such case made and provided, or f them, and the said James O'Neill Falls other lands adjoining said piece of land, ed and divided as aforesaid, and lying be- said embankment and the sea or Lough of ; and the said James O'Neill Falls having d the promoters of the said undertaking to uch communication, we, the said company uch promoters by means of the premises r force of the statutes in such case made and ed, became entitled to require the said James ll Falls to sell to us, the said company, the iece of land lying between the embankment d railway and the sea or lough of Belfast, and ed by said embankment from the other of said James O'Neill Falls; and thereupon e said company, did cause another notice to ved on said James O'Neill Falls, bearing be 22nd day of November, 1847, and which uly served on the said James O'Neill Falls, : 25th day of November, 1847, and we, the ompany, by said last mentioned notice did e the said James O'Neill Falls to treat with e said company, for the purchase of the said slob, or ground, covered with water at ordin- les, and lying between the said embankment said railway and the sea or lough of Belfast. he said James O'Neill Falls again for more 21 days failing to treat with us, we, the said ay, by another notice, bearing date on or the 27th day of December, 1847, and served : said James O'Neill Falls on the 27th day cember, 1847, offered the said James O'Neill the sum of £5 for the interest which he was o sell, and that we were willing to purchase e said land, slob, or ground of said James ill Falls, lying between said embankment and a or lough of Belfast, and as compensation l damages to be sustained by the execution of id works; and said notice further informed id James O'Neill Falls, that if within ten days the service thereof, the said offer was not ed, we the said company would, at the expi- of said last mentioned term, issue our war- to the sheriff to cause a jury to be summoned quire into and assess the sums of money to be for the purchase of the said land, slob, or

ground, covered with water at ordinary tides, and lying between the embankment of said railway and the sea or lough of Belfast, and also the sum to be paid by way of compensation for all damages to be sustained by him by reason of the execution of the said works. That James O'Neill Falls still disre- garded said notice, and not having given any answer thereto, we, the said company, in pursuance of the provisions contained in the said Lands Clauses Consolidation Act, 1845, and more than 10 days after the service of said last-mentioned notice—that is to say, on the 1st day of March, in the year of our Lord, 1848, did by our warrant under our common seal, issued to the sheriff of the county of Antrim, require him to summon a jury, in compliance with the directions of the said last-mentioned Act, to ascertain and determine the sum or sums of money to be paid by us, the said company, for the purchase of the estate and in- terest of the said James O'Neill Falls, of, in, and to the respective pieces or parcels of land referred to in the said notice of 13th December, 1845, and 22nd day of November, 1847, and also the sum or sums of money to be paid by us for the damage, if any, to be sustained by the said James O'Neill Falls in respect of the purchase thereof, and also to ascertain by their verdict the value of said slob referred to in the said notice of the 27th day of December, 1847, and also to ascertain by their verdict what would be the expense of making a communication by an arch under said railway, or such other communication as we, the said Com- pany, were by law required to make between the said slob ground and the other lands of the said James O'Neill Falls, from which same was severed by the said railway embankment. That in pursuance of the several Acts before referred to, we, on the 4th day of March, 1848, being more than 10 days before the time appointed by said sheriff for holding said inquiry, served a notice, bearing date the 4th day of March, 1848, on the said James O'Neill Falls, informing him that the sheriff of the county of An- trim, in obedience to said warrant, had appointed that he would, at 11 o'clock in the forenoon, on Thursday, the 16th day of March then instant, at the Court-house in Howard-street, in the town of Belfast, in the said county of Antrim, empanel a jury, pursuant to the statutory provisions in that behalf, to inquire of, and assess, and give a verdict for the sum or sums of money to be paid by us, the said Company, for the purchase of the parcels of land required for part of our said works, by the said acts authorized, and also the sum or sums of money to be paid by way of compensation for damages by reason of the execution of the works of the said undertaking, and to ascertain by their verdict the value of the slob ground outside the embankment of the said railway, in the said notice to treat of the 22nd of November, 1847, served on said James O'Neill Falls mentioned, and to ascer- tain by their verdict what would be the expense of making a communication by an arch under said railway, such as we, the said company, were by law required to make between the said slob ground and the other lands of the said James O'Neill Falls, from which same was severed by said rail- way embankment; and said notice required the

said James O'Neill Falls to attend at the time and place therein and hereinbefore mentioned, otherwise the said inquiry should not be proceeded with, but the compensation to be paid would be ascertained according to the enactments in that behalf. The return then stated the summoning of the jury in pursuance of the statute. The default of Mr. Falls at that inquiry, that then in pursuance of the Lands Consolidation Act nominated two justices of the peace, who nominated a surveyor to determine by his valuation the purchase or valuated money to be paid by us, the said company, to the said James O'Neill Falls, for, or in respect of the purchase by us of the said pieces or parcels of ground, hereditaments and premises, and the appurtenances thereunto respectively belonging, and also the sum or sums of money to be paid by us for the damage, if any, to be sustained by the said James O'Neill Falls, in respect of the purchase of the said pieces or parcels of land and other premises, or otherwise injuriously affecting the said James O'Neill Falls, by the exercise of the powers of the said act of parliament referred to, and to ascertain the value of the piece of ground of the said James O'Neill Falls, severed from the other lands of the said James O'Neill Falls, by the said embankment of said railway, and lying between said railway and the sea or Lough of Belfast; and also what would be the expense of making a communication by an arch under the said railway, such as the said company are by law required to make between the said last mentioned slob, ground, and other lands of the said James O'Neill Falls, from which same was severed by the said railway embankment. It then stated the declaration of the surveyor to discharge his duty faithfully. That after having viewed and inspected said premises, did declare, that having inspected and valued the said pieces or parcels of land, slob, or strand, lying opposite to, or being part of the townland of Greencastle in said nomination mentioned; and also the slob ground covered with water at ordinary tides, and lying between the embankment of the said railway, and the sea or Lough of Belfast, and which was severed by said embankment of said railway, from the other lands or slob of said James O'Neill Falls in said nomination also mentioned, and having ascertained the damage which had been done and would be sustained by the said James O'Neill Falls in respect of the purchase of the said pieces or parcels of land and other premises or otherwise injuriously affecting the said James O'Neill Falls in said nomination, and said writ also mentioned, and also having considered what would be the expense of making a communication by an arch under said railway, such as we the said company were by law required to make between the said slob ground and the other lands of the said James O'Neill Falls, from which the same was severed by the said railway embankment, did, by that, his valuation in writing, determine that the sum of £1 and no more, was the value and should be paid by us the said company, for or in respect of the purchase by us of the said piece or parcel of ground, hereditaments and premises, being the premises occupied by said railway and the embankment thereof, with the appurtenances thereto belonging, for the residue of

the term of 61 years, being the interest therein of the said James O'Neill Falls, and that the sum of £49, and no more, was the compensation money, and should be paid by us for the damages sustained or thereafter to be sustained by the said J. O'Neill Falls in respect of the purchase of the said piece or parcels of land and other premises, or otherwise injuriously affecting the said James O'Neill Falls by the exercise of the powers of the Lands Clauses Consolidation act, 1845, or the Belfast and Rathfriland Railway act, 1845, or any act incorporated therewith, and in lieu of all crossings, communication with the sea, or accommodation works, that £5 and no more, was the value of the slob ground of the said James O'Neill Falls covered with water at ordinary tides, and lying between the said embankment of said railway, and the sea or Lough of Belfast, and which was severed by said embankment, from the other lands of the said James O'Neill Falls. And that the sum of £1 would be the expense of making a communication by an arch under the said railway, such as we the said company were by law required to make between the said slob ground, and the other lands of the said James O'Neill Falls, from which same were severed by the said railway embankment, of the 3 first mentioned several sums of money making the whole the sum of £55. That on the 21st of April the company tendered, and on the 21st of April lodged in Bank of Ireland with the privy of the accountant-general, and to the credit of the said James O'Neill Falls, the sum of £55, and executed a deed, that before the taking of any of the proceedings hereinbefore mentioned, the whole of the capital or estimated sums for defraying the expenses of the said undertaking of us the said company, had been subscribed under contract binding the parties thereto, their heirs, executors, and administrators for the payment of the sums by them subscribed. That to make the works required by the said James O'Neill Falls, would greatly obstruct the working or using of the said railway for the period of two months at the least, and for these reasons and causes, we, the said company, ought not to be required to make or cause to be made such arch, tunnel, or passage, under the said railway, as is said writ of mandamus mentioned.

Demurrer. The points noted to be argued were—That the return is insufficient by reason of its omitting to negative the exceptions contained in the Lands Clauses Consolidation Act 1845, with respect to the power of the company to purchase intersected pieces of land, and also by reason of the omission in the return of the several averments mentioned in the said demurrer, and the promoter will also contend that the return is insufficient for not shewing any legal authority in the company to serve the several notices relied upon in the said return, and also that the service of such notices, even if legally effected, does not constitute in law any sufficient answer to the demand of the prosecutor for accommodation works as specified in the said writ.

And further, that the said company having, by their said return, admitted a permanent obstruction of the prosecutor's right of access to the sea on the shore thereof, have not shewn any sufficient

ation for such obstruction, or any sufficient for their refusal to comply with the provisions of the Railway Clauses Consolidation Act, with respect to the making of the accommodation works.

arguments in this case are so fully treated by the judgment of the court, it is not necessary to repeat them.

A. Vance, with Mr. Tombe, Q.C., and Mr. O'Hagan, Q.C., for plaintiff in error.

Falloon, with Mr. Gilmore, Q.C., and Mr. J. Q.C., for the defendant.

following sections and cases were cited and stated upon:—6th, 16th, 68th, & 69th sections of the Railway Clauses Consolidation Act, 8 & 9 Vic. c. 18 (the Lands Clauses Consolidation Act), and then state, that the part of the land cut off by the railway embankment, was of less value than the expense of making a communication between the lands so divided; and that they served a notice on the prosecutor, requiring him to treat for the purchase of the said land; that upon his disregarding their notice, they had the lands valued, and lodged in bank, to the credit of the prosecutor, the amount of the valuation. I think it must be admitted, that if the injuries, of which the prosecutor complains, are properly the subject of pecuniary compensation, within the meanings of the Lands Clauses Consolidation act, the return is good; but if, on the other hand, this proposition cannot be established, the return is bad. If we look to what was the policy of the legislature, when passing these railway acts, we will find, that it was intended that private individuals should not suffer any injury from railways. There are a large class of injuries, which are made the subject of compensation; but there are some which are not. It appears to me, that loss of access to the sea, for the purpose of fishing, bathing and boating, is not, properly, the subject of compensation; to one, these things may be valuable, and not to another. I now proceed to examine the enactments of these statutes. [His Lordship here referred to the 68th section of the Railway Clauses Company's act, upon the true construction of which, he said he felt some difficulty; he also referred to sections 21, 22, 23, 39, 47, 48, 49, of the Lands Clauses Consolidation Act, and proceeded.] Sec. 49 of this latter act, gives compensation for the damage sustained by the severance of the lands, or otherwise injuriously affecting such lands, confining the compensation to the damage done to the land, as land. This shews what the Legislature meant by the words "disputed compensation" in the 39th sec. of this act. The injury complained of by the prosecutor, does not come within the 49th sec: the injury is not an injury to the land, or a cutting off a piece of his land; it is for the non-access to the sea; it is on account of the embankment which cuts him off from the sea, it is because he has lost that which he cannot enjoy unless he has access to the sea. The 49th section was not framed to include the case of personal inquiries, which are independent of land. Sec. 54 of this Act gives a special jury at the request of either party, and sec. 56 provides "that any other inquiry than that for the trial of which such special jury may have been struck, may be tried by such jury." That very clause was enacted to enable the special jury to inquire what would be compen-

son, J.—This is a writ of error brought to reverse the judgment of the Court of Queen's Bench. Damus issued against the company, at the instance of Mr. Falls; to that there was a return by the company, and the Queen's Bench overruled the decision to that return. I cannot but feel that this question of considerable importance, calculated to affect the interests of railway companies, and of fishermen and occupiers of land through which railways may run. It is also a question of much public interest, and I am willing to confess my opinion is not a good deal. I have, however, come to the conclusion, that the judgment of the Court of Queen's Bench ought to be reversed. The question depends upon the construction of two acts of Parliament, the Lands Clauses Consolidation act, and the Railway Clauses Consolidation act. It is impossible to look at those acts of parliament as independent statutes; it is manifest on the face of them, that they are incorporated; and reading them together, we have to consider whether the injuries, of which the prosecutor complains, are properly the subject of pecuniary compensation under the Lands Clauses Consolidation Act, or whether he is entitled to have accommodation works executed for him under the Railway Clauses Consolidation Act. Let us first see what is the complaint made by the prosecutor; he states that he lately purchased a dwelling-house at considerable expense, on a piece of land, and that his chief inducement in so doing was, that he might enjoy the sea, which he had long enjoyed by the occupiers of the premises for fifty years. He then states that the company raised an embankment upon a portion of the lands in his occupation, twenty feet high, which completely excluded him from all access to the sea. The words, "use of the lands," in the Lands Clauses Consolidation Act, have been the subject of some criticism, but I think the fair meaning of those words is, the enjoyment of the lands; this is plain from the context. What he complains of is, that by reason of the severance of his lands, he is cut off from his communication with the sea—that is the grievance

for which he seeks redress; and what he requires is, that he may have the use of his lands, so as to get access to the sea. The prosecutor then states, that he served a notice on the company, specifying the accommodation works which he required to be made; and then the mandatory part of the writ is that the company shall make such works as shall be necessary for the purpose of making good the interruption caused by the railway to the use of the said lands—which I consider to mean the enjoyment of the premises. That is the scope of the writ; and the company in their return make this case:—They set forth the 94th sec. of the 8 & 9 Vict. c. 18 (the Lands Clauses Consolidation Act), and then state, that the part of the land cut off by the railway embankment, was of less value than the expense of making a communication between the lands so divided; and that they served a notice on the prosecutor, requiring him to treat for the purchase of the said land; that upon his disregarding their notice, they had the lands valued, and lodged in bank, to the credit of the prosecutor, the amount of the valuation. I think it must be admitted, that if the injuries, of which the prosecutor complains, are properly the subject of pecuniary compensation, within the meanings of the Lands Clauses Consolidation act, the return is good; but if, on the other hand, this proposition cannot be established, the return is bad. If we look to what was the policy of the legislature, when passing these railway acts, we will find, that it was intended that private individuals should not suffer any injury from railways. There are a large class of injuries, which are made the subject of compensation; but there are some which are not. It appears to me, that loss of access to the sea, for the purpose of fishing, bathing and boating, is not, properly, the subject of compensation; to one, these things may be valuable, and not to another. I now proceed to examine the enactments of these statutes. [His Lordship here referred to the 68th section of the Railway Clauses Company's act, upon the true construction of which, he said he felt some difficulty; he also referred to sections 21, 22, 23, 39, 47, 48, 49, of the Lands Clauses Consolidation Act, and proceeded.] Sec. 49 of this latter act, gives compensation for the damage sustained by the severance of the lands, or otherwise injuriously affecting such lands, confining the compensation to the damage done to the land, as land. This shews what the Legislature meant by the words "disputed compensation" in the 39th sec. of this act. The injury complained of by the prosecutor, does not come within the 49th sec: the injury is not an injury to the land, or a cutting off a piece of his land; it is for the non-access to the sea; it is on account of the embankment which cuts him off from the sea, it is because he has lost that which he cannot enjoy unless he has access to the sea. The 49th section was not framed to include the case of personal inquiries, which are independent of land. Sec. 54 of this Act gives a special jury at the request of either party, and sec. 56 provides "that any other inquiry than that for the trial of which such special jury may have been struck, may be tried by such jury." That very clause was enacted to enable the special jury to inquire what would be compen-

sation for an injury such as is here complained of. The loss of fishing, bathing, and boating is not an injury to the land. Ss. 69 and 72 of this act are confined altogether to injury to land; s. 78 is a remarkable one; it applies, however, only to cases where the amount is ascertained by agreement. The 93 s. has no reference to the present case. The return is grounded on the 94 s. The Company say they have severed a piece of land from the rest, and that that piece of land, so severed, is of less value than the expense of making a communication between the lands so divided, and that they purchased that piece of land. If the accommodation works were required only to connect the piece of land which has been so severed, I think they are right; but, in my opinion, the 94th sec. does not apply to a case where a party complains of an injury unconnected with land. The question is, had the Company the power to apply the machinery of those acts to a case like the present. It is clear, the Legislature had in contemplation, when penning these enactments, such injuries as the prosecutor here complains of. If the 94th sec. were to receive the construction contended for by the Company, this absurdity would follow, that if there was a small part of the lands cut off, the Company could avoid making the accommodation works, by purchasing that piece of land; whereas, if the railway went along the margin of the sea, they would then be obliged to execute the works. The case put by my brother Moore, in the court below, of a person being deprived of a power to draw manure, does not apply, for that, being an injury to the land, admits of compensation. The prosecutor relies on the 68th section of the Railway Clauses Consolidation Act, and that section is compulsory on the Company; it is *for making good any interruption*; and it has only two exceptions,—one where the party has agreed to take compensation; the other, where the works would prevent or obstruct the working of the railway. There should be another proviso in this section, if the Company be right, to the effect, that where a party had received compensation by a verdict of the jury, the Company should not be required to make the accommodation works. Sec. 16 is material in this respect, for it shews the anxiety of the legislature to give compensation to private individuals. No contract was made by the prosecutor for any compensation, and I am not aware of any clause in the Lands Clauses Consolidation Act, enabling the Company to give pecuniary compensation for the loss of such easements as bathing and boating. The next objection applies to the return, and is, that the return does not aver that this was not ground built upon within the meaning of the 93rd section of the Land Clauses Consolidation Act; but, in my opinion, the words *such land* in the 94th section do not apply to land in a town, or land built upon, but to the intersected lands. For these reasons, I am of opinion that the demurrer ought to be allowed.

LEFROY, B.—We have to consider whether the judgment of the Court of Queen's Bench is right. The effect of that judgment was to refuse to the prosecutor works of accommodation which he sought. It is material to see what he sought, and what he did not seek. He states generally that he

and his family had occupied these lands for a considerable time, and had enjoyed bathing in the sea; he does not rest there, for if he did, the mandamus must be refused; but he goes on to say, that the railway ran through his lands, and that in consequence he and his family were excluded from access to the sea. If he had rested his case on this, that, having lands near the sea, a railway was interposed between him and the sea, he would be without a remedy; for there is not anything in these Acts of Parliament which gives to her Majesty's subjects a right of access to the sea, if they should happen to have lands along the sea-side, and a railway was to be run between them and the sea. There are no such provisions, but there is this provision, that if a railway runs through a piece of land, and so intersects it as to occasion an injury, the owner has a right to have that injury removed, and a tunnel or passage made which would enable him to go from one side of the land to the other. If a party's own land goes down to the sea, the simple and only right he has is to obtain from the Company a culvert or passage which would enable him to go from one part of the land to the other. This is the very right claimed. The prosecutor says that his land is intersected, and his access to the sea cut off, and he requires that the Company shall make such works as will enable him to go from one part of his land to the other. Virtually it comes to this, has he a right to the culvert? If he has not, he will be shut out from the sea. It would be a strange interpretation of the meaning of the 68th section, to say, that in providing works of accommodation to relieve a party from any interruption to the use of his land, that section contemplated that he was to have relief from being shut out from the use of the sea. That would be a strange interpretation of these words, "the use of the lands," to mean "the use of the sea." *Prima facie*, he has a right, by the 68th section, to the use of the land, but not to have a communication to the sea; he may have it as incidental to the land, but the injury is not his being deprived of the sea. It is quite another question, whether that is a right to be compensated in damages; we are now considering whether he has a right to specific accommodation works under the 68th section. Supposing him now to have a right to accommodation works, to enable him to go from one part of the land to another, if his right to relief be founded on intersection, the basis of his right is intersection; there is no other injury but intersection. If it is in virtue of the intersection of his land, that he is to get specific works, must he not be bound by every provision in the act that gives him the right. The case made by the mandamus is for intersected land, the claim is for intersected land, to make a culvert, because the railway has intersected the land, and have not the company a right to say, the value of the land is less than the price of the culvert you require us to make. If the company have not this right, the words must be expunged from the act of Parliament. The company called on him to sell that piece of land, and upon his refusing to do so, they had it valued, pursuant to the terms of the act of Parliament. The 49th sec. of the 8 & 9 Vic. c. 18, prescribes the mode of

ing the premises, whenever there is a dispute the amount of compensation to be paid for damage sustained by the owner of the land, by reason of the severing of the lands taken from the lands of such owner, "or otherwise injuriously using such lands." He is entitled to have damages if the lands left in his possession are injured. I say, however, that he will also be deprived of access to the sea; but if the company are entitled to purchase these lands, and are obliged to make compensation for the incidental injuries, is it to be said they must also make him a culvert—that they give him a right of access to the sea. I cannot think the legislature intended any thing of the kind, though the railway might run along the whole of the portions of land which are less than half an acre, and are subject to this enactment; and the legislature has given the company this right. The case before us is one of intersection, the prosecutor asserted his right on this basis, and where, I ask, is the provision that gives a right of access to the sea, *jure sea*. You cannot have the relief, which is only for securing the communication from one piece of intersected land to another, for this absurdity would follow, that the man who had paid you for the land, should give you a culvert through their own land down to the sea. You do not ask for a culvert to give you a communication with the land, but with the sea. Can that be done, this being a case of intersection? The company say we will take this piece of land from you, and give you compensation for it. In my argument I have assumed that the act of the legislature is confined to cases of intersection. The effect of the 8 & 9 Vic. c. 20, is wholly conversant with "lands" intersected by the railway, and has no reference to a party being shut out from the sea? I have endeavoured to explain why I hold that the prosecutor's contention below is right, and that the prosecutor is entitled to the relief which he seeks. The answer to him by the company is this, we meet you on the ground put forward in your writ; you ask for accommodation works, and we say it would be convenient to us to comply with your request.

LL. J.—I am of opinion that the prosecutor sought his case within the 68th section of the 8 & 9 Vic. c. 20; this is an enactment completely applying to all cases, save where the party has been shut out from the sea, and where the making of accommodation works would obstruct the running of the railway; on the part of the Company, however, it is contended that a third exception should be grafted into this section, which would have the effect of releasing them from the necessity of making accommodation works which the prosecutor requires. They say the value of the piece of land cut off is trifling, and they insist upon purchasing it, by exercise of the powers conferred on them by the 94th section of the 8 & 9 Vic. c. 18, but, in my judgment, the argument on behalf of the prosecutor is right, and it is said that this case is not within the 94th section. That section does not contemplate any more than that the prosecutor should get the value of the severed piece of land, and it cannot be said from it that he was to get compensation for the description of damage or loss, including the

loss or damage by reason of being cut off from the sea. The true meaning of the section I take it to be that the severed piece of land was the only thing for which he was to get compensation, and the real question for consideration is, whether this is a case in which the Company can insist upon purchasing the piece of land, or in which the prosecutor is entitled to have accommodation works made for him. In my judgment the prosecutor is so entitled, and the Company are not at liberty to say they will purchase this piece of land, but are bound to build accommodation works under the 68th section. The piece of land or slob in question remains still in the hands of the prosecutor, there has been no conveyance of it to the company, and they could have therefore acquired no title to it under the 94th section. Cases might be put where the most palpable injustice would arise if the company had such a power. The case of a mansion house cut off from the high road has been put forward by the counsel for the prosecutor, and it is stated in the judgment of the Queen's Bench that such a case does not admit of compensation, because the access to the high road is essential to the enjoyment of the mansion house; the owner, however, might have a limited enjoyment of the house without going to the high road. If a certain amount of inconvenience was to regulate whether a case was to be kept out of the operation of the 94th section the inquiry would be as to the degree of inconvenience, and the difficulty would be to know where to draw the line; suppose the case of a merchant debarred from landing his goods so as to have them conveyed to his stores, is that a case in which a person so circumstanced is bound to take compensation, and to seek a place elsewhere to land his goods? is that a case in which the Legislature intended that a person so circumstanced should take money? Suppose the case of a wharf or quay, or take the present case; it is stated in the mandamus and not traversed that the principal inducement the prosecutor had to expend his money was that he and his family might enjoy sea-bathing, fishing and boating; is not that essential to the enjoyment of his property? The construction which I put on the 94th section is, that where a party requires nothing more than mere access from one part of his land to another that shall be a case for compensation, but where the owner requires access to the severed piece of land, not for its own sake, but as a means to an end, that is not a case in which he shall be obliged to take compensation. It is plain for all other purposes section 94 has an application, that is, in all cases where mere access is required. But it is not only a constrained, but an unjust construction to insist upon the prosecutor's taking pecuniary compensation, when no amount of it would satisfy his purpose. Does he then come literally within the 94th section? The modes of proceeding, previously provided, are four. It is the fourth we are to deal with—namely, the power of adjudication by the surveyor. When the section points to the jurisdiction, it limits the proceedings, and confines it to two out of the four; being entirely silent as to the authority of the surveyor, the person who has been acting here. If this case come literally, or at all, within the 94th section—if, in

fact, the act of the surveyor is without authority, this would take the case out of the 68th section. It is said that the interruption here complained of, is not to the land, but to the use of the sea; that the right is in some degree personal, and not appertaining to the land. The mandamus states in terms, that the company by their embankment, excluded the prosecutor from access to the sea, and that the effect of it was to interrupt him in the use of his lands. So far as regards the term, use of the lands, by the acquiescence of the company in the statement, the prosecutor can put his own construction on it. But have we not in the 74th section, a reference to the use of these terms? It is also said, that no specific relief is prayed in the writ; that it should have pointed out the particular works required. The case made by the mandamus is only, that he was deprived of the use of his lands; and for this reason, that the 68th section contains no specific directions. It stands admitted, that the company had the means of knowing what works were required, and it therefore was not necessary, nor would it be proper to specify them in the mandamus, *Rex v. Bristol Dock Co.* (6 B. & C. 181, S. C. 9 Dowl. & Ry.) Does no inconvenience arise from the company being at liberty to become the purchasers of the piece of land between the sea and the railway, and thereby cutting off all communication; so that if this railway were to extend along the coast, the company might have the public effectually stopped from communication with the sea. Taking into account the expenses, which it is now admitted the prosecutor has incurred; it is said he must be satisfied to take £49 for the loss he has sustained, and I do not find he has any mode of increasing the amount; he did not appear, and as far as I can see, the act of parliament leaves him without a remedy. This is a position, in which I do not think the legislature intended any man should be placed; and for these reasons I think the judgment of the court below should be reversed.

RICHARDS, B.—After the full consideration this case has already undergone, I shall not occupy the public time at any great length. The case of the prosecutor rests upon the 68th sec. of the 8 & 9 Vict. c. 20; and the company have proceeded under the 49th sec. of the 8 & 9 Vict. c. 18. The latter section cannot, in my judgment, be considered as superseding the provisions of the 68th section. We are to construe these acts of parliament consistently with each other, and, if we can, give a construction which will effectuate their several provisions. Wherever a communication is necessary, the company are bound to make accommodation works. There are only two exceptions to their liability, and these exceptions afford them ample protection. If, therefore, the only injury suffered by the prosecutor, was the injury to the land, the company would not be required to make accommodation works. It is a mistake to suppose that it was in respect to the piece of land cut off, the prosecutor required accommodation works. Whenever an occupier has lands *adjoining* the railway, I think a party would be entitled to accommodation works, though the railway did not go through his lands. If a party, by virtue of his land, had

a right of way over another man's land, through which the railway passes, he would have a right to accommodation works. The prosecutor alleges, that before the company ran the railway through his land, he had access to the sea. This he was entitled to, as an easement incident to the enjoyment of his land. His land extended to the sea, he had a common law right to fish and bathe there, and it was necessary for him to go through his land for those purposes. He used it before as a way to the sea; he cannot now do so, but his right still exists, unless the company have a right to deprive him of that they have no right to. The allegations in the return do not bring the company within the exceptions in the 68th section. The company can make the accommodation works, without obstructing or injuring the working of the railway. I am, therefore, of opinion, the judgment of the Court below ought to be reversed.

PERRIN, J.—The prosecutor complains of two interruptions; he says that he was in the occupation of premises adjoining the sea-shore, from which he had access to the sea, and that the company made an embankment which deprived him of that access. From the writ and from the return it appears that the embankment divides his lands. The mandamus proceeds to state, that the prosecutor called for accommodation works, and the return states—[His Lordship here stated the return, and proceeded]—The substance of these, taking them together, is, that the prosecutor complains of the interruption to the use of his land by the embankment, and the interruption of bathing, boating, and fishing, and insists upon a culvert to make good his loss. The company rely on the provisions of the Lands Clauses Consolidation Act, and say they have given full compensation under the 49th section of that Act. The mandamus and return are not as satisfactory as they might be, but the interruption complained of in the writ is, that the railway has so cut through the prosecutor's land, that he cannot proceed from one part of it to the other. The company answer this by saying that they have taken the course pointed out by the statute, and have become the purchasers of the piece of land cut off under the 94th section of the 8 & 9 Vic. c. 18. There is no repugnancy between the 94th section and the 68th section of the 8 & 9 Vic. c. 20. In ascertaining the value of that piece of land, the surveyor had a right to consider all the advantages and rights which attached to it. We must, therefore, take that finding as the value of that piece of land, and that the surveyor included all the easements and enjoyments which were attached to that piece of land. On the other hand, I do not think that the answer given by the company, in respect of that piece of land, is an answer to the rest of the complaint. I hold, that the accommodation works are not confined to lands intersected, but apply to all lands adjoining, and that the company were bound to answer that interruption. It appears to me that they have answered it. I doubt that this mandamus is warranted. I doubt whether an individual has a right to a mandamus for exclusive accommodation works. Sects. 70, 71, 72, and 73, were passed for arranging

these rights, and I do not think the Legislature contemplated works for each individual, but for the public. The meaning of the Act of Parliament was, that they were to be settled by the Justices; and I do not think that the mere interruption gave an absolute right to an individual to get accommodation works. I have felt a difficulty arising out of the terms of the writ; it does not specify the nature and character of the interruption, but commands the company to make such convenient culvert for the use of the lands, leaving it uncertain whether the want of boating, bathing, and fishing, or the use of the lands, is the grievance. This case differs from *Res v. Bristol Dock Co.*, because in that case it was a public company, and the mandamus went to perform a public work; whereas here it is to do an act for a private individual. What is the return to be? What is the interruption now to meet? Are the Justices to interfere, or is each person along the shore entitled to have a mandamus. The prosecutor neglected the notice that was served on him before the company took possession of the land; he was bound to state what damage he would sustain. It is said, this was not an injury to the lands; it is, however, as owner of the lands that he claims to have relief. The company acted under the provisions of the 49th and 68th sections; the surveyor was called on to value the land severed, and the compensation to be given for the damage sustained by the execution of the works, and the company were to be bound by the valuation; and, I think, where a party has neglected to treat, has neglected to put in any claim, has declined to attend the empanelling of a jury, has allowed the company to proceed in the alternative course of applying to two justices and the surveyor has determined the amount, that is conclusive, and that the party has not now a right to treat all these proceedings as a nullity, and to ask for a mandamus. Is it to be said that a party not satisfied with an award is to treat it as nothing. The Company are bound; and is the prosecutor to say, I want access to the sea, I am not bound by the proceedings. In my judgment these proceedings are to be so regarded; they bound the Company, and I think it would be anomalous if every man had a right to complain. For these reasons I am of opinion that this is not a case where a peremptory mandamus ought to go.

CRAMPTON, J.—Two questions arise upon the demurrer taken to the return to this mandamus: first, whether the mandamus has brought the case within the 68th section of the 8 & 9 Vic. cap. 20, and if it has, secondly, whether the return, relying upon the 94th section of the 8 & 9 Vic. c. 18, has taken away the right to specific relief prayed by the mandamus. The second is an important question, and upon which a great difference of opinion exists I adopt the construction which my brother Richards has put upon these two sections—a construction reconciling the apparently two conflicting acts of Parliament. The mandamus in substance states, that the prosecutor was possessed of property running down to the sea, and had a right to the use of certain easements, growing out of the character of his possession; that there was an interruption to his

right to the use of his lands, in the words of the act of Parliament, and it prays for a communication to the different parts of his lands. The argument on behalf of the Company is founded on the 94th section of the Lands Clauses Consolidation Act, and if that section be applicable to this case, the Company are right, but if it be not applicable all that has been done under it goes for nothing; it is *coram non judice*; it could not bind any one, and the prosecutor is entitled to the slob and to the accommodation works which he requires. It is a mere *petitio principii* to say that the Company have got this land, and that they are entitled to give pecuniary compensation. If the 94th section does not give them a title to it the prosecutor's title remains as it was before, and the question is, has he a right to get the interruption removed. A very important argument has been founded on the fact that this is an application by an individual for a mandamus. He is the owner of land, and the railway passes through it; he is injured, and the Company admit it; no one else complains; he may in point of fact be the only person who was injured, and it would certainly be a strong construction to hold, that, because there was not a number of persons in the district who were injured, no mandamus should go. Two principles are continually kept in view; the first is, that private rights must give way to public purposes, and the second is, that liberal compensation is to be given to every person injured by the railway. Compensation is of two kinds, pecuniary compensation to be given by a jury, and accommodation works for the owners and occupiers of land adjoining the railway. A party may be entitled to pecuniary compensation for his land; in some cases pecuniary compensation is the only compensation, but I consider the facts of this case bring it within the 68th section of the Railway Clauses Consolidation Act, and that the prosecutor is entitled to have the specific performance of these accommodation works. It is sufficient to read that section of the act of Parliament to see that the case of the prosecutor comes within it. An accommodation of the kind must be made by the Company: but two exceptions are provided for in this legislation, namely, where such works might prevent the working or using of the railway, and where there has been an agreement between the parties; take away these two exceptions, and the 68th section is imperative on the Company, and universal in its comprehensiveness. I shall not stop at these exceptions, because they are negatived by the mandamus, and not traversed. Every fact stated in the mandamus, and not traversed by the return must be taken to be admitted. The Company say that the estate and interest in the premises are now vested in them by the proceedings which they have taken under the 94th section; upon that section they rely for their defence, and insist that the purchaser is bound to take pecuniary compensation, and to give up his property to them. They cannot set up any case of waiver on the part of the prosecutor, for on the face of the mandamus it appears that before any step was taken under the 94th section, a notice was served on the Company calling on them to make their works. Can it be said that the prosecutor retains all the commodious use of his lands

after all communication with the sea is cut off? The prosecutor does not acknowledge the property as being in the Company. In my opinion the 94th section does not apply to the case now before the court. For these reasons I think the judgment should be reversed.

June 7th.—TORRENS, J.—I have fully considered this case, and concur in the opinion of my brothers Crampton, Richards and Ball, that judgment should be given for the plaintiff.

PENNEFATHER, B. concurred in the opinion of the Court below.

FIGOT, C. B. considered the case to be one of great doubt and difficulty, but was of opinion that the prosecutor was entitled to relief under the provisions of the 68th section of the 8 Vic. c. 20, if his case was sufficiently stated.

BLACKBURNE, C. J.—I am of opinion that the judgment of the Court below should be affirmed. The prosecutor can have every compensation under the 49th section of the 8 Vic. c. 18. As the majority of the Court are of a different opinion the judgment of the Court below must be reversed.

*Judgment reversed.**

COURT OF CHANCERY.

DELAP v. HALL.—February 12, 13.

Will—Construction—Power of disposition amongst issue of tenant for life—Bequest of chattels real to A. for life, with remainder to his lawful issue, to be disposed of to them as he may think fit, and on failure of his lawful issue over, held to vest the absolute interest in A.

This case came before the Court on pleadings and proofs. The question arose upon the constructions of a bequest in the will of Robert Delap, in the terms following:—"I leave to my son, Joseph Delap, 30 acres of my land, of the south side of Tully-garden, adjoining Mr. Richardson's estate, subject to a proportional part of my debts and legacies, and a proportional part of the Primate's rent and renewal fines, during his natural life, and, at his decease, in remainder to his lawful issue, to be disposed of to them as he may think fit, and in failure of his lawful issue, to my son John Delap, and his issue in like manner." The lands of Tully-garden were held for a chattel interest from the Primate. Joseph Delap had made no disposition of the said lands under this will, but William Delap, the plaintiff in the original suit, claimed as his only child against purchasers from Joseph Delap. William Delap died, and his administratrix filed a bill of revivor, which now came on to be heard.

Mr. R. W. Green, Q.C., and *Mr. R. Armstrong* for the plaintiff. The question is, what interest the legatees took. The first limitation is for life expressly. *Merest v. James*, (1 Brod. & Bing. 484.) Issue is an expression more flexible than heirs of the body. *Lees v. Moseley*, (1 Y. & C. Ex. 589.)

* We regret that, owing to the illness of the gentleman who reported this case, of which we were ignorant when it went to press, that the able judgments of the last four judges have not been given.—*Ed.*

Atkinson v. Hutchinson, (3 P. W. 258.) Even in freeholds, it could only give an estate tail by implication. *Lampley v. Blower*, (3 Atk. 396;) *Torget v. Gaunt*, (1 P. Wms. 432;) *Forth v. Chapman*, (ib. 663.) In *Jesson v. Wright*, the words were heirs of the body, not issue, and that case decides nothing with regard to personality. *Hockley v. Mawbey*, (1 Ves. Jr. 143,) governs this case. *Peacock v. Spooner*, (2 Ver. 195;) *Dafforne v. Goodmoan*, (2 Vern. 362;) *Hodgeson v. Barry*, (2 Atk. 89;) *Morse v. Ormond*, (1 Russ. 382;) *Radford v. Radford*, (1 Koe. 486.)

Mr. Brewster, Q.C., *Mr. Christian, Q.C.*, and *Mr. S. B. Miller*, for the defendants.—Without the power, J. Delap would have taken an estate tail, and therefore the absolute interest in personality. *Robinson v. Robinson*, (2 Vez. Su. 225;) *Manning v. Moore*, (Al. & Nap. 96.) The case, therefore, rests entirely on the power. The limitations here are very unlike those in *Lees v. Moseley*. *Hockley v. Mawbey*, (3 Bro. C. C. 81, 8 C. 1 Ves. 1. 143,) has been much shaken by subsequent cases. *Doe dem. Jesson v. Wright*, (2 Bli. 1;) *Sele v. Barter*, (2 Bos. & P. 485;) *Simmons v. Simmons*, (8 Sim. 22;) *Croly v. Croly*, (Batt. 1;) *Doe v. Applin*, (4 T. R. 82;) *Doe v. Cooper*, (1 East, 229;) *Ward v. Bevil*, (1 Y. & J. 512.) The question, in fact, is, in what sense the testator used the word "issue." It properly means the whole line of descendants, and must, unless something control it, have that force given to it. *Britton v. Boothby*, (2 Sim. & Stu. 463;) *Caulfield v. Maguire*, (2 Jo. & L. 141;) *Green v. Harvey*, (1 Her. 428;) *Love v. Wyndham*, (1 Lev. 290.)

Mr. Armstrong, in reply.

June 22nd. LORD CHANCELLOR.—This case comes before me on a bill, by which the representative of William Delap claimed to be entitled to the interest in certain leasehold premises, which had belonged to Robert Delap, and which passed under his will. The plaintiff contended that they passed to William Delap, as son of Joseph Delap, one of the persons named in the will of R. Delap. The question in the case is, whether the plaintiff is entitled to that interest under the provisions of the will. The property is a chattel interest in Armagh; there have been subsequent renewals and other dealings with the property, but unless the plaintiff can sustain his case upon the construction of the will, all other questions fail. The material words on which the question depends, are—"I leave to my son, Joseph Delap, 30 acres of my land, of the South side of Tully-garden, adjoining Mr. Richardson's estate, subject to a proportionable part of my debts and legacies, and a proportional part of the Primate's rent and renewal fines, and also my lease in Cavan, under James Tisdall, Esq., and my house and tenements in Dungannon"—Nothing turns upon this part of the property, which was not mentioned in the case—"during his natural life, and, at his decease, in remainder to his lawful issue, to be disposed of to them as he may think fit, and on failure of his lawful issue, to my son John Delap, and his issue in like manner." The other part of the same premises he bequeathed to John Delap, with remainder to Joseph, in the

guage; there is no difference between the Under this will, the plaintiff contends eph Delap and John Delap took only or life. John Delap died intestate, and d, and unless the plaintiff can sustain her hat portion, she has no title to the lands. Delap made various dispositions of the in his lifetime, under which the different is derive. William Delap was absent country for many years. On his return, he original bill in this cause; he afterd, and the present plaintiff is his personal ative. The plaintiff contends that Joseph Delap took only estates for life, with r over to their children, and that William sue of Joseph. The defendants contend ph and John took the whole interest, on d that, if the property had been freehold, ld have taken estates tail, and that they take the absolute interest in the person words of devise here are very simple. does not contain much to qualify them. sition is, whether what it does contain qualification. But as the gift to Joseph t is as simple as any which ever came court. Take it to be "to J. Delap s natural life, and at his decease remain- is lawful issue;" that would clearly give e tail. I need not go back to first prin- such a case would fall within *King v. Mil-* Vent. 232); *Low v. Burrow*, (3 P. Wms. lanning v. Moore, (A. & N. 96.) The only then is whether there is anything in the give a different construction. The words as having this effect are, "to be disposed lawful issue, as he may think fit." Do rds then control the remainder to the law- Do they show that the estate is to go particular class of issue? The cases on et are numerous, and the only difficulty ecting the cases which bear only on the oint of this will, which turns merely on r of appointment amongst the children. ases tend to this, that the mere introduc- power such as this is not enough to take the general doctrine. The first case to hall refer is *Doe v. Applin*, (4 T. R. 82); e is *Seale v. Barter*, (2 Bos. & P. 485.) s a devise "of all the testator's lands to ohn, and his children lawfully to be be- ith power to settle the same, or any part y will or otherwise to them or any of he should think proper, and in default of over," it was held that John took an l, and that this construction "was not by the power." The power, it was said, Alvanley in delivering the judgment of , "had some operation, since it enabled ee to dispose of the estate to his children, going through the forms of a recovery; ower, because it enabled John to make en take by purchase, did not make it im- on the court to give the estate to the y purchase, in all events, and to confine ife estates as tenants in common." I state the argument in *Jesson v. Wright*, (2 Bligh.

O. S. 11), which case appears to me to be a clear authority for the same proposition, that a mere power to divide amongst issue will not control the general doctrine. The devise there was "to William Wright for life, and from and after his decease, unto the heirs of the body of the said William lawfully issuing, in such shares and proportions as he, the said William, should appoint, and for want of such appointment to the heirs of the body of William, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue over." The next case is that of *Croly v. Croly*, (Beatty 1), where the devise was "to the use of my younger son Richard, for and during the term of his natural life, and from and after his decease to the use and behoof of his issue male or female, in such proportion or proportions as he shall think proper, by his last will and testament to devise the same." That was held an estate tail in the first taker; it shows strongly that a mere power of appointment will not cut down the estate tail to a life estate. I find it impossible to distinguish it from the case before the court. Then there are two cases in the Exchequer here, *Irwin v. Cuff*, (Hayes 30); *Briscoe v. Briscoe*, (ib. 34.) *Irwin v. Cuff* was a devise in trust for "Henry Irwin for life, without impeachment of waste, and from and after his decease, in trust for such of his issue male and their issue male as he should by deed or will appoint, and in default of such issue, over." That was held an estate tail in Henry; and Baron Pennefather then threw doubt on *Hockley v. Maobey*. *Briscoe v. Briscoe* was very much to the same effect. The same doctrine was followed in a very strong case in the Exchequer, *Watson v. Bourne*—it is not reported, but Mr. Brewster has given me a note of it. The devise there was to trustees for the testator's widow till her second marriage or death, "after her decease, to permit testator's sons, Benjamin and Thomas, to receive the rents in equal shares during their respective lives, and from and after their and each of their decease, to permit such of the issue, male and female, of the testator's said sons, to receive their father's share of the said residue, in such shares and proportions, and for such estates as their fathers and the testator's wife during her widowhood, or their fathers, after her death or marriage should by deed or will appoint, subject to a power given to each of his sons to jointure, and in failure of such appointment to permit the respective issue male and female, of such of testator's said sons as should fail to make such appointment, and their heirs to receive their fathers' proportion of the residue of the said rents in equal shares and proportions, and from and after the decease of any of testators said sons without issue, then to permit the survivor or survivors of said sons and their respective issue to receive the shares and proportions of such son or sons so dying without issue, with the like powers and limitations as expressed concerning their original shares." That was held an estate tail. I cannot well imagine a stronger case than that, because of the additional restriction in the power giving the wife a share in it; but the court seems to have held the general doctrine too strong.

It only shews how little effect will be given to a power of appointment to control a devise which amounts to an estate tail. *Martin v. M'Causland*, (4 I. L. R. 340), is much to the same effect: "I leave and bequeath to my son Robert M'Causland, during the time of his natural life, all my estate, right, title, and interest in or to the lands of, &c., and in case my son Robert shall marry with the consent of his mother, then I devise the same to any issue he may happen to have, in such manner as he shall by deed or will direct, limit, or appoint, and for want of such appointment, to go equally amongst them share and share alike; but in case my son Robert shall die without issue," over. That was argued at great length in the Common Pleas, and the court was of opinion that it was an estate tail. Another case which I shall mention is that of *Whittitt v. Thompson*, which I cite not for its authority, but as being the latest case on the subject. It was decided here in June, 1848. I offered a case to a court of law, but that was declined, and the decision acquiesced in. The testator there, after giving the residue of his property to his son Joseph Whittitt, gave and devised "to my said son all my real and freehold estate, and to his issue male and female, in such manner and proportion as he may by deed or will, duly attested, direct, limit, or appoint, with power to my said son to charge the same with an annuity by way of jointure, and in case of the death of my said son without lawful issue," then over. The court held, that Joseph Whittitt took an estate tail, under that devise; which concludes the line of cases down to the latest moment, shewing that a power of appointment would not, of itself enable the court to put any other construction on words of this nature. I must allude to another case of great importance here, not only as being strong in itself, but because it applies the doctrine to personal property—that is *Simmons v. Simmons* (8 Sim. 22), where the will was of all the testator's real and personal property to Gwin Simmons, upon trust, "That he shall dispose of all, or any of my property as he shall deem best for the benefit of my dearly beloved daughter, Elizabeth Simmons, to whom I leave all during her life, for her separate use upon her own receipts, and free from the debts, control, and interference of any husband in case she marries; at her decease she shall be at liberty to will the same to her issue as she may think fit; but in case of her dying without issue." The Vice Chancellor held, that that gave an estate tail in the freehold, and an absolute interest in the personalty which was devised in the same will; that, however, is of no consequence, for it is settled, that words, not only in the same will, but in the same clause, may receive a different construction with regard to personalty and to realty. Several cases were referred to on behalf of the plaintiff, which may in general be distinguished from the present. One was *Hockley v. Mawbey*. That case has often been doubted; and it seems very uncertain whether if it were now to arise in specie, it would receive the same decision. It is, however, distinguishable from this case so much, that it cannot be relied on as authority. The question turned not so much

on the wording of the limitation or of the power, as on that of the limitation over, as to whether it did not control the prior bequest. There was in that case, much argument as to whether the failure of issue was to be construed as meaning a general failure of issue, or to be restricted to issue living at the death of the tenant for life; but the court decided on other grounds, saying, "The limitation to the son and his issue, would be an estate tail—and perhaps the aptest way of describing an estate tail, under the statute. But it is clear he did not intend it to go them as heirs in tail, for he meant that they should take distributively, and according to proportions to be fixed by the son." So far, that case appears to conflict with the class of cases to which I have referred; and if it had rested on that alone, it might be difficult to distinguish it. However, even if the other peculiarities of that case did not distinguish it, it would be better to be governed by the other class of cases, as its authority has been much shaken. *Target v. Gaunt* is the common case of a bequest of personalty, with a power of disposition to the issue, the will not giving any estate at all to the issue, save by the exercise of the power. *Lees v. Moseley* (1 Y. & C. Ex. 589), turned completely on the construction of that particular will; the devise there was, "To my son Henry James for life, with remainder to his lawful issue, and their respective heirs in such shares and proportions, and subject to such charges as he the said Henry James shall by deed or will appoint; but in case my said son Henry James shall not marry and have issue, who shall attain the age of twenty-one years, then I give and devise this moiety to my son Oswald and his heirs for ever." It was held there merely that Henry James did not take the absolute interest; but it may be inferred from the judgment, that his children attaining twenty-one would have taken by purchase. Baron Alderson in delivering the judgment of the court says, "Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words, 'lawful issue' in this will, accompanied by their context as words of purchase, and in so doing, we do not impugn the authority of any decided case to be found in the books, for there is not one in which these words with such a context as in this will, have ever been held to be words of limitation." With only such a context, as we have in this will, to affect the words of limitation, the general doctrine of the cases from *Doe v. Applin* down to *Simmons v. Simmons*, appears to establish that the mere power of appointment will not control the original devise. *Merest v. James* (1 Bro. & Bing. 484), turns on the introduction of additional words, giving the estate over, if the issue die under twenty-one. On the whole I think that here a general failure of issue was contemplated. That without the power of appointment, it would have been a clear case of an estate tail; and that the introduction of those words is not sufficient to alter it. The consequence is that this bill in this cause cannot be sustained.

ROLLS COURT.

MONTMORENCY v. PRATT.

ment was obtained by the guardians of a poor union for rate due by the defendant as immediate lessor; after the proceedings at law a receiver was appointed over the defendant's interest in the lands out of which the rate became due. On an application by the guardians that the receiver might be directed to pay this rate, Held, the obtaining of the judgment against the immediate lessor did not prevent the guardians from proceeding against the occupier under the 6 & 7 c. 92, s. 3, and that the receiver was bound to the amount.

In the case the defendant, Mervyn Pratt, being rated in the sum of £116 6s. 0½d. for poor rate Ballina union, in December, 1847 proceedings taken for the recovery of that sum, and on the 6 June judgment was marked in the Court of King's Bench for the amount due and costs; after proceedings a receiver was appointed over the property of the defendant, including the lands out of which said sum of £116 6s. 0½d. became due. The receiver, on being applied to for this sum, refused to pay same without an order of the court for that purpose, as judgment had been obtained for the amount.

On behalf of the guardians now moved the receiver might pay to said guardians this poor rate due by the defendant out of the property over which the receiver had been appointed. Judgment is no satisfaction of the poor rate. *Rate v. Mitchell*, (3 East. 251.) one of three covenants gave a bill of exchange for part of the sum secured by the covenant, and on this bill a sum was recovered; it was held that such a recovery was no bar to an action of covenant against the receiver. In *Lloyd v. Moore*, (9 Jur. 772.) a solicitor attached his client for non-payment of his costs, afterwards caused the order to be registered, it was held that the solicitor might enforce his lien on the fund; also a judgment obtained in an action of covenant for rent which remains unsatisfied will not defeat a condition of re-entry for the rent. (Furlong, L. & T. 1151); and *Rush v. W. J.* (3 Cr. & Dix. 162.)

Orpen, contra.—The rates now applied for and due before the appointment of a receiver, the guardians having obtained a judgment for the amount cannot now be paid in priority to the creditors. *O'Grady v. Glover*, (1. Jur. 153); *Howe v. Howe*, (8 I. L. R. 273.)

23.—MASTER OF THE ROLLS.—In this case the defendant has been rated for poor rate as immediate lessor, and judgment was obtained for the rate due. This motion has been resisted on the ground, that this judgment having been obtained, the nature of the demand has been changed. By 6 & 7 Vic. c. 92, sec. 2, any rate payable by an immediate lessor can be recovered by action or suit in the superior courts, or by civil bill; and by the 3rd section it is provided that if the rate is not paid by the immediate lessor within four calendar months after the making thereof, it shall be lawful for the guardian to give notice in writing to the occupier to pay the rate due, and after the expiration of one

calendar month from the time of giving such notice it shall be lawful to recover such rate from the occupier, or, upon his default, from any subsequent occupier; and every occupier may deduct from his rent the whole of any such rate he may have paid. It appears to me that the judgment against the defendant is not an extinguishment of this claim for poor rate against the occupiers under the third section, and I consider the remarks of the Vice Chancellor in *Lloyd v. Mason*, (4 Hare, 136,) are in point; and in page 138 he says, "A mortgagee who recovers judgment on his bond or covenant cannot, so long as the judgment remains in force, sue his debtor on the same bond or covenant, but he does not thereby lose his collateral security." In the present case I do not think that the judgment against the immediate lessor affects the right of the guardians to proceed by service of notice upon the occupier; and as a receiver has been appointed this claim should be discharged by him.

"Be it so; and £5 for the costs of this motion within one month after service of this order on said receiver, and let said receiver have credit for such payment in passing his account, and let said receiver and plaintiff abide their own costs of appearing on this motion."

Lib. 285. fo. 335.

JARDAN v. GREY.—May 24th.

Practice—Injunction—Exceptions to answer.

Answer filed on 31st March, exceptions taken on the 18th of April, which were abandoned; a motion to continue an injunction was too late, not being within the time directed by the 62nd rule.

Mr. Hughes, Q. C., moved to continue an injunction.

Mr. Sherlock, contra.—In this case the answer was filed on the 31st of March, and notice served on the same day. On the 18th of April, notice of exceptions was served, and on the 10th of May these exceptions were deemed abandoned, under the 76th general order, and the answer was deemed sufficient. [Counsel referred to *Peyto v. Hudson*, (8 Sw. 363, note,) where it was held, that where exceptions are shewn as cause against dissolving an injunction, and the answer is reported sufficient, the injunction cannot be revived on the merits disclosed in that answer. Also to the case of *Cos-tigan v. Hinchey*, (1 Hogan, 45.)]

Mr. Joy, Q. C. in reply.

MASTER OF THE ROLLS.—By the 62nd general order, an injunction obtained before answer, is dissolved without further order, unless within 14 days from the filing of the answer, the plaintiff serves notice of a motion to continue it. In the present case there has been a breach of the order of the court.

"And, it appearing to the court, that the said answer was filed on the 31st of March last, and the notice of the filing of such answer was given on the day after; and the exceptions to the said answer having been abandoned, and notice of this motion not having been given until the 11th of May, after the injunc-

tion stood dissolved under the 62nd general order. And it appearing to the court, that there is not sufficient Equity confessed on the answer for the renewal of said injunction, refuse this motion with costs, to be paid by plaintiff to defendant when taxed, &c."

Lib. 285, fo. 392.

IN RE CORKERS, MINORS.—*May 26th and June 9th.*

Condition in restraint of marriage.

Bequest of an annuity of £50 to A. V. C., a widow, for her life provided she did not marry again. Held that the annuity determined on the second marriage of A. V. C., and the proviso that she should not marry again was not a condition subsequent so as to be void as in restraint of marriage.

The petition in this case stated that Chambre Corker, late of Cor Castle, the father of the petitioner, made his last will and testament, dated the 16th of July, 1841, and after several specific bequests he gave an annuity of £50 per annum to his daughter-in-law, Anna Victoria Corker, the widow of his son Chambre Corker for her life, provided she did not marry again, or sell or in any way dispose of same; that in the year 1848 said Anna V. Corker intermarried with Henry Ainelie, and that said annuity was thereby determined, and the petition prayed that the rents of the lands charged with said annuity might be paid to the parties entitled, except said A. V. Corker.

Mr. Jones for the petitioners.—This is a condition precedent. *Luxford v. Cheek*, (3 Lev. 125;) *Sheffield v. Lord Orrery*, (3 Atk. 282; 1 Jarman on Wills, 731.) *Doe on the dem. of Dean and Chapter of Westminster v. Freeman and wife*, (1 T. R. 389;) *Fry's case*, (1 Vent. 203.) And in *Webb v. Grace*, (2 Ph. 701,) there was a covenant to pay an annuity to a person during her life, and a proviso that in case she should at any time thereafter happen to marry the annuity should be reduced, that was held to be a covenant to pay the full annuity until marriage, and afterwards the reduced annuity, as the proviso for reduction of the annuity was part of the original gift, and was not a condition subsequent, and void as being in restraint of marriage. [Counsel also referred to *Acherley v. Vernon*, (Willis 159;) *Scott v. Tyler*, Dick. 712;) *Lowe v. Peers*, (4 Burr. 2225;) *Grace v. Webb*, (14 Sim. 384;) *Brooke v. Spong*, (15 M. & W. 153;) *Cooke v. Turner*, (14 Sim. 502.)]

Mr. Barnes contra.—There is no disposition over, and this condition should be construed strictly; the estate is given for her life and must vest. Conditions in defeasance must be construed strictly. (4 Burr. 2055; 1 Jarm. 732.) *Milvers v. Slater*, (8 Ans. 295;) and in *Marples v. Banbridge* the testator bequeathed to his wife, should she survive and continue unmarried, all his goods, chattels, estate and effects, to possess same during the term of her natural life, and from and after her death he disposed of same; the widow married, and it was held only to be a condition subsequent, and in *terrorem*.

June 9th.—MASTER OF THE ROLLS.—The whole question depends on the construction of the will of Mr. Corker, by which he bequeaths this annuity to Anna V. Corker for her life, provided she does not marry again. The question has been decided in a very recent case before Lord Cottenham, *Webb v. Grace*, (2 Ph. 701,) there was a covenant in these terms, "That J. Webb, shall pay to E. Castle, for and during the term of her natural life, subject to the proviso hereinafter contained, an annuity of £40, provided always, and it is hereby agreed and declared by and between the parties hereto, and it is the true intent and meaning of these presents, that in case the said Eliza Castle shall at any time hereafter happen to marry, then from and immediately after her marriage the said annuity of £40 shall be and is hereby reduced to £20 only, which said sum of £20 shall in such case be paid and payable unto the said E. Castle from the time of her marriage for and during all the remainder of her life." In giving judgment the Lord Chancellor said "The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply: there can be no doubt that marriage can be made the ground of a limitation ceasing or commencing; it is unnecessary to refer to the authorities for this purpose. *Richards v. Baker*, *Sheffield v. Lord Orrery*, *Gordon v. Adolphus* were cited in the argument. If then this grant is a grant of £40 per annum until marriage, and from that event happening of £20 per annum for life, there can be no doubt but that such a gift is lawful, and that after marriage there can be no demand for the £40 per annum. This claim is grounded on contract and obligation on the part of the grantor; the parties claiming must, therefore, prove that their claim is within the terms of the contract and obligation. What then are these terms? is there in this any contract or obligation to pay £40 annum after the marriage of E. Castle? the argument in favour of the claim assumes that there is an unqualified grant of an annuity of £40 per annum for life, and an attempt to defeat the gift by an illegal condition subsequent; this proposition I think fails in all its parts, for there is not any unqualified gift of an annuity of £40 for life, the contract and obligation is to pay to Eliza Castle during her life, subject to the proviso hereinafter contained, an annuity of £40, at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay £40 per annum to her during so much of her life as she shall remain unmarried." Master Brooke, I have been informed, has come to the same conclusion upon this question which arose before him in another case. I consider that this annuity, was determined, and will make the order according to the prayer of the petition.

R. P. H. B. 30, fo. 76.

COURT OF CHANCERY.

MACNAMARA v. BLAKE.—Jan. 26.

Office—Pleading Supplemental Bill—Want of parties—Bill of Review.

On hearing a bill was allowed to stand over to be read by adding parties. The plaintiff added necessary parties by a supplemental bill, which added new matter affecting the parties to the original suit. Held, that they were necessary parties. Semble, that a supplemental bill cannot be used to modify the original decree.

The case came before the court on an appeal from the Rolls order allowing the demurrer.

Sergeant O'Brien and Mr. Maley, for the plaintiff.

R. W. Green, Q. C., and Mr. F. W. Walsh for the defendant.

THE CHANCELLOR.—This case came before me on appeal from an order made at the Rolls, on demurrer to the bill, taken by the defendant, J. Macnamara. The Master of the Rolls, on hearing the case, allowed the demurrer. From his decision the plaintiff has appealed to me. The case was argued on both sides; but in the view which I have taken, it is not necessary to go so fully into the facts or the arguments, as might otherwise have been required. The Rolls order must be affirmed, and the defendant must succeed. The plaintiff seeks to raise a portion of a charge of £10,000, created by a settlement of the 25th November, 1844, as a charge for younger children, under one of whom the plaintiff claims through Henry Butler, a signee of a part of the charge. The bill, however, purports to be supplemental to a bill filed by the same plaintiff on the 8th of October, 1844, purporting to be a supplemental bill, and it needs to state in detail the case made by that bill of 1844, in a manner sufficient to put in issue only the filing of that bill, but the facts stated therein. As I have said, the bill of 1844 was itself supplemental, the plaintiff here, claiming under the charge made by the settlement of 1773, on the charge of Xaverius Blake, the elder, asked the benefit of certain proceedings in this court, which may be described as follows:—In the year 1773, Xaverius Blake confessed a judgment, and on proceedings were taken. In 1815, a decree was made on foot of that judgment was obtained, and the report was made up in 1818. That cause is known as *Bachelor v. Blake*. By the first decree therein it was referred to Master Ball, to take an account of the real and personal estate of said Xaverius Blake, and of the incumbrances affecting the same, with liberty for creditors to appear and prove. The Master on that reported the sum due to Bachelor by Xaverius Blake. This sum of £10,000 which the settlement provided for raising by a term of 500 years, was also read, and was allocated to the persons entitled, of whom was the person whom the plaintiff sues. By the final decree the report was read. Bachelor was declared entitled to the benefit of the proceedings in a cause of *Blake v. Bachelor*. It was declared that Bachelor's was the charge in the lands of Xaverius Blake, and it was directed "that a sale should be had of the said lands for payment of the sum due on foot of the

judgment, and the several other sums which were so as aforesaid reported due, with costs, and that the said John Bachelor should be paid the amount of his said demand out of the produce of such sale, and that the other incumbrancers should be paid according to priority." That decree directs a sale of the fee-simple and inheritance of the lands for the payment not only of the judgments, but of the portions which were only secured by a term. It does not appear to have been done by consent, and therefore *prima facie*, this seems to be a decree, erroneous in ordering a sale of the inheritance for payment of a charge only affecting a term. In effect the difference is nothing, perhaps it may even be better for the inheritor that the fee, than that a long term, should be sold; but that is not to the purpose. There was then an order for rehearing, and on the rehearing the former decree was affirmed, and the Master was ordered "to set up and sell the lands in the report mentioned, or so much thereof as would be sufficient to pay the sums due on foot of the judgment which was so assigned to the said John Bachelor, and the several sums reported due under the said indenture of marriage settlement, of the 25th November, 1773. And that the said John Bachelor might make up and enroll the decree with costs," which was accordingly done. And so it now stands with that decree duly enrolled, according to the practice of the court. The plaintiff by his bill of 1844 took up the case then, and stated a variety of matters not material to the present question; he finally prayed "that he might have the benefit of the suit of *Bachelor v. Blake*, and the decrees made, and the accounts taken, and the report made therein, and that the several decrees made in that cause might be carried into execution, so far as might be necessary for the plaintiff's relief, and that an account might be taken of what was due to the plaintiff on foot of the sum due to him, and also an account of all prior and contemporaneous incumbrances, and that all necessary accounts might be taken of the said parts, shares, and proportions of the said sum of £10,000, for securing the payment of which the said trust term of 500 years, created by the said settlement, and that the plaintiff might be paid what should appear due to him," and so forth. That prayer of the bill of 1844, to have the benefit of the decree for selling the fee-simple, and inheritance of the lands is qualified in this way by adding the words, "so far as might be necessary for the plaintiff's relief." I do not see any valid objection to the right of the plaintiff to have the benefit of the former suit, so far as is necessary for his relief, though he cannot file a bill to have the benefit of the decree for the payment of his portion of the sum of £10,000. It must be, as laid down in *Hamilton v. Haughton*, (2 Bli. 169), a bill to carry into execution the decree generally. A party seeking to carry out a decree must do so for the benefit of all persons interested under it, as well as of himself. Having filed that bill, the plaintiff proceeded in the cause. A supplemental bill was rendered necessary by the birth of a child of Walter Blake the younger; and it eventually came to hearing. At the hearing the objection was taken that the decree was erroneous, and the plaintiff could have no benefit of it, on account of the direction to sell

the inheritance. Much discussion took place, and it appeared to the court that if any relief could be given, it could only be by departing from the direction of that original decree; but that in order to decide on it, the court must have every one before it, who was interested in that decree, partly that the security might not be affected in their absence, and partly on the ground alluded to—that in a bill to carry out a decree, the plaintiff must act for the benefit of all interested under it. On these grounds the court ordered it to stand over, with liberty to bring the other parties interested before the court; these appear to have been the representatives of *Bachelor*. The simple course would have been either by amendment to introduce them by name, with an averment that they were the persons, making no other variations; or which would also be not improper, to bring them before the court by supplemental bill; it is clear by the authorities that you may do so. The plaintiff, therefore, might have done what he has done, so far as he has gone right; that is to say, might by supplemental bill have made those persons parties; but he seems to have thought he had more to do, and he does accordingly do more. I have omitted to mention the trusts of the settlement of 1842, through which J. H. Burke the defendant, who has taken this demurrer, is a necessary party to this suit, and if they had been mentioned at the hearing, liberty would have been given to the plaintiff to make the persons interested under it parties; and, as in the case of *Wood v. Wood*, (4 Y. & C. Ex. 135), that would have entitled him to take whatever steps might be necessary against them. In that case the marginal note is, that "when the court gives leave to amend, by adding parties, the power so given is in no case to be considered illusory, and therefore when it is necessary to read evidence against the new party, the plaintiff, notwithstanding the order be merely to amend, may file a supplemental bill, and he may incorporate in such bill any other matter which might, independently of the order to amend, be the subject of a supplemental bill." An order had there been made, that the bill should stand dismissed, unless the plaintiffs amended their bill, by adding the official assignee as a party. Then, as Baron Alderson said, "instead of doing this, the plaintiff has filed a supplemental bill, in which he introduced new matter, to which he made the former defendants parties." A motion was made to take the bill off the file, and it was held that the party had a right to adopt the course he had taken. The court said, "If the party has a right to treat a supplemental bill as a compliance with the order of this court, I do not think he alters his position by including other matters proper to form part of a supplemental bill in that bill. For this he does not want the permission of the court, but has a right to include those matters in a supplemental bill."—In this country the 56th general order gives such permission.—"Suppose the plaintiffs here had amended their bill in the way in which the defendants suggest they ought to have done, and had also, after doing this, filed a supplemental bill, including the new matters, I am not aware that the defendants could have objected to it. If so, it seems to me that they may well consolidate the new matter in a supplemental bill, filed under the permission

to amend. This would be, in fact, the most convenient and compendious mode of proceeding." On the authority of that case, therefore, so far as the plaintiff rightly brought the defendants before the court—that is, rightly constructed the suit—he was justified in doing so, by supplemental bill. The question is, what else he has done. He has introduced a variety of statements relating to orders for various purposes in *Bachelor v. Blake*, and the other causes, and introduced into the present suit for two reasons—one declared, and the other easy to be guessed. He declares a purpose to use them by way of estoppel, in this way, that the parties having, by those orders, acted on the decree of 1819, cannot object to it. These are all material as to the right to this money having been barred by the statute of limitations; and also—on the authorities referred to in *Dundas v. Blake*, (1 Ir. Jar. 121), in which I lately gave judgment—to sustain the plaintiff's demand, if the suit were not to be treated as supplemental. Altogether I cannot say that these statements are irrelevant; they seem of vast importance, whether as sustaining the right to the decree of 1819, or as if he began now for the first time on the settlement of 1773, without basing his right to relief on that decree. But the more important they are, the more important it is that all parties whom they may affect should be before the court. The more I look at them, the more I think that all the parties to the bill of 1844 should be here in this bill. The parties deriving under the settlements of 1799 and 1809, who might be much affected by this proceeding, have a right to see before a decree on estoppel, that they are protected. The decision in *Jones v. Howell*, (2 Har. 342), is in point, in which the rule is laid down how far parties to the original bill are necessary parties. There the defendants "to an original bill were held to be necessary parties to a supplemental bill against a new defendant, where the interests of such original defendants, as well as those of the new defendant required that the new defendant should be a party to the suit. *Dyson v. Morris*, (1 Har. 413), also bears upon this part of the case. The interest of the original defendants is the test whether they are or not necessary parties. They have an interest to see that there is no decree founded on an estoppel which ought not to bind them; they have an interest to see that the instrument to bar the statute of limitations is not improperly used. On that ground I must say, that the bill is wrong. I might stop there, but when I look at the prayer, there is a good deal to observe. The plaintiff appears to have framed it on the assumption that it is a case for the court to do what it has done in some cases, that is, not carry out fully the decree of 1819, but carry it out so far as it is right, and it is contended that on the bill of 1844 that can be done. The words "so far as may be necessary for the plaintiff's relief," are not material, and it does not appear whether that can be done by consent, as in the case of *O'Connell v. Macnamara*, (3 Dru. & W. 411); whether by the court stopping short, and only doing part of what had been previously decreed; or whether, as in *Hamilton v. Haughton*, (2 Bli. 169), the bill must be re-cast, for that case does not decide that a party is at liberty to take up an erroneous decree, and amend it. Lord Redcliffe says,

"The amendment to this bill may be not only by making proper parties to it, but by framing his bill according to the rights of the parties, namely, to have the proper trusts carried into execution," which seems rather to imply that the plaintiff must file a new bill to carry out the deed, than modify the former decree, which is the relief which the present bill seeks. After stating what I have alluded to, this prays that the plaintiff may be entitled to the full benefit of the suit so instituted by Bachelor, and of the former decrees. It goes somewhat beyond the bill of 1843, but is not inconsistent with it; it goes on, "And if your lordship shall be of opinion that the said several decrees which were made in this cause, ought not to be carried into execution according to the terms thereof, then that the same may be carried into execution for the benefit of the plaintiff, in such manner, and from and with such modifications as to your lordship shall seem meet." What is the meaning of, modify a decree? Is it that the court is to take an enrolled decree, and modify, that is vary it, which the court has not power to do, except on a bill praying to open the enrolment, and vary the decree for errors apparent on it, or such other grounds as the court allows, which this bill does not do? It goes on then, "that an account may be taken of what is due to your suppliant on foot of his charge, and also an account on foot of all prior and contemporaneous incumbrances, and that all other necessary accounts may be taken on foot of the other parts, shares, or proportions of the aforesaid sum of £10,000, and that your plaintiff may be paid what shall appear due to him, or in default thereof, that what shall be found due to plaintiff on foot of his demand, and all prior and contemporaneous incumbrances may be raised by a sale of a sufficient portion of the townlands, &c. comprised in the said term of 500 years, according to the nature of such charges, and as the same respectively affect the inheritance in the said lands, or are secured only by means of such trust term, and that all proper parties may join." That is to say, the court is to go back to the report passed by the decree of 1819, take up the account on that report, and make a new decree as if there had been none, and thus have one decree enrolled directing a sale of the fee and inheritance, and another directing an account and sale of the term, or of the fee, as the case might be. No such bill was ever heard of; no such decree could be made, save on re-hearing, or on a bill of review for error apparent. If we look to the recent cases on variation, we find them even more strict as to the practice than the earlier authorities. In *Davis v. Bluck*, (6 Beav. 393,) the case was not so strong as it is here. In that case "a contract was entered into for the sale of the vendor's interest in a lease and premises at Doncaster, known as the betting rooms, for the remainder of the lease granted by A. A bill for specific performance was filed by the purchaser, in which (in the decree) the agreement was treated as comprising the premises held of A. An account of the rents was directed; it turned out that the rooms and premises were partly under A and partly under B; whereupon the vendor filed a second bill, praying a declaration that the whole was comprised in the agreement. Held, however, that the

plaintiff could not, upon a re-hearing, obtain the relief asked by the second bill, nor could he, by such second bill, obtain the relief thereby prayed, while the decree stood in its present form; that is to obtain the relief asked, the original cause must be re-heard with the second, and consequently, that the second bill was a supplemental bill, in the nature of a bill of review, which ought not to be filed without the leave of the court." I did not advert to the leave of the court, the want of which is an additional element of irregularity here. I will refer now to a case showing that such relief can only be obtained on a bill of review; the facts were not so strong as they are in the case before me, that is, the case of *Toulman v. Copeland*, (4 Hare. 41), on re-hearing; it also illustrates the difficulty of making a variation in a decree. It turned on the question, whether a substantial vendition was sought. It was the same thing in *Ogilvie v. Heron*, (13 Ves. 563,) which was a decree *pro confesso*. Then, what does this bill seek to have done? Is it to have the plaintiff declared entitled to the benefit of the decree? or that a new decree be made? In *Perry v. Phelps*, (17 Ves. 173,) Lord Eldon seems to doubt whether a bill of this kind is open to plea or demurrer; he says, "If it is competent to the plaintiff, not filing a bill of review together with a bill of revivor and supplement in order to have the relief which may be obtained by such a bill, but stating that he will not determine whether there is error apparent in the decree, contending that there is, but in case it shall not prove so, electing in his prayer to make it a mere bill of revivor, or supplement, or both; the consequence is, that all the protection against a bill of revivor, founded on error apparent in the decree, is gone by the effect of that alternative prayer. In the case of newly-discovered facts the leave of the Court must be obtained, which gives protection, but this difficulty occurs from putting the case in the alternative, that the defendant can neither plead nor demur, he must be brought to a hearing, and may incur all the vexation of a suit, whether it shall turn out to be a bill of review or not." The modern doctrine seems to be that a bill contrary to the course of the Courts is open to demurrer. I do not know, however, whether there be any such case; I can only find Story Eq. Pl. Sec. 638, where, speaking of demurrer to bills not original, he says, "It is also a good cause of demurrer to a bill of either sort that it is not brought according to 'the course of the court.'" At all events although on this defect of parties I shall allow the demurrer, I shall give the plaintiff leave to amend by adding parties.

ROLLS COURT.

HAMILTON GEALE AND WIFE v. JOHN NUGENT AND OTHERS; MICHAEL MOLONY, PETITIONER, EDWARD JOHN NUGENT, RESPONDENT; SAME PETITIONER v. SAME RESPONDENT.—July, 21.

An attorney or solicitor ought not to be appointed a receiver, and if he should be appointed the Court will, upon application for that purpose, direct him to be removed on that ground.

When several judgments are vested in the same person, separate petitions for the appointment of receivers should not be presented on foot of each

judgment—they should be included in one petition.

Any solicitor who nominates a solicitor's clerk or apprentice to the office of receiver, will be suspended from practising in this court.

If a solicitor, solicitor's clerk, or apprentice, shop-keeper, or person carrying on a profession or trade, is nominated or appointed receiver, he will be removed, and the person having the carriage of the proceedings will have to pay the costs of the appointment of a new receiver.

Mr. Brewster, Q. C., and Mr. De Moleyns, on behalf of the plaintiffs in the first cause, moved that Henry Joly, the receiver in this cause and matters, be removed from said receivership, and that the said receiver do proceed forthwith to pass a final account.

[The facts of this case will be found fully set forth in the Master of the Rolls's judgment.]

Mr. Hughes, Q. C. and Mr. Tuthill, for the Receiver.

MASTER OF THE ROLLS.—In this case a motion has been made on the part of the plaintiffs in the cause, that Henry Joly, of 76, Harcourt-street, the receiver in the matters and cause, should be removed, and that he should proceed to pass a final account, and that the balance, if any, which shall appear due on foot of his account, shall be paid to the plaintiffs in part discharge of the interest due to them. The plaintiffs contend that Mr. Joly is a solicitor, and should on that account be removed; and it is insisted that he has been guilty of default in the discharge of his duty. As to any particular acts of default they should have been specified in the notice of motion if intended to be relied on, but there is no doubt that the arrear due on the property over which the receiver has been appointed has considerably increased. The counsel who moved this motion were not fully instructed, but having had inquiries made, and having called for the documents, the following appear to be the facts of the case: In Michaelmas Term, 1844, a judgment was obtained at the suit of John Henry Dunne against the respondent, Edward John Nugent, in the penal sum of £823 11s. By deed of assignment of the 17th of Dec. 1844, J. H. Dunne assigned the property to the petitioner Michael Molony. In Hilary Term, 1842, Richard Deane Keane obtained two judgments against the said respondent, each for the sum of £71 5s. 9d. Mr. R. D. Keane is a solicitor. How two judgments were obtained for what appears to be the same demand, does not appear. By deed of assignment of the 4th of January, 1845, the said two judgments were assigned to the petitioner, Mr. Michael Molony, the deed reciting that there was due on the two judgments £65 4s. 5d. In Trinity Term, 1845, Mr. M. Molony, and a Mr. M'Cullagh, being trustees in a settlement, the particulars of which do not appear, obtained a judgment for £3,200 against the said respondent. The judgment of Michaelmas Term, 1844, and the two judgments of Hilary, 1842, being vested in Mr. Michael Molony, and the judgment of Trinity, 1845, being vested in Mr. M. Molony and Mr. M'Cullagh, Mr. M. Molony appears to have employed Mr. George Augustus Labatt as his solicitor. The judgment of 1814 was vested in Mr. M. Molony for his own benefit. The two judgments of 1842 were vested in him as trustee for his solicitor, Mr. George Augustus Labatt. The judgment of 1845 was vested

in Mr. Michael Molony and Mr. M'Cullagh, as trustees in a marriage settlement, the trusts of which do not appear. The petition in the first matter was presented in the month of February, 1846, on behalf of Mr. Michael Molony, by Mr. G. A. Labatt, as his solicitor, under Sir Michael O'Loughlin's act, for the appointment of a receiver. The effect of Mr. Labatt not including the other judgments in the same petition was to accumulate costs. In the month of May, 1846, Master Henn, under the order of reference in the first matter, appointed Mr. H. Joly to be receiver over certain lands in the County of Westmeath, the profit rent of which was stated in the petition to be £173 6s. 9d. a-year. On the 4th of March, 1847, Mr. George Augustus Labatt, as the solicitor for Mr. M. Molony, presented another petition under the same act, in respect of one of the two judgments of 1842, which was vested in Mr. M. Molony, when the former petition was presented, praying that Mr. Joly, the receiver, should be extended to the second matter, and to appoint him over additional lands, the profit rent of which was £153 9s. a-year. The latter petition alleged that as to this judgment Mr. M. Molony was trustee for his said solicitor, Mr. G. A. Labatt. The receiver was accordingly extended, and appointed over such additional lands in May, 1847. Mr. Labatt omitted to include the second judgment which was vested in Mr. Michael Molony, as trustee for him, reserving that, I presume, for a future petition. In Trinity Term, 1847, Mr. Labatt presented a third petition on foot of the judgment of Trinity Term, 1845, in the name of Mr. Michael Molony, and Mr. M'Cullagh, to extend the receiver already appointed, and to appoint him over additional land in the county of Longford. That petition was dismissed with costs, on what ground I am unable to say. There ought to have been but one petition to appoint a receiver, and supposing that the Lord Chancellor's Secretary should have objected in respect of his fees to the including all the judgments in one petition, there should at the utmost have been but two petitions, the one to appoint and the other to extend the receiver, the costs of the former being about £26, and of the latter about £10; but by the course adopted of presenting separate petitions, and seeking on each occasion to have the receiver appointed over additional lands, the three petitions, if an order had been made on the third petition, would have involved costs to an extent which, according to the ordinary calculation, would have amounted to from £75 to £80; and there was no excuse whatever for not including in the same petition the judgments in the first and second matters. The costs were doubled by the course adopted. The plaintiffs in the cause, who are in no default, and who are merely seeking in a legitimate manner to recover their demand, obtained an order to extend the receiver in July, 1847. What the rental of the additional lands over which the receiver was extended in the cause I do not exactly know. It was stated by counsel to be upwards of £500 a year. The arrear of interest due to the plaintiffs on foot of their demand amounted in January, 1848, to £681; and they have not received one shilling of their interest since the extension of the receiver. The facts which I have already stated do not directly apply to the question which I have to decide; but I have adverted to them to

When the order of reference to appoint a receiver was made in 1846, in the first matter, Mr. George Augustus Labatt, as solicitor for the petitioner, proposed four names to the Master for the purpose of having one of them appointed receiver. The four persons named were Marcus Tuthill, of Station View Cottage, Sandymount, Esq.; James G. of North Cumberland-street, in the city of Dublin, solicitor; Henry E. Joly, of Harcourt-street, in said city, solicitor; and Lewis Darcy, of Essex-street, in said city, Esq. Mr. Labatt has received a letter from his client, the petitioner, in which it is stated was received in May, 1846, recommending Mr. Henry Joly for the office of receiver. The petitioner states in that letter that Mr. Henry Joly was receiver in the cause of *Joly v. Rumley*, in which the petitioner was tenant; and he says, "I am, him and mention my name." Thus of the four persons nominated to act as receivers over lands situate in the county of Westmeath, two were Dubuornerneys, another resided at Sandymount, near Dublin, and the fourth in Jervis-street, Dublin. Of the two esquires are I am not aware, probably some of the same class of esquires who figure on the list of receivers returned to Parliament, several of whom I understand turn out to be attorneys' and attorneys' apprentices. I cannot find the names of these esquires in the Directory. Mr. Henn was not at this time (1846) a solicitor of the Court of Chancery, but he was an attorney of the Court of Exchequer, and Master Henn appointed Henry Joly to be receiver. I am clearly of opinion that an attorney or solicitor ought not to be appointed to the office of receiver, and I shall upon ground remove him, and this question can be decided before the Lord Chancellor on appeal. I delivered my opinion upon that subject very fully in the case of *Reynolds v. Reynolds*, so long ago as January, 1848. It appears from a report which was published of that case that I made, amongst other observations something to the following effect:—"The gross mismanagement of estates under the Court of Chancery was a matter of public notoriety, and from a return recently published it would appear that from 1841 to 1843 (and the return would probably be still more remarkable if carried down to 1847) an additional arrear of something amounting to a quarter of a million of money had arisen from the bad management of estates by receivers. The case then before him was one which called for the animadversion of the court, and the mismanagement had arisen from the person who had the carriage of the proceedings not having it to be his duty to exercise care and consideration in nominating a competent receiver; for was it to be supposed that a practising attorney or barrister was a proper person to act as receiver? as it is, he would ask, extraordinary when such an appointment had been made that the tenants upon

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have stated, either by the Lord Chancellor or by the Masters upon this subject, or by the solicitors of the Court of Chancery, and as the Masters have been in the habit of appointing solicitors, shopkeepers, attorney's clerks, apprentices, and other unfit persons to the office of receiver (imposed on I have no doubt in many cases by the party having the carriage of the proceedings)—it may be right that I should inform the solicitors who practice in this court, that if any solicitor, solicitor's clerk or apprentice, shopkeeper, or other person carrying on any profession or trade, shall be in future nominated and appointed to be receiver, I shall, upon an application for that purpose, unless some strong reason to the contrary is shewn, remove such receiver, and make the plaintiff, or the petitioner, or receiver, or the solicitor having the carriage of the proceedings, pay the costs of the appointment of the new receiver. The masters ought to open books in their offices, in which queries should be put, which should be answered by every solicitor proposing a receiver, and by every person nominated to the office. The answers to such questions should be inserted in writing in such books, and signed by those parties; and if those questions were properly prepared, it would be impossible that the class of unfit persons who have been appointed under the denomination of esquires and gentlemen could in future be appointed. The Masters ought, in my opinion, to submit to the Lord Chancellor, under the provisions of the 108th general order of the court, such suggestions as would prevent a recurrence of the improper appointments which have hitherto so frequently taken place. Many other steps should be taken which it is not necessary upon this occasion to state. I was informed when in London, that upon inquiry it appeared that many of the esquires and gentlemen in the list of receivers returned to Parliament turned out to be attorneys' clerks and apprentices. A system of the grossest fraud and deception has, I believe, been practised upon the Masters. I have no power to make general orders, but orders are necessary to reform the disgraceful system, which, I am glad to say, is now fully exposed. Whether the Lord Chancellor should or should not do so, I am unable to state; but I shall in this court, visit any future attempt to nominate an improper person to be receiver with the utmost severity; and if I shall find an attorney's clerk or an attorney's apprentice, again nominated to the office, I shall not have the slightest hesitation in suspending from further practice in this court the solicitor who adopts such a course. What has been the result of appointing an attorney to be receiver in this case? The rental is stated to be several hundreds a year; the arrear due by the tenants has greatly increased; not a shilling has been paid to the creditors; a sum, however, of £187 13s. 10d. costs has been paid to the receiver and petitioner's solicitor, and £30 more is claimed, amounting to £217 13s. 10d.; and thus the main object of petitions under the sheriffs' act has been obtained in this case. I shall, therefore, order that Mr. Joly shall be removed as receiver, and proceed to pass a final account—that it be referred to the Master to appoint, a fit and proper person to be receiver in his place and that the plaintiffs shall have the carriage of this order. I do not fix Mr. Labatt or Mr. Joly with

the costs, as the Masters have thought it right to appoint attorneys and solicitors to the office, but they must abide their own costs. It is satisfactory to me that I am in no way responsible for the enormous evils which have arisen from the system, my opinion expressed in January, 1848, having been entirely disregarded. If, however, in future a solicitor or attorney should be nominated to the office of receiver and appointed, I shall fix the party who nominates him with the costs of appointing a new receiver.

MASTER LITTON'S OFFICE.

MOLONY v. NUGENT—July, 27th.

MASTER LITTON.—It is my desire to correct some errors which appeared in a report in the public papers of what I stated here on Wednesday last. Since the Master of the Rolls' judgment in the case of *Molony v. Nugent*, the question continues to be daily proposed to me, whether if a competent, and respectable, and solvent man, or man of business, understanding the duties of an agent, and resident upon, or close to, the lands named in the pleading, and whose appointment as receiver is desired by the parties, shall be proposed to me for the office of receiver, I will refuse to entertain the question of his nomination, because the party proposed is a solicitor? My answer has been that I shall not refuse to entertain it, notwithstanding the judgment and opinion given by the Master of the Rolls in that case. And further, that if I shall deem him, upon a consideration of the circumstances of the estate and his qualifications, the best man, I will appoint him. I am bound, in the first place, to follow the law as I find it; and, in the next place, in the important duties with which I am entrusted, and which I am bound to perform to the suitors and the public, I must follow my own opinion, if it be not opposed to, or at variance with the law. The course which I thus announce it is my intention to pursue, is sustained by the law, and the uniform practice of more than half a century, both in England and in Ireland—by the Court of Exchequer—presided over by four learned and experienced men, its barons—by the uniform practice of the four Masters in Chancery, and of the Chief Remembrancer of the Exchequer; and, above all, by the opinion of the head of the court, the present Lord Chancellor, who, in the case of *Loftus v. Stephenson*, to which I shall again advert, has decided the very point. If the Lord Chancellor should ever be found to agree with the Master of the Rolls, and should, by his decision, alter the law as it has uniformly prevailed in his court, the suitors and the public may be assured, that the Masters will follow, in spirit and in letter, whatever decision shall be so pronounced. If he shall pronounce a general order on the subject, as suggested by the Master of the Rolls in his judgment (but which for the sake of the suitors and the public I anxiously hope he never may), he may be assured that he will find that the Masters of the court will yield implicit deference to the order of the head of the court, whatever their own opinions may be. If an act of parliament should pass, by which solicitors shall be pronounced incapable to act as receivers, much as we should deplore an enactment

as very injurious to the interests of the public, we should, of course, carry it into full effect. But, on behalf of the suitors and the public, we have a right to require that the law of the land shall be altered by act of parliament, or by the head of the court, before we shall be called upon to act—as upon an altered law—especially where we are of opinion that such alteration would prove greatly detrimental to the public interests. In giving my reasons for considering that the opinion of the Master of the Rolls—“that solicitors should never, or should, only under special circumstances, be receivers,”—is erroneous, and that it cannot, consistently with the interests of the suitors, be followed, I premise that I have, in my appointments of receivers, always required, as essentials, residence upon or near to the lands, personal character, habits of business, solvency, and a knowledge of the duties of an agent, having reference as well to the interests of the tenant, as to the interests of the landlord. In all these qualifications, I find, as a general proposition, the local resident solicitor infinitely superior to the country gentleman; and yet, the class of country gentlemen would appear to be the only class left to us, if the Master of the Rolls’ judgment be rightly reported, from which we could in future select a receiver. A solicitor has some knowledge of the law of landlord and tenant, and hence he avoids the perpetual irregularities and illegalities into which, in dealing with the tenantry, a country gentleman so often falls. A solicitor knows the peculiar rules of the court, as to the dealing with tenants of the court, the limited powers of distress, the favour shown to good tenants in the letting of lands, the form of affirmance by the receiver of the justice and fairness of the proposals for the taking of lands, which are brought before the Master for his approval, and he is acquainted with the many other protections to both landlord and tenant, which, by the rules of the court, are thrown around the suitors, as well as around the tenants of the court. A country gentleman receiver knows not any of them, hence continued delay, expense, and trouble. He is wholly ignorant of all the points which arise between landlord and tenant (and they are many) in relation to the poor laws. He pays away money (as, for instance, interest on charges and maintenances) which he ought not to pay without an order; and he requires an order for the payment of head rent and tithe rent charges, which he is bound to pay without an order. He does nothing without reference to his solicitor, and his solicitor becomes the receiver, without the responsibility of the office. Hence heavy demands for costs made, because the solicitor has been employed by the receiver, but which would not, and could not be made if the receiver were a solicitor. In the passing of accounts the contrast is still more apparent, and it is all in favour of the solicitor receiver. Various rules as to accounts have been of late years made by the Masters, and confirmed by the Lord Chancellor. When these rules are attended to, the account presents upon the face of it arithmetical demonstration of its accuracy which cannot err. When they are neglected all is confusion, and the suitor is subject to the effects both of mistake and of fraud. I advert especially to the reconciliation

rule, now the law of the court, and to other practical rules regulating the form of accounts, the value of which, to the suitors and to the public, none can appreciate save those who are conversant with the details; and no man filling a judicial office in the Court of Chancery can be so, save the Masters in Chancery, before whom these details pass daily and hourly, and whose duty it is to require that these rules shall be accurately abided by. The accounts brought before the Masters by the receivers, who are solicitors, are, in most cases, excellent. Perfectly acquainted with these rules, they, generally speaking, accurately follow them. They lodge their accounts within the periods prescribed by the rules of the court, saving the expense of extending the time for passing the account, and all the mischiefs attendant upon delays—whereas, the accounts sent up by country gentlemen receivers are, generally speaking, tissues of errors, and have in a very great number of instances to be sent back to them for correction and amendments—hence extensions of time for passing the accounts, and its attendant costs become necessary—balances remain in the hands of the receiver—failure in his circumstances—necessity to require payment from his sureties, and all the evils which attend the administration of an estate by an inefficient officer. I repeat it, and aver it upon the experience of nearly seven years as a Master in Chancery, and of thirty years of Bar practice, confined for many years almost exclusively to practice in the Courts of Equity, that a resident solicitor, possessing adequate qualifications in other respects, is the best agent and receiver. And, I will add, (a fact which every practical man knows), that in many counties of Ireland at present we cannot obtain any others than solicitors who would be at all qualified to act as receivers. So that, in this point of view also, the rule proposed by the Master of the Rolls, if adopted, would prove quite destructive to the suitors of the court. The opinions of the Master of the Rolls, I would say, have been adopted from three or four extreme cases (and none but extreme cases appear in his court) which have been brought before him—cases which have presented very large arrears of rent uncollected; but it is to be remembered, that these cases have occurred within the last three years, the most disastrous to the agricultural interests of Ireland, which have occurred within the memory of the present generation, and a period exactly coeval with the period of the exercise of his judicial functions. As to the suggestion that a solicitor can create costs for himself, by reason of his office as receiver, no practical man can, for one moment, entertain such a question. No proceeding can be adopted by a receiver without the order of the Master, made in the presence of, or upon notice to, all parties. No costs of any other proceedings can be, by the law of the court, allowed. I have thus, I think, shewn that the opinion of the Master of the Rolls, that in no case (save on special grounds) shall a solicitor be appointed a receiver, is not a well-founded opinion; and I am now to state that it is opposed to the opinion of the Court of Exchequer, and of the Chief Remembrancer—to the opinion of the four masters of the Court of Chancery—and, above all, to the opinion of the Lord Chancellor, the head of the court, whose

opinion has been expressed by a deliberate decision upon the subject. The law of the Court of Chancery in this respect has never been doubted. Sir William M'Mahon, a very experienced and painstaking judge (as stated by the Master of the Rolls himself in his judgment) decided the point—Mr. Smith, in his book on receivers, lays it down as the law of the court—all the Masters of the Court of Chancery have acted upon it, uniformly, as long as any living man can remember. Sir Edward Sugden's general orders, in excluding solicitors' clerks only, virtually established that solicitors are eligible. The general orders of the Court of Exchequer, in excluding solicitors' clerks and solicitors concerned in the cause, virtually established that solicitors generally are eligible, and the four Barons of the Exchequer and the Chief Remembrancer have given this construction to their rule, and act upon it. The Master of the Rolls is right in saying, that Sir Edward Sugden, at one time, entertained the opinion that it would be better not to appoint a solicitor or attorney receiver. Whether he still entertains that opinion I have not any means of knowing. But this I do know, that whatever his individual opinion was when he was Lord Chancellor of Ireland, he acted not according to that opinion, but according to the law and practice of the court. That he did so is established, not only by the general order I have adverted to, but in the case of *Pepper v. Foster*, in which case I appointed Mr. M'Creight, attorney-at-law (so describing him) receiver. Sir Edward Sugden who perused my report, communicated with me upon this very subject, and having heard my reasons, and been assured of the law and practice of the court, he deliberately confirmed my report, and Mr. M'Creight is still acting as receiver. Will the Master of the Rolls remove him, and make the solicitor who nominated him pay costs? I trow he will not. In this state of the law and practice about two years since, there came to be discussed, in the Rolls Court, the case of *Reynolds v. Reynolds*. In that case, the Master of the Rolls expressed his opinion as strongly as he has done in the case of *Molony v. Nugent*. The Masters did not, as suggested by the Master of the Rolls, disregard his opinion; but having considered it, the Masters arrived at the conclusion that it was not a sound opinion, or one which could be acted upon consistently with the law of the court, or the rights of the suitors, or the interests of the public, and they declined to act upon it. In this state of things, the case of *Layton v. Stevenson*, about a year since, came before me upon an order of reference for the appointment of a receiver. It was a case of great magnitude in point of property, and there were proposed two candidates for the receivership—one a solicitor, Mr. Bruce, of Belfast; the other gentleman not a solicitor. Able counsel were heard by me on both sides. The case of *Reynolds v. Reynolds* was relied upon as establishing the Master of the Roll's opinion; and it was fairly stated that, if I should appoint Mr. Bruce, there would be an appeal from my decision. I did, notwithstanding, appoint Mr. Bruce; and that there might be no mistake as to my intentions, I styled him in my report, "Attorney at-Law;" and requested of the able counsel who attended before me, to state in court-

ous, but decided terms, to the Master of the Rolls in open court (which was done), that I could not follow his opinion, as declared in the case of *Reynolds v. Reynolds*, but must continue to appoint solicitors receivers in all cases where I considered them, under the circumstances of the estate, the best men. The appeal came on to be heard in the Rolls Court. The discussion of it occupied almost an entire day. The Master of the Rolls, yielding to the force and power of the law, surrendered his opinion, and confirmed my report. There was an appeal to the Lord Chancellor; he confirmed my report so far forth as the principle of appointing solicitors receivers was involved, and though the report was sent back to me for the moment, that I might reconsider a question as to the association with Mr. Bruce of other persons as advisers in reference to a certain question touching the machinery of a mill, yet on the return of my second report, Mr. Bruce, solicitor, was confirmed in his office as receiver, and holds it still. Will the Master of the Rolls remove him, and make the solicitor who nominated him pay costs? I trow he will not. This case, in the view of the profession, established the law of the court, if it had ever been doubted. In point of fact, it did—not by mere opinion, but by the concurrent decisions of the Master in the cause, the Master of the Rolls, and the Lord Chancellor, in a very contested case, devoid of any peculiar circumstances—establish that a solicitor, if otherwise eligible, and where there were rival candidates, is not ineligible because he is a solicitor. I do not understand how it is that the Master of the Rolls can free his judgment from the force of this decision, to which he was a party, affirming and following as it does the settled law of the court. He may make orders, setting aside the appointment by the Masters of such receivers (which appointments they must continue to make); but I must say that it appears to me perfectly clear, unless the law of the land shall be altered, that all such orders must be reversed. I conclude my observations by reading what Master Henn has put into my hands, in writing, that what he publicly stated two or three days since in his court may not be misunderstood. He has desired that I should read it publicly. Whatever comes from that learned functionary and most just judge, has ever been received by his brother Masters as it has been with the public, with that attention, deference and respect which his learning, his experience, his sense of justice, his caution in dealing with the rights of others, and his strict adherence to the law and practice of the court, so justly entitle him to. His words are these:—

"If the head of our court were to pronounce a decision affirming the principle, that in no case ought a solicitor to be a receiver, I would hold myself bound by the authority, and would follow it strictly; or if a general order of the court were pronounced to the same effect, I would strictly obey it; but, in the absence of a direct authority by the head of the court, or of any general order of the court prohibiting such an appointment, I do consider that in every case in which, by the law of the court, the selection of a proper person to be a receiver is committed to my discretion, I am not only entitled, but bound to exercise that discretion to the best of my own judgment, without reference to the opinion of any individual, leaving it to the Judge of the appellate jurisdiction to deal with it according to his duty, if of his judgment, and that I would be guilty of a dereliction of my duty, if in such a case, I were to yield up my opinion in deference to that of any other person, unless I knew the opinion of that other person to be final and conclusive. Holding that to be my opinion, be it right or wrong, the suitor is entitled to, and I would act corruptly and dishonestly if I did not give him the benefit of it."

COURT OF CHANCERY.

HUTCHINS v. O'SULLIVAN.—February 3rd,
May 5th, 26th, and July 22nd.

Statute of Limitations—Liberty to prove.

A judgment creditor revived against the heir, but not against the executor of the consor. After an allocation order in a suit for the administration of the consor's estate, the judgment creditor obtained leave to come in and prove, by a motion, on notice to all parties. The fund in court was produced from the sale of personalty of the testator. Held that the Master was precluded from going into the question whether the judgment was barred as against the executor, and that the proper time for raising the question of the statute is on the application for leave to come in and prove.

The bill in this cause had been filed for an account of the real and personal estate of Morty O'Sullivan, the elder, deceased. A decree to account was obtained in 1834. The master made his report, and a final decree for a sale was made the 26th Jan., 1836. Under this decree, certain chattels real were sold, from which the fund in court was produced. By an order of the 4th day of December, 1845, it was referred to the Master to allocate this fund. In Michaelmas term 1810, Daniel Callaghan, the elder, obtained two judgments each for the sum of £533 8s. 4d., Irish, against Morty O'Sullivan, the elder. On the 15th of October, 1844, two writs of *sci. fa.* were issued on these judgments by Daniel Callaghan, the executor of Daniel Callaghan, against John O'Sullivan, the heir at law, and against the *terre* tenants of Morty O'Sullivan, the elder, on which after defence taken, revivors were obtained, but no *sci. fa.* was issued, nor revivor obtained against Morty O'Sullivan's executor. Under O'Sullivan's will, John O'Sullivan was tenant for life of Morty O'Sullivan's personal property. By a motion on notice to all parties in the cause, including the executor of Morty O'Sullivan, the elder, Daniel Callaghan obtained an order of the 5th March, 1846, "That he be at liberty (at his own expense) to go before the Master in the cause, and file a charge on foot of the two judgments, and at his own expense, obtain a report as to whether there be any, and what sum due on foot of the said judgments; and if the Master shall find that there is any sum due on foot of the judgments, then, that the Master, in proceeding under the said order of the 4th December, 1845, do have regard thereto, and report the priority of such demands when proved, and include the same in the allocation report, to be made under the said order."

Daniel Callaghan duly filed his charge under this order, to which John O'Sullivan filed his discharge, insisting that the judgments were barred against the personal representative, by the statute of limitations; and that, therefore, they could not be proved against the fund in court, which was entirely the produce of personalty.

The Master, by his report under the order of 1846, filed the 19th of June, 1847, found that there was due on foot of the said judgments, for principal and interest, the sum of £984 15s. 5d., sterling, being the full amount of the penalty. This report

was subsequently, by a motion at the Rolls, varied by reducing the amount reported due; a portion of the interest being held to be barred by the statute.

By the allocation report of June, 1848, the Master, amongst other things found, "Having regard to the said order of the 5th day of March, 1846, I find that there is due to the said Daniel Callaghan, on foot of the said two judgments, in the said last mentioned order referred to, for principal, interest, and costs, the sum of £835 11s. 0½d., sterling, but that the said sum so due to the said Daniel Callaghan, is not payable out of the funds now to be allocated, inasmuch as the said funds are the produce of the personal estate of Morty O'Sullivan, and the said judgment was never revived against the personal representative of the said Morty O'Sullivan." Daniel Callaghan moved to vary this report, contending that under the order of 1846, the Master was bound to find the sum reported due a charge upon the fund. Upon Daniel Callaghan's objection the Master of the Rolls, on the 23rd of December, 1848, made the following order:—"It appearing to the court upon the said Daniel Callaghan's motion that by the report of the 19th of June, 1847, the Master thereby reported that there was due on foot of the judgments vested in the said D. Callaghan the sum of £984 15s. 5d., and for costs, the farther sum in the said report mentioned; and it appearing on the face of the said report that a summons was served on Ellen O'Sullivan, the personal representative of Morty O'Sullivan, the elder, the consor of the said judgments who did not appear or contest the rights of the said D. Callaghan; and it further appearing that by the discharge of J. O'Sullivan, the heir at law of the said M. O'Sullivan, it was insisted that the said judgments were barred as against the personal estate of the said M. O'Sullivan by the statute of limitations; and it appearing further that two objections were taken to the said report of the 19th of June, 1847, one of which was allowed, but which in no way affected the said question, as to whether the said judgments were barred by the statute of limitations as against the personal estate of Morty O'Sullivan, the elder, deceased, the consor of the said judgments. And whereas the Master, by his report of the 30th of June, 1848, has found that there was due to the said Daniel Callaghan on foot of the said two judgments the sum of £835 11s. 0½d., but that the said sum was not payable out of the funds then to be allocated by the said Master, inasmuch as the said funds are all the produce of the personal estate of Morty O'Sullivan, and the said judgment was never revived against his personal representative. And whereas counsel for the said Daniel Callaghan in support of the objections now before the court to that finding insists that the Master is concluded by his former report of the 19th of June, 1847, made after a summons was served on the personal representative of the said M. O'Sullivan, the elder, and that although no evidence was laid before the Master under the order of reference upon which the report of the 19th of June, 1847, was made, or under the order upon which the present report of the 30th day of June, 1848, was made to take the case out of the statute of limitations; as to the said personal estate of the said Morty O'Sullivan, the elder, the Master could

not consider such question being so concluded by his former report of the 19th of June, 1847; and it further appearing to the court, after communication with the said Master, that he did not intend to decide by the said last-mentioned report any question that the personal estate was liable to the said two judgments, no evidence having been laid before him to take the case out of the statute of limitations as to the above personal estate. It is ordered by the Right Honourable the Master of the Rolls that the Master in this cause be and he is hereby at liberty to re-consider his report of the 19th of June, 1847, and to amend the same, and to find, if he shall so think fit, as he has found by his last report of the 30th day of June, 1848, that the said two judgments are barred by the statute of limitations as to the said personal estate. And it is further ordered that the said Daniel Callaghan be and he is hereby at liberty, if he shall so think fit, to go into evidence, or prove any matter which took place within the last twenty years, prior to the said Daniel Callaghan filing his charge under the order of reference of the 5th of March, 1846, or any other matter which the said Daniel Callaghan shall be advised, to take the case out of the statute of limitations as to the said personal estate, such evidence to be concluded within such time as the said Master shall direct. And it is further ordered that the said Daniel Callaghan be and he is hereby at liberty to take such objection or objections to the said report of the 19th of June, 1847, after the Master shall have amended the same as he shall be advised." Daniel Callaghan now appealed from the Master of the Rolls' order, and moved to vary the Masters' allocation report.

Mr. Christian, Q. C., for O'Callaghan.—Bennett v. Bernard, (10 I. E. R. 584); O'Kelly v. Bodkin, (2 I. E. R. 361; 3 I. E. R. 390); Barrington v. Evans, (1 Y. & C. 434.)

Mr. T. Fitzgerald contra.—Putman v. Bates, (3 Russ. 188.)

Mr. Rogers for J. O'Sullivan.—Wilson v. Leonard, (3 Bur. 373); Busby v. Seymour, (1 J. & Lat. 527); Boyd v. Bolton, (8 I. E. R. 113.)

Mr. Deasy in reply.—Harrison v. Duignan (2 Dru. & War. 295); Byrne v. Duignan, (3 J. & Lat. 116.)

LORD CHANCELLOR.—This case came before me on appeal from an order at the Rolls. Many objections were disposed of, but those which remain to be considered are those of Daniel Callaghan, who claims to be a judgment creditor of a person named Morty O'Sullivan. The bill was filed for relief on a specialty debt of O'Sullivan. The first decree is of the 7th May, 1834, which is the ordinary decree to account. Under that decree a report was made, on which the final decree was founded. The report was of the 25th of January, 1836, by which it appeared that the property consisted of a chattel real, and of some freehold property, and that the only creditor who had come in and proved was the plaintiff himself. Under that decree this chattel real was sold, and the proceeds being paid into court, an order was made to allocate the funds produced by the sale of the chattel. In that state of the case Callaghan, applied to the court by notice of the 28th February, 1846. He was a judgment creditor of M. O'Sullivan, by two judgments of

Michaelmas Term, 1810, but he did not come in under the decree, and was precluded from the benefit of the proceedings in the cause. He then applied to the court in the ordinary way for liberty to go in and prove his demand on foot of his judgment. As I have said, his judgment was one of the year 1810, but it had been revived before the commencement of the cause. In Michaelmas, 1844, it was again revived against the heir, and the tenants of Mortimer O'Sullivan. A plea of the statute of limitations was put in, and a verdict was obtained by the plaintiff, on the ground of payments made within twenty years. On that the application was made to the court, as I have mentioned, on notice to all parties in the cause. The heir-at-law was then tenant for life of the chattel interest, and the fund was wholly produced by the sale of it. Thus, in truth, the application was made against the chattel interest, on notice to the personal representative, and the person having the beneficial interest in the lands. That came before the court, and on the 5th March, 1846, an order was made in these words. [His Lordship read the order.] On that the parties went into the office, where the usual proceedings took place; but it being the practice, on an order of this kind, to make a separate report of the sum due, the Master accordingly made his report of the amount due on foot of O'Sullivan's judgments. [His Lordship here read the report of the 19th of June, 1847.] So far the Master satisfied the order in finding the sum due. It appears that about that time John O'Sullivan died, and Mortimer, who succeeded to his claim, was an infant. He took objections to the report as to the amount of the sum found due. One was, that under the circumstances, only six years interest should have been allowed; thus he admitted that the principal sum was due. That came on to be heard, and was allowed, and in consequence the matter stood thus on the order and Master's report:—By the order, the Master was directed to find whether any, and what sum, was due to Callaghan; and by the report, as varied, he found that £839 11s. 0½d. was due. It seems that the Master adopted the opinion, that notwithstanding the first order, and the allocation order, he was at liberty to enter into the question, whether, as the revivor was not against the personal representative, he was to give him any of this fund produced from the personalty of M. O'Sullivan, and accordingly refused to allocate any portion of it to Callaghan. As I infer, from what has been stated, Callaghan insisted at the Rolls that the order of 1845, and the report of June, 1847, were conclusive, and that nothing more was to be done than to allocate the money. It appears that the Master of the Rolls took that view, and thought that while the allocation order, and the report of the sum stood, the Master's report could not be varied from them. The order made at the Rolls on Callaghan's motion, was as follows. [His Lordship here read the order appealed from.] There is much difficulty in that course. It is unusual for the court on motion to send back a report which has been accepted to and confirmed, in order to raise a question of the statute of limitations. In that state it comes before the court. It struck me that there

was much question whether the order allowing Callaghan to prove did not stand in the way of hearing any such objection. At the time when that order was made, all parties were before the court. There could be no mistake as to the fund from which it was intended to raise the amount, and that it was the fund of personality which alone was in court to be distributed. It was open to the personal representative to have contested the debt then, and it would have been a matter of course for the court to have disposed of the question whether this was a debt, when that objection could be taken, if that question had been then raised by her. At the time that order was made, *Martin v. McCausland* had been decided, and there was not then the strong opinion against that case which has since arisen; indeed that case has never been expressly overruled, and though much doubt has been thrown on it, it may happen that on debate in a court of law on that question, it may be decided that a personal representative is bound by a revivor against the heir at law. However that may be, the words of the statute are very general, and this proceeding on the judgment was just as much a proceeding as if there had been no suit pending. I apprehend, therefore, that this question should then have been raised, and that it will be found, that the executrix, having allowed it to go to the office she will be bound. In *Berrington v. Evans* (1 Y. & C. Ex. C. 434), the Chief Baron says, "The words of the statute are, 'that after a certain day no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, either at law, or in Equity, but within twenty years after the right shall have accrued.' Now I am not prepared to say whether—if I could be satisfied that the bill was filed with Kemp's consent, and he meditated like Berrington to prosecute his claim under that bill—whether, under those circumstances, I should arrive at a different conclusion. Even then, I apprehend he would have to give a satisfactory reason for remaining so long without calling in the aid of this court in his own person. But supposing that he never knew of the filing of the bill, or of the progress of the suit, and that twenty-five years after the right had accrued, upon a new discovery of the suit having been instituted, and of funds being in court, he petitions to be allowed to go before the Master and to make his claim, can I say that his petition is not a proceeding in Equity within the statute." Lower down he says, "Considering, therefore, that this is a proceeding in Equity to recover money upon a judgment, upon which twenty years have run, and that it comes within none of the exceptions of the statute, I am of opinion that the claim is barred." Thus he treats this as proceeding within the act. In *Lord St. John v. Boughton*, (9 Sim. 219), the Vice-Chancellor says, "I am of opinion, therefore, that the right of the petitioners to the same due on these bonds has been acknowledged by a writing signed by the agent of the person by whom the same are payable, and that the petitioners ought to be at liberty to go in before the Master and prove their debt." That was also a case decided on petition, (equivalent to a motion here,) and treating it as a proceeding. In *O'Kelly v. Bod-*

kin, (2 I. E. R. 361,) the question was not directly before the court; the question of interest had been saved by the report, and when *Berrington v. Evans* was cited, and it was stated that the court there did not determine what would be the effect of the creditor proving his demand under the decree, Baron Pennefather says, "They did so in fact; the question there was, whether the creditor was barred or not. The only thing relied on to take the case out of the operation of the statute was the pendency of the suit; but the court determined, that inasmuch as the creditor stated that he was not aware of the institution of the suit until after the final decree was pronounced, he could not in any wise consider that suit as his own, and being of that opinion, the court properly refused to go before the officer and prove his demand." Thus, as that decree was a difficulty in the way of the Master, in the present case there is the further difficulty of disturbing the intermediate report. I have not found any direct authority to say whether or not the statute of limitations can be relied on in the office under such circumstances. My present impression is, that this matter is not open on such an inquiry, and that as long as the original order to come in and prove exists, such a defence is not open to the party. If the parties wish to discuss the case again on the effect of the original order, they are at liberty to do so; but my present impression is, that it having been made in the presence of all parties, it is as it was said in *Berrington v. Evans*, &c., a "proceeding," and that it is no more open to parties to raise that question in the office, than it would be after a decree to account on a bill filed regularly, to set up the statute of limitations in the office, as a bar to the plaintiff's debt.

According to the permission of the Lord Chancellor, a motion was brought in on the 26th May 1849, to insist that the statute of limitations was open to the debts in the office, notwithstanding the order of the 5th March 1846, or otherwise to vary that order by declaring that it was to be without prejudice to any question as to the funds properly applicable to the payment of the sum, if any, to be found due on the foot of the said judgments.

Mr. Rogers and *Mr. Lawson* for the motion.

Mr. Christian, Q. C., and *Mr. Dausy, Q. C.*, contra, for Callaghan.

July 22.—LORD CHANCELLOR.—I do not think the order of March 1846 can be varied. On the other point, I am of the same opinion I before intimated. It is not necessary for me to go into the detail of the cases; on reconsidering them, I still think that the "proceeding" within the statute is taken by the application to the court to become a party to the suit. It appears from *O'Kelly v. Bodkin*, that the court always, on the first application, decides whether the party is at liberty to prove, notwithstanding the statute of limitations; and that the same rule must apply to orders of this kind, which is applied to the statute of limitations, in all such cases, that it must be raised as soon as possible. In suits, that rule has been long established; so far back even as the time of Lord Hardwick, in *Prince v. Haylin*, (1 Atk. 498). And on the same principle, it was held in a very

late case, *Roch v. Callin*, (6 Har. 531). "That, notwithstanding the principal question in the suit be the right of the plaintiffs to two annuities, one of which has been paid; the defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the statute of limitations as limiting the period of the account, if the benefit of the statute be not claimed on the pleadings. The Vice-Chancellor says that it would be obviously improper to permit a defendant, at the hearing of a cause, to insist upon the statute of limitations, if he has not set up that defence upon the pleadings. If the statute be pleaded, the plaintiff may be able to show cause, taking the case out of the statute, which he cannot be expected to do, if the objection be not taken. Is the court in such a case to refer it to the Master, to inquire whether the statute ought to be allowed as a bar to the claim, before the decree is made?"

The Master of the Rolls order was varied, and the report sent back on Callaghan's objections.

O'Sullivan's motion was refused, but without costs.

Ch. Motion Book 4, pp. 244, 254, 290.

ROLLS COURT.

O'KEEFE v. LANIGAN.—*May 11, 12.*

Practice—Amendment after issue joined and witnesses examined, refused.

After issue joined and witnesses examined by the defendant, the plaintiff will not be permitted to amend the bill by introducing new matter, which will alter the frame of the suit, and to which an answer is required.

On the 2nd of March a motion had been made in this cause, for the production of a mortgage for the purpose of inspecting an alleged indorsement. A report of this application will be found ante p. 210, where the nature of the suit is fully stated. That motion was refused without prejudice to the plaintiff amending the bill, by putting in issue this alleged endorsement, and without prejudice to the plaintiff applying to the court when the defendant should have put in an answer to the bill when amended. A commission for the examination of witnesses was taken out on behalf of the plaintiff, and on the 2nd of April notice was served of speeding same on the 24th; on the 11th notice was served of witnesses names to be examined on the part of the plaintiff; on the 20th of April, upon the discovery of new evidence, notice was served by the plaintiff, that he would not proceed with the examination, and on the 24th of April, notice was served by the defendant, with the names of three witnesses to be examined before one of the examiners in chief in Dublin, and cross interrogatories were subsequently lodged by the plaintiff. On the 30th of April, the rule for publication was entered. From the affidavit of the plaintiff it appeared that notice had been served of the names of five witnesses to be examined on the part of the defendant, and the commission had not been executed; also that neither the plaintiff or his solicitor had been informed of the contents of any of the depositions taken in the cause, and that from the discovery of

new evidence, and the necessity of consulting counsel, plaintiff had been unable to apply sooner to the court. The bill had been amended once since answer, by putting in issue a letter to which no answer had been required. The plaintiff's affidavit also stated, that some of the matters sought to be introduced by amendment, only came to the knowledge of the plaintiff or his solicitor, subsequently to the time of serving notice of the witnesses names.

This was an application on the part of the plaintiff, that the defendant might be restrained from further proceeding on the rule of the 30th of April, to pass publication in the cause, and that the plaintiff be at liberty to withdraw the replication without prejudice to the commission issued for the examination of witnesses, and to amend the bill by putting in issue a deed of mortgage of the 1st of March, 1834, a letter of the 8th of April, 1843, a statement of one of the defendants respecting the manner in which C. O'Keefe, jun. disposed of his property, a diary alleged by the defendant to have been kept by the said C. O'Keefe, and a proposition made by him respecting the taking of a farm.

Mr. Greene, Q.C., and Mr. Lowry for the plaintiff.—In *Mitford E. Pl. 383*, last Ed., it is laid down that a plaintiff may obtain leave to amend his bill after replication, and leave will be granted to the plaintiff to withdraw the replication, and amend the bill. In *O'Grady v. Barry*, (1 I.E.R. 11,) an amendment was allowed six weeks after the last answer. An order to amend may be obtained at any time before publication. 1 *Danl. C. P.* 396. In the case of *Smith v. Gould*, (7 I.E.R. 271,) a second amendment after answer was allowed, although the last answer was filed twelve months previous.

Mr. W. Smith and Mr. Meagher contra—In this case it does not appear that any reasonable diligence has been used by the plaintiff, and it should appear by the affidavit in support of the motion, that all the matters sought to be introduced by these amendments became lately known to the plaintiff, and he should satisfy the court that this motion could not have been sooner brought forward. [Counsel also referred to *Calvert v. Ganly*, (1 Ph. 518); *Davis v. Davis*, 10 I. E. R.; *Roach v. Johnstone*, (2 Har. 638; 1 Ph. 78.)]

May 12th.—MASTER OF THE ROLLS—In this case, the replication was filed in February, and on the 2nd of April. Notice was served by the plaintiff, of speeding a commission to examine witnesses, on the 24th. A day or two previous to this, a notice was served by the plaintiff, stating his intention of applying for liberty to amend the bill. The defendant was permitted to examine witnesses, and cross-interrogatories were lodged by the plaintiff, although it appears that he did not examine. Early in April, three witnesses were examined on the part of the defendant, and no application has been made to suppress these depositions for irregularity; and at this stage of the proceedings, after three witnesses on the part of the defendant have been examined, I am called on to allow an amendment, not by adding parties or amending the prayer of the bill, but amendments of a most extensive character, and calculated to alter the entire frame of the suit. There may be cases in

which this Court will exercise its jurisdiction at the hearing of the cause, and, under peculiar circumstances, will allow it to stand over, for the purpose of amendment; and it may be contended, that if an amendment may be made when the cause is at hearing, by adding parties, and possibly by altering the frame of the bill, an amendment may also be made at this stage of the proceedings. It is not necessary for me to offer my opinion on that point, but what I am called on to say is, whether I will allow amendments which will alter the entire frame of the suit, and to which an answer is required, and in respect of which a discovery is sought. What will be the state of the record, if the bill becomes demurrable by this amendment? for a bill may become demurrable by amendment. The ground of the demurrer may for the first time arise out of the new matter introduced, and may be taken advantage of by plea or demurrer. In this case the replication has been filed, and three witnesses examined, by the defendant. This replication must now be withdrawn, and what is to become of the evidence of the three witnesses who have been examined? It will be necessary to have a new replication, new examination, and there may be one case made by the original bill, and another by the amended bill. It will be necessary to have a new record; no case has been cited to me, in which a similar application has been granted. In the case of *Milligan v. Mitchell*, (1 M. & Cr. 442,) liberty was given to amend the bill, by shewing the plaintiffs were unable to bring all proper parties before the Court, and Lord Cottenham said, "Under that order, made at the hearing of a cause in which two persons were plaintiffs, and in which depositions had been taken, the bill is amended by adding certain other plaintiffs, and inserting allegations and charges of no inconsiderable length, relating to matters connected with those new plaintiffs. The cause is again brought to a hearing, with the additional plaintiffs on the record, such plaintiffs having adduced no evidence, and making no case at the hearing; and the question is, whether the bill is to be dismissed generally, or whether those plaintiffs shall be at liberty to attach themselves to the former cause, and to avail themselves of the evidence in that cause, under the pretext afforded by an order authorizing the original plaintiffs to amend the bill by adding parties or shewing why all proper parties could not be brought before the Court. The course which has been taken was perfectly unjustifiable; no authority has been cited in support of it, and on principle it cannot be supported. The plaintiffs having taken the original record from the Court, and introduced a totally new record, how could these witnesses, supposing them to have sworn falsely, and their depositions to be read, be indicted for perjury? They are depositions in a suit of which the record no longer exists." Also the observations of Vice-Chancellor Sir J. Leech, in the case of *Wright v. Howard*, (6 Mad. 105,) are applicable to this case, and the affidavit should shew that the plaintiff could not with all due diligence bring forward this application at an earlier period. — Refuse this motion, with costs, to be paid by the plaintiff to the defendant when taxed," &c.

Lib. 286, fo. 143.

OWEN JAMES KELLY, AND SARAH HIS WIFE,
AND OTHERS, *Petitioners*.—May 12.

Practice—*Solicitor refusing to attend taxation of costs.*

This court will make an order compelling a solicitor to attend and tax his costs, and if the taxing-master has been unable to proceed, on account of his non-attendance, he will have to pay the costs of the motion.

Mr. Darley moved, on behalf of Patrick Dolan, and Marianne Dolan, his wife, that Alexander J. Humphrey might forthwith tax and mark his costs, acting as solicitor in the several matters, in the petition mentioned, and lodged by him in the Master's office, on the 25th day of July, 1845, and that the amount due on foot thereof might be ascertained—the petitioners offering to pay the balance which might be found due upon such taxation. In consequence of Mr. Humphrey's refusal to attend, the Master has been unable to tax the costs.

June 2.—MASTER OF THE ROLLS.—In this case I felt some difficulty, and referred it to the taxing master, who stated that such a case had never come before him, as a solicitor refusing to attend to tax his costs. I was not sure whether, under the circumstances, the Master would not be justified in striking out all the costs; however, upon consulting Master Henn, he informed me that the practice has been for the court to make an order to compel the solicitor to attend. I will make such an order, and if he disobeys, it will be at his peril.

"Let the said Alexander J. Humphrey proceed within ten days, or such further time as the taxing master shall allow for that purpose, to have the costs claimed by him, and in the petition mentioned, taxed, &c., and in the event of the said Alexander J. Humphrey not having his costs taxed within said period, or such further period as the taxing master shall allow for that purpose, let the petitioners be at liberty to make such application against the said A. J. Humphrey, as they may be advised, although the last day for serving notice on petitions may have elapsed; and it is further ordered, that the said A. J. Humphrey do furnish, on oath, to the solicitor for the petitioners, a list of all credits to which the petitioners are entitled against said costs—the petitioners undertaking to pay the amount of any which shall appear to be due on such taxation, after all just credits; and it is further ordered that the said taxing master, on taxing and certifying said costs, do take an account of all such credits, and strike a balance, and it appearing from the certificate of Master O'Dwyer, that he was unable to tax or certify the costs of Mr. A. J. Humphrey, under the General Order of the court, in consequence of his continued non-attendance before the said taxing master, let the said Mr. A. J. Humphrey pay to the petitioners the costs of the said petition, and of this application, and refer it to the taxing master to tax same."

R. P. H. B. Lib. 30, fo. 2.

M'DERMOTT v. O'CONNELL.—May, 14th.

Practice—Rule for publication entered too soon, set aside for irregularity.

Replication filed the 1st of March, amended the 5th, rule for publication entered the 1st of May, set aside for irregularity, and an application that this rule might be permitted to stand, notwithstanding the irregularity, was refused.

The replication in this cause was filed on the 28th of February, but was not served until the 1st of March; on the 5th of March the replication was amended by adding several defendants, pursuant to an order of the 2nd of March previous; but no copy of this order or of the amended replication was served on the defendant's solicitor. On the 1st of May the peremptory rule for publication was entered and served. This was an application on the part of the defendants, M. A. Mahony, K. Mahony, and J. Barry, that this rule for publication should be set aside.

Mr. Greene, Q. C. for the motion.—By the 93rd General Order it is provided, that any defendant, after the expiration of two months from the replication filed, and the plaintiff, after the expiration of two months from the replication served, shall be at liberty to enter and serve the peremptory rule for publication; in this case the two months would not expire until the 5th of May, as the replication was amended on the 5th of March. The plaintiffs are clearly irregular, and the rule for publication was entered too soon, and should be set aside.

Mr. Serjeant O'Brien, contra, moved a cross notice, that in case the Court should be of opinion that the rule for publication was entered and served irregularly, and before the proper time, that said rule and the proceedings consequent thereon might be permitted to stand, notwithstanding such irregularity. This rule is not peremptory in its terms. The case of *Attorney-general v. Ball*, (9 Ir. E. R. 463,) shews that the rules may be relaxed; under the 86th General Order ten clear days notice is to be given of the examination of witnesses before a commissioner examiner; in that case only nine days notice was given, and the Court refused to suppress the depositions; there is a discretion which may be exercised by the Court.

Mr. Berkley, in reply.

MASTER OF THE ROLLS.—The plaintiff has been altogether irregular. In general a pleading is considered as filed the day upon which notice is served, and it would be strange to allow a replication to be amended and publication to pass the next day. I do not think this cross notice can be sustained.

"Let said order, dated the 1st of May, 1849, to pass publication in this cause, be set aside, and no rule on the cross notice, and let plaintiff pay said defendants, M. A. Mahony, K. Mahony, and J. Barry, £7 for the costs of this motion."

Lib. 285, fo. 204.

BLAKE v. COMINS.—May 26th.

Practice—Payment of money into Court—Admission in answer of an agent.

Bill filed against an agent for an account; admission in the answer of a sum due, ordered on motion to be paid into Court.

The bill in this case was filed by a landlord against his agent for an account; by the answer it was admitted that there was a sum of £253 in the hands of the defendant.

Mr. P. Blake now moved that the defendant might invest in government stock the sum of £253 19s. 10d., being the amount admitted by his answer to be in his hands, and might transfer same to the credit of the cause. In the case of *Gordon v. Rothley* (3 Ves. Jun. 572), a defendant was ordered on motion to pay into court a balance ascertained by a report. In *Wood v. Downes* (1 Ves. & B. 49) a similar order was made, and the case of *Fairley v. Freeman* was there cited, in which a sum admitted by an answer to be in a defendant's hands, was ordered on motion to be paid into court.

Mr. F. Meagher contra.—It is only in the case of trustees or personal representatives that an order to bring money into court is made on interlocutory application (2 Dan. C. P. 1636), and has never been done in the case of an agent; besides, in this case, the plaintiff gave an order to a person named O'Flaherty, who had been the former agent to receive this money, and we may be compelled to pay him.

MASTER OF THE ROLLS.—If you pay Mr. O'Flaherty in pursuance of this order, I will not compel you to bring the money into court; but if not, I order the money to be lodged in court, and not to be paid out without notice to Mr. O'Flaherty.

"Be it so, with liberty to the said defendant to apply to the court that said sum may be transferred to Mr. O'Flaherty, and the costs of this motion be costs in the cause."

Lib. 286, fo. 51.

DOOLEY v. HARDING.—May, 28th.

Where a defendant in a cause has been found a lunatic by commission, this Court will not, on the application of the plaintiff, appoint a guardian ad litem, to file an answer for the lunatic.

Mr. Hughes, Q. C., on behalf of the plaintiff, moved that one of the clerks in court might be appointed a guardian ad litem, to file an answer for the defendant to the bill in this cause; an appearance had been entered for the defendant by his solicitor, but by an inquisition subsequently held under a commission of Lunacy, the defendant was found a lunatic. [Counsel referred to *Crawford v. Knughan*, (1 Dr. & Wal. 195.)]

Mr. B. Murphy, contra, contended that the motion was irregular and unnecessary, the defendant having been found a lunatic by the commission.

Mr. Hobart, in reply, referred to *Shelford v. Lunacy*, 561.

MASTER OF THE ROLLS.—This application is irregular, and although orders, similar to that sought, have sometimes been made; it is only in cases where the defendant has not been found a person of unsound mind by a commission of lunacy.

"It appearing that a committee has been appointed in the matter of Harding, a lunatic, no rule, &c."

Lib. 288, fo. 74.

WILLIAMS v. WALKER—July 18.

Judgment creditor—Supplemental bill—Pleading.

Where a bill was filed subsequent to March, 1843, and by a supplemental bill judgment creditors were made notice parties, a decree was made giving them liberty to surcharge and falsify the account taken in the original cause, and in default, that they should be bound by the proceedings.

This cause was set down to be heard *pro confesso* against the inheritor, who had been brought before the court by supplemental bill. Some judgment creditors of the inheritor, who had not been made parties in the original cause, were made notice parties to the supplemental suit, and the inheritor had been made an answering party. The bill was filed, and a decree pronounced in the original cause, subsequent to the general orders of 1843; the cause was now set down to be heard *pro confesso* against the inheritor, and the bill prayed that the judgment creditors who had been made notice parties, should be bound by the proceedings and decree in the original cause, and that they should be at liberty to surcharge and falsify the accounts in the original cause and in the event of their neglecting so to do, within such time as the Master should appoint for that purpose, that they should be bound by these accounts.

Mr. Lyons for the plaintiff.—In the case of *Rutledge v. Rutledge* (3 J. & Lat. 307, S. C. 8 I.E.R. 84), after the new rules of March 1843, a supplemental bill was filed against judgment creditors of the inheritor to have the benefit of a decree for a sale made in 1847, and it was held that these creditors were properly made notice parties, and a decree was made that they should have liberty within a limited time, to surcharge and falsify the original accounts. Also, in *McDowell v. Skerrett*, reported in the note to *Rutledge v. Rutledge*, a similar decree was made. These cases establish that under the old practice, judgment creditors not before the court when a decree was pronounced may be made notice parties to a supplemental bill. Since the late general orders these cases are stronger than the present, for according to the old practice, judgment creditors should be made answering parties, and the original bill, in the present case, was filed since the new rules, by which it is only necessary to have made judgment creditors notice parties in the original cause.

MASTER OF THE ROLLS.—I will make the order in this case in the same form as that in *Rutledge v. Rutledge*.

“Let the plaintiff’s bill in this cause be taken *pro confesso* against the said defendant, Thomas Walker, for want of answer; and let the said J. Coote, &c. be at liberty to surcharge and falsify the accounts under the decree to account in the original cause, wherein R. C. Williams was plaintiff, and the said Thomas Walker and several others were defendants, bearing date the 30th day of May, 1845, provided the said defendants shall do so within such period as William Brooke, Esq., the Master in said original cause, shall appoint; and in case the said defendants shall not so surcharge or falsify said accounts within the period to be so limited by the said Master, then let the said plaintiffs have

as against the said defendants the benefit of said decree pronounced in the original cause, on the 31st of January, 1848, and accordingly let the same be carried into execution against the said defendants.” *R. H. B.* 20, *fo.* 824.

COURT OF EXCHEQUER CHAMBER.

COLE v. BATCOCK—May, 30.

Coram Blackburne, C.J., Doherty, C.J., Pigot, C.B., Pennefather, B., Torrens, J., Crampton, J., Perrin, J., Richards, B., Ball, J., Jackson, J., Moore, J.*

Pleading—Bill of Exchange—Gambling Consideration.

To a declaration upon two bills of exchange the defendant pleaded “That before and at the time when he first became and was the indorsee and holder and interested in the bill of exchange the plaintiff knew they were given for an illegal consideration.” The plaintiff replied, “That he did not before or at the time when he first became and was the indorsee and interested in the said bills know they were given for an illegal consideration.”

Held, on demurrer to the replication, that as the statement in the plea meant a single allegation that the plaintiff became indorsee and interested at the same moment, or, in other words, had then notice of the illegality, that the traverse was good.

The plea also alleged that the money was lost at a certain game called “Hazard,” and that the plaintiff well knew that was the consideration for the bills. The replication alleged that the plaintiff did not know that the bills were given for the consideration in the plea mentioned.

Held also that it was a good traverse, the replication being in the same words, must be taken to be co-extensive with those of the plea.

Held, that the traverse did not throw the onus upon the defendant of proving a knowledge, in the plaintiff, of the illegality before and at the time of his becoming holder, as if he proved a notice of it before he became so, it would follow he had it at the time.

This was a writ of error from the judgment of the Court of Queen’s Bench, (reported 11 *Ir. L. Rep.* 306). The action was assumpsit upon two bills of Exchange by the indorsee against the acceptor. The declaration contained two counts on the bills, and the money counts. The defendant pleaded *non-assumpsit* to the whole declaration, and to the counts upon the bills, “That before the accepting of the said bills of exchange in the said first and second counts mentioned, or either of them, by the defendant as therein mentioned, to wit, on the 21st day of June A.D. 1845, at Dublin, in the county of the city of Dublin aforesaid, the defendant did lose to one George Maugham, and the said George Maugham did win of the defendant, a certain sum of money, to wit, the sum of £500, by gaming and playing at a certain game called “hazard,” and the said sum of £500 so lost by the said defendant as aforesaid, and so won by the said George Maugham as aforesaid, being and remaining unpaid and unsatisfied, heretofore, to wit, on the 21st day of June, 1845, to wit, at, &c., aforesaid, it was agreed between the said George Maugham and the defendant that the

* Lefroy, B. sitting in Equity Exchequer.

payment thereof should be secured by two bills of exchange to be accepted by the defendant; and the defendant avers that in pursuance of the said agreement, to wit, on the day and year last aforesaid, to wit, at, &c., the defendant, for securing the said payment of the said sum of £500 so won and lost as aforesaid, accepted the said two bills of exchange in the said first and second counts respectively mentioned, contrary to the statute in such case made and provided; and the defendant avers that the said two bills of exchange so accepted as aforesaid were and are the identical bills of exchange in the said first and second counts respectively mentioned, and the defendant further saith, that the plaintiff, before and at the time when he first became and was the indorsee and holder, and interested in the said two bills of exchange, or either of them, to wit, on the 21st day of June, A. D. 1845, to wit, at &c., aforesaid, well knew that the same had been, and were, and that each of them had been, and was so made upon and for the said illegal consideration." To the plea, the plaintiff, protesting that there was no such illegal agreement as that stated in the plea, and that the said bills were not given upon an illegal consideration, replied, "that the said several bills of exchange in the said first and second counts respectively mentioned, were indorsed to the said plaintiff after the 31st day of August, A. D. 1845, and before the said bills respectively became due, to wit, on the day and year in the said declaration in that behalf mentioned, to wit, at, &c., aforesaid, for valuable consideration: that is to say, for and in consideration of the said plaintiff discounting the same and paying therefor to the said George Maugham, being then and there the holder thereof respectively, a large sum of money, to wit, the amount of the several sums of money in the several bills of exchange respectively mentioned, less by the interest thereon for the time which the said several bills respectively then had to run; and that he the said plaintiff did not before, or at the time when he first became and was the indorsee and interested in the said two bills of exchange, or in either of them, to wit, on the 21st day of June, A. D. 1845, to wit, at, &c., know that the same had been or were, or that either of them had been, or was, made upon or for the illegal consideration in the second plea of the said defendant alleged; and this he the said plaintiff prays may be inquired of by the country," &c.

Mr. C. Kelly with *Mr. Napier, Q. C.*, for the plaintiff in error.

Mr. A. Maley, with *Mr. Gilmora, Q. C.*, for the defendant.

[The following books and cases were cited and commented on: 3 Chit. Pl. 1146; Steph. Pl. 272, (5th Ed.); *Horn v. Boulcott*, (1 Bing. N. C. 323. S. C. 1 Scott 122); *Humphreys v. O'Connell*, (7 M. & W. 370, S. C.; 9 Dow. P. C. 213); *Goreham v. Sweeting*, (2 Saund. 207, note a); *Cowlishaw v. Cheslyn*, (1 Cr. & Jer. 48); *Eden v. Turtle*, (10 Mee. & W. 635); *Alcager v. Currie*, (11 M. & W. 14); *Hodges v. Sandon*, (3 T. R. 432); *Marrton v. Allen*, (8 Mee. & W. 494)]

BLACKBURN, C. J.—This is an action of assumption, and the declaration contains two counts on separate bills of exchange, and the money counts. It is an action by the indorsee of a bill

of exchange against the acceptor. The defendant pleaded the general issue, and a special plea to both the counts on the bills of exchange. To this plea a replication was put in, which was demurred to. The court below gave judgment in favour of the plaintiff. The plea in substance alleges that there was no consideration for the sum of money in the bills of exchange mentioned, but that it was lost at the game of hazard, and "that the plaintiff before, and at the time when he first became and was the indorsee, and holder, and interested in the said two bills of exchange, &c., well knew that the same had been and were, and that each of them had been and was so made upon and for the said illegal consideration." The replication traverses that statement, "That the said plaintiff did not before or at the time when he first became and was the indorsee, and interested in the said two bills of exchange, or in either of them, to wit, &c., know that the same had been or were, or that either of them had been or was made upon or for the illegal consideration in the second plea alleged." This traverse, it was argued, was too large on various grounds. The first is, because the defendant by his plea says that the plaintiff had notice both when he became indorsee, and interested in the bills. It is, however, a clear answer to this to say, that on this record the plea says that the plaintiff became indorsee and interested at one and the same moment of time. If the indorsement to the plaintiff, and his becoming interested in the bill, could be distinct acts, they are not so pleaded; but as pleaded, the construction to be given to it is, that it contains a single averment, that at one and the same moment he had notice of the illegal consideration. This is the real meaning of the plea. The next objection is of the same kind, namely, that the replication is bad, because it avers that the plaintiff did not know that the defendant lost the money (i. e. for or "upon the consideration in the second plea alleged") at the game of hazard, and does not deny that it was lost at any other game. To this objection the answer is, that the words of the replication being the same as the plea, the construction must be the same. The traverse is of the very matter alleged in the plea, and the words are co-extensive. The next objection is that the traverse should be in the disjunctive—that the traverse is in such a form as would require from the defendant proof of notice before, "and" at the time of the indorsement, whereas notice, before "or" at the time would sustain the plea. This objection is untenable. If the defendant gave proof of notice before the plaintiff became indorsee, such proof will of necessity establish that he had notice at the time of his becoming indorsee; nor is the defendant inconvenienced in any defence he could have made. Independently of this, the traverse is right in form, simply negating the form of the plea. The last objection is, that the replication does not deny that the plaintiff had notice when he became the holder. This is in effect the same as the first objection, and is to receive the same reply. All the allegations are connected with the copulative "and," traversing the single averment in the plea, that the several acts were done at the same moment of time. We are therefore of opinion, that the judgment of the court below must be affirmed.—*Judgment affirmed.*

COURT OF EXCHEQUER CHAMBER.

KEAN v. STRONG.—Feb. 2, 3, and May 30.

Coram Blackburne, C. J., Doherty, C. J., Pigot, C. B., Pennefather, B., Torrens, J., Crampton, J., Perrin, J., Richards, B., Jackson, J., Moore, J. Absente Ball, J. and Lefroy, B.

Covenant, construction of—Evidence—Bill of Exceptions.

Where in a lease there are covenants for renewal and quiet enjoyment (with intervening covenants), the first unqualified, the latter qualified, and the covenants are not inconsistent with each other, the general covenant is independent and uncontrolled by the qualified covenant, and was held to be rightly set forth in the declaration as an unqualified covenant.

Held that evidence of the value of a lease was admissible—though not strictly applicable to the issue raised—for the purpose of guiding the jury in their estimate—the question being wholly one of damages.—Richards, B. dissentiente.

Held that where the renewal, if granted, would be valueless, the grantor having no interest from which to renew, that the judge should have directed the jury to find for nominal damages.

*Held that exceptions to different expressions in the judge's charge seriatim, without stating clearly what the judge did tell the jury, or what the defendant requested him to tell them, was not a proper mode of framing a bill of exceptions; and, per Blackburne, C. J., that on this ground alone the exceptions should be overruled.**

This was error from the judgment of the Court of Queen's Bench, on exceptions to the ruling of the Lord Chief Baron, on the trial at Armagh Summer Assizes, 1847. The action was in covenant by the assignee of lessee against the personal representatives of the lessor. The declaration contained four counts upon the same covenant. Pleas, *non est factum* to the lease of 1800, and also to the assignment of it in 1820, and *plene administravit*. There were other pleas which were not now before the court, being held bad upon demurrer—(reported 5 I. L. R. 540.) The second count (which alone was before the court) stated that John Maxwell, on the 1st day of November, in the year 1800, demised to Joseph Craig, his executors, administrators, and assigns, certain lands with the appurtenances, except as therein excepted, to hold with the appurtenances except as aforesaid, to the said Joseph Craig his executors, administrators, and assigns, from the said 1st day of November, 1800, for the term of twenty years, at a certain rent, "and the said John Maxwell did in and by the said last mentioned indenture for himself, his executors, administrators, and assigns, covenant, promise and agree to and with the said Joseph Craig, his executors, administrators, and assigns, that at the expiration of the demise then granted, he, the said John Maxwell, his executors, administrators, and assigns, would renew the then present lease, or any future lease which should be granted of the said last mentioned premises, by adding thereto such number of years as in that present demise, that is

to say the term and space of twenty years, and so on at the end or expiration of every term, he the said John Maxwell, his executors, administrators, and assigns, should and would make out a new lease, or renew the then present or any future lease which should be granted of the said last mentioned premises, for the term and space of twenty years, and so on to be continued." The declaration then stated a covenant by the lessee, his executors, administrators, and assigns, to pay to the lessor, his executors, administrators, and assigns, a triennial fine of £1 2s. 9d. during that demise; the entry of the lessee; the assignment on the 17th April, 1820, by the lessee, of his whole interest to William Craig, in as beneficial a manner as he held it himself, and subject to all the covenants of the original lease of 1800; that William Craig, being so possessed of the said term, and of the said right of renewal, died in the month of April, 1820; that the plaintiff Jane Kean, before her marriage, took out administration, and became thereby possessed of the residue of the said term of twenty years; and her marriage with the plaintiff in October, 1820; the death of John Maxwell the lessee, on the 20th of January, 1820; and that the term of twenty years granted by the said John Maxwell, expired on the 1st of November, 1840. The regular payment of the triennial fines by Joseph and William Craig, and by said Jane before her marriage, and by her husband and her since her marriage to the said John Maxwell in his life-time, and to his executors since his death, and the demand of a renewal by the plaintiff, and the refusal of the defendants. In the lease, after some intervening covenants, there was a qualified covenant for quiet enjoyment as follows—"And the said John Maxwell does covenant, promise, and agree to and with the said Joseph Craig, his executors, administrators, and assigns, that he and they paying the hereby reserved rent and receiver's fees and duties, and performing the conditions hereinbefore mentioned and expressed shall and may quietly and peaceably hold, and occupy, and enjoy the hereby granted premises with their and every of their appurtenances, except as before excepted, without the let, hindrance, or molestation of him the said John Maxwell, or any other person deriving by, or from, or under him."

The plaintiff gave in evidence the lease of 1800, and the assignment in 1820; endorsed on the lease of 1800 was the following memorandum:—

"Received from the within-named Joseph Craig the sum of £950 sterling, as a fine for the within-mentioned lands of Manooney, given under my hand this first day of November, 1800.

(present.)

The following receipt was also given in evidence, subject to objection:—

"Received from Mr. Joseph Craig on account of a purchase of a part of Manooney farm, Nine hundred and thirteen pounds, fifteen shillings, sterling.
Dublin, Sep. 20, 1800.

By procuration from John Maxwell.

JOHN MAXWELL.

EDWD. ARMSTRONG.

£913 15 0

Now received, 36 5 0

£950 0 0—in full,

Dec. 22, 1800.

JOHN MAXWELL."

* The difference of opinion in the Court was rather on the result of the evidence, than on the legal propositions here stated.

Evidence of the payment of the rent and renewal fines to John Maxwell and his executors, under the lease of 1800 was also given. Mr. H. L. Prentice, a witness for the plaintiff, was asked what was the value of such a farm held under a College lease, taking into consideration the risk on the one side that the College might not renew, and the chance on the other side that they would? The question was objected to, but admitted by the Lord Chief Baron. There was no evidence of any demand of renewal, nor of any tender for execution by the plaintiff of any deed of renewal, all of which matters were subject of exception by the defendant. The defendant gave evidence that the lands in question were a part of the College estate, and proved a lease of them to Robert Maxwell for twenty years from the 30th of March, 1754, and renewals thereof to 1769. On the 22nd of February, 1774, the lease was renewed to Henry Maxwell, to whom the renewals were granted till 1816, after which period they were made to Maxwell Close till 1824, the last renewal proved. The payment of rent under the lease was proved, the practice of the College to renew, and the will of Robert Maxwell, the first lessee, whereby he devised his interest to Henry Maxwell, and that probate thereof was granted to John Maxwell, one of the executors; that Henry Maxwell in 1816 devised his interest to the Reverend Samuel Close, who, on the 31st of December, 1816, devised his interest to Maxwell Close; that Henry Maxwell had possession under the will of Robert Maxwell, and that John Maxwell, who made the lease of 1800 to Joseph Craig, paid a rent of £19 10s. to Maxwell Close for the premises demised by John Maxwell in the lease of 1800; that Maxwell Close had given John Maxwell notice to quit, and recovered possession of these premises under a judgment in ejectment in Hilary Term, 1822, and continued in possession till he sold the land to the defendant Strong. Evidence was given of a search for the *habers* under which Maxwell Close obtained possession, but that it could not be found. There was no evidence of rent being paid to any person by J. Maxwell prior to 1818. The defendant admitted assets. The charge of the Lord Chief Baron was thus stated in the bill of exceptions:—

And the said counsel for the said defendant did then and there insist that the said learned Judge ought to direct the said jury that inasmuch as it so appeared in evidence as aforesaid that all the estate and interest which the said John Maxwell in his life time had or the said defendants his executors as aforesaid as such executors had in the said premises demised by the said lease of the 1st day of November, 1800, were evicted as aforesaid by the said Maxwell Close, having such title paramount thereto, as aforesaid, the said plaintiff was not entitled to a verdict for more than nominal damages; but the said learned judge then and there refused so to inform and direct the said jury, and on the contrary thereof, after stating to the jury the issues upon which they were to find, and the evidence relating to the said issues, told the said jury that they were also to assess the damages sustained by reason of the breach of covenant stated upon the record, and that the question of damages was one entirely for the jury; and the learned Judge read for the said jury the covenant for renewal contained in the lease of 1800,

and told, and directed the said jury that it did not amount to a contract that John Maxwell would have such an interest as would enable him, at the expiration of the lease, to grant such renewal; and the learned Judge read to the said jury the covenant for quiet enjoyment contained in the said lease, and told them that the latter covenant was such that if an eviction by title paramount, that is to say, by any person claiming and having title not derived through or under John Maxwell, took place during the term of the said lease, or after its expiration, and after a renewal of it damages could not be recovered for such an eviction upon the last mentioned covenant, or upon a similar covenant contained in such renewal. And the learned Judge told the jury that as no damages could, in such case, be recovered on the covenant for quiet enjoyment, then, if no valid renewal could have been granted by the executors of John Maxwell, he would, without giving them a positive direction upon the amount of damages, which was a matter entirely for the jury, advise them to give nominal damages only; but the learned judge further told and directed the jury, that a material question for the consideration of said jury upon the said evidence was, whether, at the time of the execution of the said lease of the 1st day of November, 1800, by the said John Maxwell, there was in fact such an estate or interest in the said premises vested in the said John Maxwell as would have enabled him or his executors to grant a valid renewal of the said lease at the expiration thereof, whereupon the said counsel for the said defendant did then and there except to the said opinion and directions to the said jury of the said learned Judge as well because he refused so to inform and direct the said jury as last aforesaid, and they were by him informed and directed as to a material question as aforesaid for them upon said evidence. And the said learned Judge further held and so informed the said jury that the said lease of the 1st day of November, 1800, if unexplained and in no way affected by other evidence, would import on the face of it that the said John Maxwell had an estate in said premises co-extensive with that which he professed to grant thereby, and that there was a distinct intimation given by the said lease to the lessee thereof that he, the said John Maxwell, then had a lease under the said College, of the said premises mentioned in the said lease of the 1st day of November, 1800. And the said learned Judge further informed the said jury that if the said John Maxwell was, at the time of the execution of said lease of the 1st day of November, 1800, the owner of a lease of the said premises from the said College, then it was clear from the practice disclosed to the said jury by the said witness, Joshua Nann, that there might have been an interest in the said John Maxwell or the defendants, his executors, out of which a renewal of the said lease of the 1st day of November, 1800, could have been granted to the present plaintiffs, and that though the legal interest in such lease under the said College, if any, was not vested in the said John Maxwell, yet if any party was interested therein as a trustee for him, an equitable estate might have been granted to the said plaintiffs by an instrument purporting to be a renewal. And the said learned Judge further held and

so informed the said jury that in his opinion the statement in the said lease of the 1st day of November, 1800, of a lease to the said John Maxwell from the said College with the other evidence in the case, raised a question for the said jury, whether such an instrument did not exist as would have enabled the defendants in 1820 to execute a renewal to the plaintiff of the said premises. And the said learned judge after calling the attention of the jury to the evidence given by the defendant, tending to procure eviction by title paramount, told the jury there was on the other side evidence for their consideration that John Maxwell might have had such title as aforesaid at the time of the execution of said lease of the 1st day of November, 1800, and the said learned judge called the attention of the jury to the evidence from which it would appear that the said John Maxwell remained in the enjoyment of the said demised premises till shortly before the date of the said ejectment brought by the said Maxwell Close as aforesaid, and that the said John Maxwell received the rents of the said premises and a triennial fine thereout, and the learned judge told the jury that there was on the record an admission that those rents and fines were paid, and called their attention to the evidence of the finding of the lease of 1800 among the papers of the defendant, and to the fact that the lease under which John Maxwell held was not found among said papers or produced at the trial. And the said learned judge left it to the said jury to consider whether such continuance as aforesaid in the enjoyment of the said demised premises by the said John Maxwell was consistent with the supposition that there was no such title in the said John Maxwell under the said College as aforesaid. But the learned judge told the jury that they should also take into consideration the evidence of the said Maxwell Close, and the whole of the evidence given by the defendant, that the said John Maxwell was only tenant at will of the said premises to the said Maxwell Close, and thereupon the counsel for the said defendant did then and there, on the part of the said defendant, except to the said opinion and direction to the said jury of the said learned judge, and to what he so told the said jury; inasmuch as he thereby left matters to the said jury for their consideration and decision not legally arising upon the said issues and evidence aforesaid to consider and decide; but which, if proper to be considered at all upon said issues and evidence, it belonged to the learned judge exclusively to consider and decide, and which he ought to have considered and decided himself upon the legal construction of the said lease of the 1st day of November, 1800, and the legal effect of the other evidence so given as aforesaid as applicable, if applicable at all, to the construction, effect, and legal operation of the said lease, and to have directed the said jury accordingly. And the counsel for the said defendant did then and there insist before the said learned judge that he ought, and they did then and there pray him to inform and direct the said jury that there was no legal evidence of any such estate or interest in the said demised premises being vested in the said John Maxwell at the time he executed the said lease of the 1st day of November, 1800, or at any time afterwards, as could have enabled him, or the defendant as his executors, to grant a valid renewal of the said lands

thereby demised, at the expiration of the said lease of the 1st day of November, 1800. But the said learned judge refused so to direct and inform the said jury, and the said counsel for the said defendant did then and there except to the said opinion and ruling of the said learned judge, because he refused to direct and inform the said jury as last aforesaid prayed by the said counsel for the said defendant, but left the question in that behalf to the said jury as aforesaid. And the said counsel for the said defendant did then and there insist before the said learned judge that he ought, and they did then and there pray him to inform and direct the said jury upon the whole of the said evidence given on the part of the said plaintiff and the said defendant as aforesaid, that if the said jury believed the said evidence they should either find a verdict for the said defendant or a verdict for the said plaintiff for nominal damages only; but the said learned judge refused so to inform and direct the said jury, and on the contrary thereof held and affirmed and told the said jury that if they believed the whole of the said evidence they might find a verdict for the said plaintiff for substantial damages, but the amount thereof, and whether the same should be substantial or nominal was a matter entirely for them.

The jury found a verdict for the plaintiff for £1000. The plaintiff elected to take their verdict upon the second count alone.

The postea stated, "that a special jury to try the said issues so joined between the said parties pursuant to the statute, &c. (certain jurors, naming them) came and are duly elected and sworn upon that jury, and because the residue of the jurors of the same jury did not appear, therefore one other person of those standing round in court, by the sheriff of the said county, at the request of said John Kean, &c. and by command of the said justices, is newly set down, and was sworn upon that jury, and the said juror so newly set down, together with said jurors so sworn and impanelled, being duly elected, tried and sworn to declare the truth, find, &c."

Mr. Holmes and Mr. Napier, Q.C., Mr. Ormsby with them.—The only covenant stated in the declaration* is that for renewal; that for quiet enjoyment appeared on the production of the lease at the trial. The construction of the first covenant depends upon that of the latter, which is limited to the acts of J. Maxwell and those claiming under him. There are two classes of exceptions, to the evidence and the charge: the first is to the admission of the receipt for £950, it not being mentioned in the deed, nor material to the issues on the record. The second and third exceptions are to the reception of evidence as to the value of this farm-lease, and go to the construction of the covenant; the fourth is to the charge of the learned judge. [That the whole instrument was to be taken into consideration they cited and commented upon *Broughton v. Conway*, (Dyer, 240, S. C.; Moore, 58;) *Browning v. Wright*, (2 B. & P. 13;) *Food v. Wilson*, (8 Taun. 545, S. C. 2 B.; Moore, 592;) *Mends v. Marshall*, (1 Brod. & Bing. 319; S. C. 3 B. Moore, 703;) *Brown v. Brown*, (1 Keb. 234;) *Merrill v. Frame*, (4 Taun. 329;) *Deering*

* The covenant for quiet enjoyment was stated in the third count, on which the plaintiffs allowed the defendants to have judgment.—*Reporter*.

v. Farrington, (1 Mod. 118;) *Line v. Stephenson*, (6 Scott, 447; S. C. 5 Bing. N. C. 188; S. C. in error; 7 Scott, 69, per Lord Denman;) *Stannard v. Forbes*, (6 Ad. & El. 572.)] The fifth and sixth exceptions are in effect that where either expressly or impliedly acts were covenanted to be done on both sides, neither can maintain an action for the breach without averring that he has done his part, or his willingness to perform what he has not done. [*Pennefather, B.*—This argument does not appear to be open to you under the plea of *non est factum*.] *Edmonds v. Groves*, (2 M. & W. 642, per Alderson, B.); *Smith v. Martin*, (9 M. & W. 304.) [*Pennefather, B.*—In both cases an inference was attempted to be drawn from an admission on the record.] *Freeman v. Mayor of Waterford*, (1 Sch. & Lef. 451.) The seventh exception is that the learned judge should not have left it to the jury to say whether John Maxwell might not have had some title contrary to that established by the evidence of the defendants, to be in the Close family. The learned judge should not have told the jury that there might be some title or beneficial interest in John Maxwell; if there was we admit the verdict was right. There is no evidence that John Maxwell had any estate out of which he could have given the plaintiffs that which they required, and if not they cannot complain of not getting that which would be valueless. Lastly, there was a mis-trial. It appears from the *postea* that there not being a sufficient number of special jurors present, a tales-man was taken *de circumstantibus*; the twelfth juror or tales-man was improperly chosen; this is a statutable jury, and must be chosen pursuant to the statute, [35 H. 8, c. 6; 10 Car. 1, sess. 2, c. 13, s. 3]; *Peters v. Opie*, (2 Saund. 349, n. 1); 6 Geo. 4, c. 51. By the 28th sect. of the 3 & 4 W. 4, c. 91, the tales-man should be taken from the common jury, and the officer should have taken and put them into the ballot-box. [*Perrin, J.*—He is bound to take them from the *circumstantibus*; if possible they should have a qualification, if not, whoever is present. *Pennefather, B.*—Would not a consent cure the defect? if so the averment is, that the plaintiff consenting, the jury was taken *de circumstantibus*, and the defendant went on to trial.] *Fines v. Norton*, (Cro. Car. 279;) *Crows v. Edwards*, (Hob. 5;) *Jenk. Cent.* 89, case 73; *Gardner's case*, (5 Rep. 36 b.); *Holt v. Mellowcroft and King v. Perry*, (5 T. R. 453;) *Farmor v. Dorington*, (Cro. El. 222;) *Hassett v. Payne*, (Cro. El. 256 n.); *King v. Tremearne*, (5 B. & C. 214;) *Drumgoole v. Home*, (1 Hud. & B. 212;) *Farmer v. Mountfort*, (8 M. & W. 266.)

Mr. T. O'Hagan, Q.C. and *Mr. H. H. Joy, Q.C.*, with them *Mr. Tomb, Q. C.*—The covenant is absolute and unrestricted, and the court cannot entertain a question as to damages only. *Bac. Ab.*, tit. *Damages*; *Hist v. Goats*, (2 Roll. Ab. 703;) *Lowe v. Piers*, (4 Burr. 2229.) These covenants are independent of and unrestricted by the other. There are several intervening covenants, therefore the express covenant is not controlled by the other. The cases cited on the other side are not applicable; *Browning v. Wright*, (2 B. & P. 13,) is in our favour. In *Mends v. Marshall*, (1 Brod. & Bing. 319,) the covenant was immediately connected with the preceding one, and *Food v. Wilson*, (2 B. Moore, 592,) was also a case of connected covenants. *Line*

v. Stephenson, (6 Scott, 447,) and *Stannard v. Forbes*, (6 Ad. & El. 572,) were cases of an implied covenant being controlled by an express covenant. The same principle will be found laid down in *Platt on Cov.*; *Howell v. Richards*, (11 East. 643;) *Wigg v. Lutterworth*, (13 East. 138; 548, 3;) *Grimsforth v. Griffith*, (1 Saund. 60;) *Smith v. Compton*, (3 B. & Ald. 189;) *Hesse v. Stevenson*, (3 Bos. & Pul. 565;) *Barton v. Fitzgerald*, (15 East. 530.) It was not necessary to show any eviction by some one claiming under John Maxwell, nor of loss to the plaintiffs. The receipt was legally in evidence, assuming it to be connected with the lease, and was clearly admissible as an admission of the value by the parties at the time the lease was made. The question to Mr. Prentice was also legitimate on the question of value. The lease was in evidence, and was stated to be derived from the College, and the witness proved that such leases were marketable in Armagh; it was, therefore, a legitimate question as to the value of the clause of a renewal. There was no necessity for tendering a renewal as contended for. *Steer v. Shalecroft*, (12 Mod. 401;) *Hicks v. Goats*, (Cro. Jac. 391.) Non-direction is not a ground for a bill of exceptions. *McAlphine v. Mangnall*, (3 Man. & Gr. & Sc. 517.) [*Pennefather, B.*—If a plaintiff call upon a judge to direct in a particular manner, and he refuses to do so, he may except to the non-direction.] *Baile, N. P.* 316; *Bridgman v. Holt*, (Show, P. C. 115.) When the judge leaves to the jury the evidence on both sides, and gives them no direction on the law, a bill of exceptions will not lie. *Philips v. Chichester*, (Sir T. Jones, 146;) (S. C. Sir T. Ray, 404.) A portion of one part of the charge or another is not to be made the matter of exception to the entire charge. *Newcastle v. Bristol*, (4 B. & Al. 280.) We contend that the question of damages is wholly irrespective of the question as to whether John Maxwell had power to renew. [*Blackburne, C. J.*—I do not understand that the judge's charge is to be objected to word by word and letter by letter.] *De Medina v. Norman*, (9 M. & W. 820.) As to the mis-trial; the cases cited do not apply to that before the court. All the precedents are general, and it must be now intended that the sheriff did his duty. *Cer. adv. vult.*

The court being divided in opinion, now delivered their judgments *seriatim*.

May 30.—*MOORE, J.*—This case comes before us upon a writ of error by the defendant in the court below, where the question came on a bill of exceptions to the ruling of my Lord Chief Baron. The Court of Queen's Bench gave judgment for the plaintiff below, the defendant here. (The learned judge having read the pleadings.) Some of the exceptions in this case, were taken during the progress of the case, and at its conclusion. It was contended that the covenant for renewal was qualified by that for quiet enjoyment; there was no controversy, but that the plaintiffs below were entitled to a verdict on the plea of *non est factum*, and that of *plea administravit*. The only question—subject to a question of variance, on the plea of *non est factum*, to be tried—was that of damages, and of the principle upon which they were to be assessed. The lease and assignment being proved, the receipt of the purchase money was offered in evidence. The

bears date after the execution of the lease, signed by John Maxwell the lessor. The indum on the lease states that the consideration of the lease was £950. That memorandum signed by John Maxwell, though the receipt, £918, a portion of this consideration, before the execution of the lease, the receipt. The defendant objected to the admissibility of the receipt; but my Lord Chief Baron in opinion it ought to be received. Now, I am not able to understand the ground on which it was objected to; it was offered only in question of damages, which was the sole point in controversy. Could the jury possibly have a better criterion of value than that which the landlord and lessee had agreed to put upon it at the time of the grant? It is clear, from the receipt, that £950 was given and taken for the interest of the lease. It appears to me that a receipt signed by the lessor was clearly admissible against his witnesses, to shew the amount of damages. Therefore, I am of opinion that this exception should be overruled. The next objection is the one of Mr. H. L. Prentice; where a question of value is one of opinion, it must frequently be put to the jury; nothing is more common than in a case upon the warranty of horses, to ask what is the opinion of the witness, would be the value of the horse if sound, and what, if unsound: there are many persons quite incompetent to give an opinion as to the unsoundness, or otherwise quite incompetent to speak as to the value. If the question may be put in that case, it may here also; and if the question were objectionable, it is removed to a subsequent part of the case, which shews the course of renewal on the part of the College. The next objection is, that there was no evidence of an eviction by John Maxwell. I am of opinion that no such evidence was necessary. Suppose the plaintiff not to be disturbed, that would be an answer to an action of covenant, for not granting a renewal. The fourth exception is, that the learned judge refused to direct the jury, that as there was no notice on the part of the lessee requiring the lessor to renew, that they should find for the defendant. It is stated in the declaration, that a demand of renewal was made and refused. In the event there was no obligation to tender any renewal. The plain meaning of the words are, that a renewal should be granted. I do not think there is any ground for exception. The next exception is, that the learned judge being called upon to direct the jury that the plaintiff was in no event entitled to more than nominal damages, declined to do so as there was nothing to shew any eviction by the defendant, or of loss sustained by the refusal to renew. For anything that appeared, John Maxwell might have had in him a sufficient title; there is no opinion of opinion that this objection must fail. The defendant then contended that there was a substantial issue under the issue raised by the plea of *non est*; and that on this plea the learned judge should have directed the jury to find for the defendant. That though this covenant for renewal was apparently unqualified, yet it was controlled by a qualified covenant for quiet enjoyment, and that it had been declared upon as a qualified covenant. It is clear the covenant for renewal may be

restricted by the qualified covenant for quiet enjoyment; a large covenant in one instrument, may be restricted by another covenant in the same instrument. Where two covenants are inconsistent, one should give way to the other; the courts have said that a general covenant is to be qualified by a limited covenant, and if a party were to declare as upon a general covenant, that would not be the true construction; but in the case now before the court there is no inconsistency. The covenant to grant a renewal, is to do an act, and the qualified covenant is not inconsistent with it; there is nothing to restrict the act—no qualification of the covenant declared on; the covenant is an absolute one; and there is no variance between the covenant declared on, and the covenant in the lease. I am of opinion that there is nothing to restrict this unqualified covenant—that it is absolute and declared upon according to its true legal construction; and this is therefore no ground of objection; and so far as I have considered, the exception I have referred to, the court fully agree in this view. The plaintiff's case, having closed, the defendant then went into his case, and gave evidence of a lease and renewal from the College to the Maxwell family, from 1754 to 1824; that the defendant, in 1818, paid rent to Maxwell Close, in whom the interest in these College lands became vested. It was also proved that John Maxwell was his tenant at £19 10s. per annum; and a notice to quit served on John Maxwell, signed by Maxwell Close; and further, the defendants gave evidence of an ejectment on the title to recover the possession from John Maxwell of the premises comprised in the lease of 1800, which ejectment was served upon the defendants as executors of John Maxwell. The defendants having closed their case then called upon the learned judge to tell the jury that the plaintiffs were not entitled to more than nominal damages. It then becomes material to ascertain what my Lord Chief Baron told the jury upon the question of damages. There are but two points of view, in which this question could be submitted to the jury: First, that John Maxwell, or his executors, had a power to grant a valid renewal. Secondly, that he had no such power—and the charge shews that the Chief Baron did leave it in both these views. Mr. Napier in the argument, put this question upon its right foundation. The question is not as to the preponderance of evidence, but whether there was any evidence to go to the jury that John Maxwell had such a title as he could renew from. If there were none such, the Lord Chief Baron was wrong; if there was such evidence, he was right, and bound to leave it so to the jury. The question is one entirely on the weight of evidence, and comes before us on the exception to the charge of the learned Chief Baron. The defendants say there was not any evidence from which the jury could infer that John Maxwell had the power to grant a renewal. I think there is such evidence; it is to be collected from the lease stated in the exception, that John Maxwell had a lease from the College. Now supposing that lease was to other members of the Maxwell family, it might have been in trust for John Maxwell, or be assigned to him, and be called his lease from the College; and where a man grants a lease, and states that he has a lease from the College, that is

some evidence to shew that the allegation is true. The understanding undoubtedly was, that one was to give a lease, the other to have it. If a man grants a lease and covenants to renew, and executes it, that is some evidence that he covenanted to give; and his covenanting for quiet enjoyment during the term granted, is evidence to the same effect, as is also the covenant to pay renewal fines, and the fact of their being paid to John Maxwell, and to his executors. The executors had no title except upon the assumption of there being a title to renew. I am not able to bring my mind to the conclusion that there was no evidence of a power in John Maxwell to grant a renewal, notwithstanding that Maxwell Close had treated himself as owner by giving a notice to quit. I approve of the verdict as not being against the weight of evidence. The next objection is that it was left to the jury to say whether the title of John Maxwell was legal or equitable—if the latter he could not renew. Suppose the jury came to the conclusion, that at the time of the granting of the lease, the premises were vested in trustees, and that John Maxwell had but an equitable title, that would shew a clear ground for ample damages for having screened himself behind the outstanding legal title. On these grounds I think the Chief Baron left the question correctly to the jury. With respect to the next question, it does not appear but that there may have been twelve good jurors on the panel; it ought to appear that there was there one person not competent to be drawn. On these grounds I am of opinion this writ of error is not sustained.

JACKSON, J.—The twelfth objection is resolvable into those contained in the first, second, and seventh, and may be summed up in this, that this is a case for nominal damages only, and that the Chief Baron should have so directed the jury. The question of damages is one for the jury, not the judge. The subject for our consideration is whether in an action of covenant the judge can direct a verdict for nominal damages, and give his opinion respecting the effect of the covenant for renewal, that for quiet enjoyment, being qualified, is confined to the lessor's own acts, and of those claiming under him. I am of opinion, that in this case the covenant for renewal is independent of the covenant for quiet enjoyment. The tenant whose representatives the plaintiff's are, gave £950 for the interest in the lease. The lessor refers to his having a lease from the College; taking that, with the evidence of the renewals being uniformly granted by the College, I think the tenant was fully entitled to a renewal. The third exception was that which my brother Moore spoke of first, and is to the reception in evidence of the receipt for £950. It is true that the receipt is not strictly applicable to the issues; but we must recollect that this is an action for damages, and as such, the jury must have some guide as to the amount they should give; the receipt was not contradictory of the lease. I am of opinion that it is evidence to regulate the amount of damages, and was properly admitted. The next objection is to the reception of the evidence of Mr. Prentice. In this also I agree with my brother Moore, as well as there being no necessity for a notice to renew. With respect to the objection that no deed of renewal was tendered for execution,

it is clear from the construction of the covenant, "that the said John Maxwell should and would make out a new lease," that the landlord was bound to make out a new lease; therefore I am of opinion my Lord Chief Baron was right in saying that the plaintiffs were on this ground entitled to but nominal damages. On the question of variance I also agree. Further, as to the charge of the Chief Baron, I am of opinion it was perfectly right; all the evidence went to shew that John Maxwell had power to renew. With respect to the question of the talesman, I am of opinion, as far as appears from the record, that it is impossible to say that any thing was wrongly done.

RICHARDS, B.—This is an action for a breach of covenant for renewal of a lease; the lease was for 20 years, and contained covenants for renewal, and for quiet enjoyment. The tenant of John Maxwell, after the expiration of the term of 20 years, was served with notice; the premises were evicted in an adverse suit. If the lessor had such a title as is contended he had, he was guilty of great default in not renewing, and the jury were bound in law to assess the damages; but had the title been evicted before the lease had expired, I am not prepared to say the plaintiffs could maintain any action. This case is plainly distinguishable from *Williams v. Burrell* (1 C. B. 402), there no eviction had taken place. A renewal, if executed in the present case, would have operated but for two years. I shall confine my observations to the principle upon which damages ought to be assessed. An exception was taken to the line of examination of a witness produced on the part of the plaintiff, (Mr. H. L. Prentice.) Now assuming that the plaintiff was entitled to more than nominal damages, I am at a loss to know what means this witness had, more than any of the jury, of knowing whether the College would renew. I see no reason why he should be considered more competent to form an opinion upon this subject than any of them; a witness may be asked a question upon a matter of science or skill; but in my opinion the objections to this witness were well-founded. Evidence was given on the part of the defendant, which shewed *prima facie* that there was no title in John Maxwell. Defendant called the solicitor of the College, and he produced a lease to Robert Maxwell. There is a chain of evidence shewing the existence of the lease from the College in persons other than John Maxwell. I now come to the exceptions to the charge of my Lord Chief Baron. There being some ground of presumption that John Maxwell had some title, it may not have appeared so clearly that John Maxwell had no such title as that the judge was bound to withdraw that question from the jury; but I am not disposed to affirm the manner in which he did leave the question; it was not left in such a way as to satisfy me that the jury were not misled. Possibly I may be wrong, and that no real grounds exist for disputing upon this point. Possibly at the close of the defendant's case there was no reason for suggesting that John Maxwell had no real interest in the premises. The direction of the Lord Chief Baron as to the matter of fact, as to excessive damages, was not as precise or as explicit as they should. I am very decidedly of opinion that no valid renewal could have been granted; and seeing that the jury

have given substantial damages, they must have assessed them upon some illegal principle of law. This is not an action of tort; it is founded upon contract. It has not appeared whether any real injury has been sustained in point of law; on the contrary I hold that no real damage resulted from the non-renewal. Regarding that to be the case, I think the learned judge would have been right in directing the jury to give nominal damages. Nominal damage is a phrase very well understood in the law. I think the jury ought to have been directed in this case, if they believed the evidence, to find nominal damages. The judge left it to the jury to say whether there might not have been an equitable title in John Maxwell. This part of the charge is not warranted by the evidence; there was no ground for submitting, as a matter of fact, that John Maxwell had an equitable estate. I do not see in what character this trust estate is to be viewed. I confess I am not aware of any question being raised for the jury. As I understand the case, John Maxwell did not hold under any lease, but was tenant from year to year. This part of the charge appears to me to be objectionable. If the jury believed the whole of the evidence, they might find substantial damages for the plaintiffs. I am at a loss to understand that part of the charge, "Although you believe that John Maxwell had no title to grant a renewal, you may find substantial damages." I think substantial damages cannot be given upon a covenant of that kind, unless there was a power to perform the covenant.

PERRIN, J.—I concur in the opinion of my brother Moore, that the judgment of the court below should be affirmed. I shall confine my opinion to the question of damages. This is a lease for 20 years, with a covenant for renewal, in which he mentions his lease from the College, and for which he received a consideration of £950. The lease to John Maxwell might have been either to himself or a trustee. There was no proof of an actual payment of rent by him to any one during his life; it is plain he had some interest in what he calls his lease, under which he was in possession, and under which he made the lease and received the fines. It is a principle to be preserved against him and his executors, that he told the truth. The eviction by title paramount might have been collusive. It was a serious question for the jury, whether the testator told the truth in 1800; and if he did not keep it in his power, the means of performing the contract, he should pay; and this view is consistent with the facts in evidence. It seems strange that his executors should hold him up as putting his hand and seal to what he knew he could not perform; and notwithstanding the appeal made to them by the conscience and justice of the court, they appear to me to evince a stronger regard for the property, than the character of the testator.

CHAMPTON, J.—I differ from the opinions of my brothers Moore and Perrin; my opinion is wholly founded upon the charge of the Lord Chief Baron. For the defendant it is contended that under the circumstances the plaintiff is entitled to nominal damages only; the jury have given substantial, if not excessive damages; it is peculiarly their province to measure the damages where damages may be given, and the court in general should not inter-

fere; but when the amount becomes the main question, and the judge directs the jury to assess them upon an erroneous principle, the charge may be made the subject of exception. The lease in question is from John Maxwell to John Craig, at a rent of £6, with a triennial fine of £1, and a covenant for perpetual renewal. The lease contained no covenant for title—it was an unqualified covenant to renew at the expiration of the term; the damages were for the breach of this covenant. The second count alleged no title in the lessor, but in whom we are called upon to presume a title. The covenant in the lease was indubitably broken, and had there been a covenant for title, the plaintiff would have been entitled to substantial damages. The third count was founded on the supposition that there was no covenant for title, on this count the plaintiff had a verdict by the concession of the plaintiff. John Maxwell was evicted by title paramount. The plaintiff could not sustain an action for a breach of the covenant for quiet enjoyment. What, then, is the proper measure of damages for the breach of this covenant for renewal? On what principle should they be assessed? The rule is stated in *Robinson v. Harman* (1 Ex. Rep. 150.) The defendant knew he could not grant a lease. We must then consider what was the value of the thing the plaintiff lost—if the lessor had no title the plaintiff lost nothing. If a renewal had been given in this case, no action could be brought, though all the evidence went to shew it would be valueless. The Lord Chief Baron told the jury, that if, on the whole of the evidence on both sides, they were of opinion that John Maxwell had power to execute a valid lease in 1820, the plaintiff was entitled to substantial damages; if otherwise, he was entitled to nominal damages only. His direction was founded upon the whole evidence; he stated to them the substance of the evidence on both sides. It is contended that, considering all the evidence, there was no ground for the judge to send such a case to the jury, that a title in John Maxwell can be only upheld through the presumption of a fact. The evidence for the defendants removed any presumption created against them. The evidence on the part of the defendant shews that these lands were a portion of the College estate, the leases of which contained no covenant for renewal; that John Maxwell became the owner of the lease as the executor of Henry Maxwell; that he was not the tenant to the College, but that Henry Maxwell alone was so, and paid rent every year, and that John Maxwell never paid. In 1801 Henry Maxwell renewed with the College, and still continued to be the tenant; that after the death of Henry Maxwell the rent was regularly paid by his legatees; but John Maxwell never paid, but was in possession of 40 acres as the tenant of Henry Maxwell, who had the beneficial ownership. Taking the whole evidence, John Maxwell was only tenant from year to year. The material question left to the jury was, whether John Maxwell had not, under some instrument or another, the legal or equitable interest under the College; this was a vague way to leave the question; there was no evidence to warrant such an inference; it is not possible to say that the landlord could be a trustee for a tenant, from year to year, at a rent of £19. Here

then is a case of evidence on both sides—for the plaintiff, that John Maxwell had a lease from the College, for the defendant that it was the lease of Henry, and that John was his tenant from year to year. It was said that Henry Maxwell was a trustee for John Maxwell, or that John may have assigned his interest to him—and it was left to the jury to presume that there was a legal or equitable title existing in John Maxwell. There is no inconsistency between the evidence of the plaintiff and defendant; but there is a difficulty in reconciling the interest of John Maxwell with that of Henry. The charge of the judge should not have told the jury that there was evidence on the one side and the other, but that there was no evidence of a title on the one side or the other. It is not easy to account for the payment of the £950, as but £70 was given for the assignment.

TORRENS, J.—I shall confine my opinion to the question of damages, having changed my opinion as to the substantiality of the charge of my Lord Chief Baron, it is right to state it. The question is whether John Maxwell had not such an interest as would enable him to grant a renewal; the question was already decided by the Court of Queen's Bench, (reported 9 Ir. Law Rep. 74.) It is necessary to see what is the evidence by which it is shewn that John Maxwell held from the College. The lease had been renewed from 1792, according to the custom of the College. John was appointed executor, and took out probate of the will of Robert Maxwell; and it is important to observe that no estate vested in Henry till the assent of John Maxwell was first had. We have then a legal possession in him springing from the death of Robert. There was undoubted evidence of the title and possession from 1754 to 1800, and it is clear that without the covenant for renewal the £950 was an excessive consideration. There was no evidence of any rent having been paid to Henry Maxwell, or any other person prior to 1818. I do not see anything in the evidence inconsistent with the estate being that of John Maxwell.

PENNEFATHER, B.—I concur in the opinion of my brother Moore as respects the exceptions to the evidence. But as to the exceptions to the charge of my Lord Chief Baron, although there clearly was evidence to go to the jury at the close of the plaintiff's case to entitle him to a verdict for substantial damages, I think at the close of the defendant's case there was conclusive evidence the other way; and that the plaintiff's evidence was entirely displaced. The difficulty on my mind is that the question of damages was left to the jury in a manner calculated to lead them to form a wrong conclusion on the matters referred to them. This bill of exceptions, as far as it relates to the judge's charge, is framed in a manner not to be brought into a precedent; it is taken to different portions of the charge, and is not framed in such a manner as to enable me to say in what way or to what evidence the defendants required the learned judge to direct the jury, or what the learned judge did say. With respect to the authority of the Lord Chief Baron to sign the bill of exceptions, I should not have put my signature to them. These observations are thrown out, not from any doubt on my mind as to what ought to be done, but as to what actually was done. I

have read these exceptions with as much care as I could, and have been able to find nothing to show that any exception was presented so as to lead the mind of the Court to what the learned Chief Baron did say in that case. If we take this portion of the learned judge's charge alone, it could not be sustained: "That if the jury believed the whole of the evidence they might find a verdict for the said plaintiffs for substantial damages, but the amount thereof, and whether the same should be substantial or otherwise was entirely a matter for them;" if that portion stood alone it is impossible to say that the jury were properly directed. The defendants say they required the Lord Chief Baron to tell the jury that on the whole evidence they should find for nominal damages; that exception is not properly framed. I cannot come to the conclusion that the real case was properly submitted to the jury. If John Maxwell had an interest either as *cestui que trust*, or otherwise, the plaintiff would be entitled to substantial damages; if he had no title, the plaintiff should have but nominal damages. Henry Maxwell was the legatee of this property, and the legal estate of John Maxwell was barred by the statute of limitations. The effect of a series of renewals executed to the Maxwell family was not stated to the jury by the Lord Chief Baron; it can only be guessed that it might have been so properly left to them.

PROOT, C. B.—I have been anticipated in a great deal of what I had intended to say. In the absence of any averment to the contrary, I must hold that all the jury were properly elected. Of the remaining exceptions, those to the evidence were taken during the progress of the trial, and the others to the charge. I am of opinion, that whether there was a demand of renewal, or a tender of a deed for execution, those facts not being in issue, could not affect the question of damages, the breach of covenant having been committed. As to exception on the question of variance, I agree in the opinion of my brother Moore; and with that of my brother Pennefather, on the dislocated manner in which the exception to the charge has been framed. I regret I did not scrutinize the manner in which this bill of exceptions was made up. The simple question left to the jury was whether there was such an estate in John Maxwell, as would serve a renewal, and warrant a verdict for substantial damages. First, with a view to the amount of damages upon the admitted breach of the covenant to renew. Secondly, that there was evidence of such an estate in John Maxwell, proper to be submitted to the jury. The first proposition follows from the ruling of this court, and the sole question was whether there was evidence that John Maxwell had or had not a title to renew. There was evidence that John Maxwell had, under his hand and seal, declared that he held these lands by a lease under the College; that he had received rent to 1819, and also of the payment of renewal fines. The question was one of damages. It was for the jury to weigh the evidence. It is contended that the evidence for the defendants showed an estate in the Maxwell family, not in John Maxwell. It was the province of the jury to estimate the weight of that evidence. In my opinion the evidence given by the defendants did not extinguish the evidence of the plaintiff. There

might be a sub-lease; Maxwell Close does not say that John Maxwell had no lease. If there was any evidence from which a jury might infer that John Maxwell had an interest out of which a renewal might have been served, the plaintiff was entitled to substantial damages.

DOHERTY, C. J.—I coincide in the judgment of the majority of the court.

BLACKBURN, C. J.—I also concur in the opinion of the majority of the court. The main question which has been argued, namely, whether there was sufficient evidence of any such estate or interest in John Maxwell, at the date of the lease in 1808, as would have enabled him or his executors to execute a renewal, is a question not raised, and independently of that question, I am of opinion that the bill of exceptions is totally deficient in precision, and on that ground alone that these exceptions should be overruled.*

Judgment affirmed.

COURT OF CHANCERY.

MOLONY, PETITIONER, NUGENT, RESPONDENT.

GEALE AND WIFE v. NUGENT.—July, 30, 31.

*Practice—Receiver—Solicitor—Judgment
Creditor's Petition.*

A solicitor may be a receiver. Two or more judgments may be included in one petition under the Judgment Creditor's Acts.

The facts of this case sufficiently appear in the judgment at the Rolls, reported ante p. 319, from which this was an appeal.

Mr. F. Fitzgerald, Q.C. and Mr. Tuthill for the appellant.

Mr. Brewster, Q.C. and Mr. De Moléyns contra.

Mr. Gayer, Q.C. for the Incorporated Law Society.

LORD CHANCELLOR.—The question which I have at present to dispose of is, whether, upon the grounds on which this case was argued before me, or on the grounds on which the Master of the Rolls decided to dismiss the receiver, his order ought to be affirmed. This was an order obtained on the motion of the plaintiffs in the cause, who have an interest in the proper management of the property which is subject to their incumbrance; and they are fully justified in coming to the court on every occasion when they think it material to call attention to the conduct of the receiver. They applied to the court to discharge from his office a receiver appointed in 1846, appointed according to the course of the court in regular form, when it was open to every one interested to suggest persons for the appointment, and to call the attention of the court to the objections to any individual nominated if he were an improper person. However, the plaintiffs have a right to move to displace an improper person. I do not understand that the other parties in the cause concur in this application, but they do not dissent from or oppose it. Under these circumstances an order was made by the Master of the Rolls, an officer assisting the Chancellor, to remove the receiver. Although this order did not reflect on the moral character, it did on the competence of Mr. Joly. While, therefore,

the plaintiffs had a right to call the attention of the court to the circumstances, I cannot say that Mr. Joly was not entitled to come in here against an order made on affidavits, reflecting on his integrity, competency or care; at all events when an order is made against an officer of the court I cannot think him wrong in coming here to have the order set aside. When I say that none of the parties in the cause oppose this motion I do not mean that it is made on consent, for it was competent to remove him by consent if the parties chose. The matter was discussed on various grounds; but not the least embarrassing part of the case was that those grounds were not the foundation of the order below, for the counsel here did not insist on Mr. Joly's being disqualified by being a solicitor, but on this intelligible ground, that, having regard to the condition of the property, it had been improperly managed. Now, in that point of view, it is important to see what authority there would be for affirming the Rolls' order. In general the grounds for removal are that the receiver has become unfit from some personal calamity, from bankruptcy, or insolvency, or from default. If he has not collected the rents with sufficient diligence he may be charged in his account with the arrears. While, if not satisfied with the decision of the Master, the parties may bring the case before the court, though it has never been the habit of the court to encourage appeals against receivers from the Master's decision, unless a question of principle be involved. By the rule in England, at least, the court will not re-discuss items unless on a question of principle: in the office all parties have the opportunity of scrutinizing every thing. The court has there a machinery by which minute facts can be better ascertained than in court on solemn motion. It is a question what may be the character of this motion? It is not to open or to review the accounts; it is not to complain that any particular charge has been allowed or has been disallowed; that the Master has charged or omitted to charge the receiver with any particular rents; it is not founded on any default of the receiver, or on any attachment against him. It seems to be founded on this, that on the face of the accounts there is something to show the court that a professional gentleman residing in Dublin is not a fit person to have the management of this property, and in that way it was argued at the bar. I confess I should be startled at causing the introduction of such discussion, considering the length it might go, and the number of cases which might occur; for instead of making a specific case, this would call on the court to examine all the dealings of the receiver from his appointment, to see whether too much arrear had been allowed to accumulate; and, in fact, to institute a kind of revision of all his proceedings. There are officers of the court appointed to watch step by step all the proceedings of receivers; these accounts have all received their approval, there has been no default nor attachment for any disregard of any orders of the court, and the only question of detail is as to the propriety of certain proceedings, although those proceedings were sustained by the rental returned by one of the defendants; but on examination of the circumstances of that part of the case I find the receiver per-

* This case is reported 10 I. L. Rep. Ex. Ch.

fectly blameless, and free from censure. These few matters were referred to in detail not as showing that more rents might have been received from the tenants, but as showing that the receiver tried to get rents to which he was not entitled, and that costs were thereby accumulated. If costs were improperly incurred, that matter could be disposed of in the office, (the proper place for such investigation,) upon passing the receiver's account. I cannot see where would be the end if the time of the court were to be occupied in reviewing from first to last the acts of receivers, and in considering why a particular portion of the rent was not got, or what was a sufficient quantum of rent; or if it were to be held that because certain rents had not been recovered this or that person was not to be continued as receiver, I do not know how to determine how much rent would entitle the court to say that a receiver was good, how little would make him deserve to be called bad, what quantity would constitute an indifferent receiver; I therefore think that so far as the case rests on any amount not having been collected there is no point of principle; I cannot say that because out of £600 he only collected £400 he is to be discharged. The only principle which I could discover is one open in every case, to enquire whether, having regard to the entire circumstances of the case, the receiver should be resident on or near the property, and whether, having regard to these circumstances, it is expedient that the receiver should be continued. Even that is for reference to the Master's office, where the court is sure that it will receive full investigation. It is only with reference to that part that the plaintiffs seem to have made a case to come before the court, and if they wish to have an enquiry whether it is desirable that a person residing near the property should be appointed receiver I will grant it. As the case was argued before me the only intelligible principle it involves is, whether, having regard to the condition of the property, it was expedient that a particular kind of receiver ought not to have been appointed. The case was not decided on that ground, for, as I find it reported, the judgment of the court below professed to proceed on the abstract principle of the disqualification of the receiver as being a solicitor of the court. I shall only say that when a question is raised as to the law of the court on a particular point the decision ought not to be founded on a speculative notion of what ought or ought not to be the proper practice; every judge is bound to determine according to the course and practice of the court, which are the law of the court, until it be changed by the Legislature or by a general order made by the authorities, to which the power of legislation for such purposes has been delegated; until that is done the law and practice of the court ought not to be changed. Now, what law, practice, or rule of the court exists which prohibits a solicitor from becoming a receiver? No case until this has decided that a solicitor as such is disqualified. The rule of court, framed by Sir Edward Sugden and the late Master of the Rolls, the present Chief Justice, does not contain one word to prohibit them; on the contrary the rule is directed against very inferior classes, the clerks and apprentices of solicitors, persons obviously not in a proper position to be receivers, they being

as it were, under tutelage. It was very wise to exclude individuals whose time was not their own from a situation of this nature, but the office of solicitor was not considered a disqualification: eligibility of solicitors seems implied by the exclusion of the others. When the Court of Exchequer framed their rules they examined very particularly the new rules of Chancery, and endeavoured to adapt them to the exigencies of their court; some they modified, some they adopted, and some they rejected in regard to the matter in hand; to others they added a few words, making a specific rule out of an established practice, that solicitors in a cause were not to be receivers, but left untouched the general question. It is in the knowledge of every one that, in point of fact, the appointment of solicitors to be receivers is a common practice in the Master's office. Few cases were mentioned, but I may refer to *Reynolds v. Reynolds*, where a long discussion took place on a large arrear being brought in against a receiver. It was mentioned that he was a solicitor, and some stress was laid on that as showing that the arrears had accrued on that account, but the question was not raised whether he ought to have been appointed receiver or not. When that case was discussed before me I thought that the Master ought to re-consider his judgment on the grounds that he had not sufficiently weighed certain matters which required to be taken into account, and not being sure whether he had considered these matters I referred it back to him that he might have the whole case before him on principle, he then came to the same conclusion that the receiver was in default, but it was not before me as a matter for any one to decide that a solicitor could not be a receiver. In *Lupton v. Stevenson* it was mentioned that Mr. Bruce, a solicitor, was appointed a receiver, but it was not discussed on the ground that he was a solicitor, but that by the arrangement on his appointment he was bound to be guided by the advice of another person who was not responsible to the court; I sent it back on that ground. I believe, that he was re-appointed, and that he, as well as the receiver in *Reynolds v. Reynolds*, are both still receivers. Till this order, it has never been decided in any branch of the court, that a solicitor is a disqualified person; an opinion has been thrown out that they are not competent, but I must decide upon the practice. The practice is, that solicitors are eligible, and it was so decided by Sir William M'Mahon, in a case so far back as 1826. On this ground it seems that if the case rested solely on the objection that Mr. Joly is a solicitor, his removal would not be consistent with the law of the court. Whether the Masters will in any case appoint solicitors, must be left to the discretion of the Masters, who, both in England and this country, are considered the proper judges; and it will require a strong case to entitle a party to call on the court to re-agitate a question which has been disposed of by the Master by whom these matters of detail are to be considered, and the business of this court would be overwhelming if such questions were considered by it. So far as regards that ground, the order cannot be sustained. So far as the particular details, I do not see my way to make any order against Mr. Joly, unless the parties will consent (which they

may do) to refer it to the Master to consider whether it would not be better, under the circumstances, to have a receiver resident in the neighbourhood of the property. The Master may then re-consider the question, and appoint another person. The cost of such a course might be matter for further discussion. Many matters were adverted to, which seem not to bear much on the case. It was said that petitions had been presented for the purpose of making costs; but the receiver was not a party to those petitions, and is not responsible for the course taken. With regard to what was stated as an excuse for the oppression practised in this case, by accumulating orders, that a separate petition was required for each judgment, it is a mistake to suppose that any such difficulty exists. I can state that the secretary does not refuse to receive a petition, on the ground that several judgments are included in it; and I have now here two orders, one in *Roper v. Whiting*, where the petition was founded on three judgments, and another in *Bateman v. Piers*, also founded on three judgments, and I am informed that such is the constant practice, and no person need be afraid to introduce into the petition several judgments, if vested in the same parties. I might content myself with the case as it at present stands, but I have not been insensible to the great mischief which results from the appointment of a number of receivers, and removing the proprietors from the management of estates, who, it must be admitted, ought to be the best managers; but I feel that there is great difficulty in considering this question. There is no use in speculating on the causes which have led to the increase in the number of receivers; it may have arisen partly from the practice in this country of selling instead of foreclosing in a mortgage suit, and thus estates are kept under the management of the court until accounts are taken. The judgment acts have had great effect, and in fact this court has now become an enormous sheriff's office, carrying out executions by means of receivers. The question of a remedy for the evils of receiverships has much engaged public attention. Shortly after my appointment to my present office, a bill was prepared by my direction, which provides remedies which, in my judgment, would be effectual in removing much of the evil of the present state of receiverships, and I hope that, as the attention of Parliament is now directed to the subject, it will lead to some general reform of the system, which alone can be an adequate remedy. In the meantime, whatever may be the result, I must act on the law of the court as I find it, and on established principle. The Committee of the House of Commons, which has been referred to, was justified in making their report on the evidence before them; but it cannot be an authority for any judge to alter the law, and make a change in the practice, which he would not otherwise be entitled to do. The system of examination in this court, or the law of primogeniture, or marriage, may be the subject of the report of a committee of the Commons, as recommending a change; but in my court I will uphold the law of the land till it shall be changed by statute, and will leave to others the responsibility of altering the law. It may be a question whether it will be wise now to disturb re-

ceivers when there is so likely to be a change which may also require further alterations. It may be that the subject will be taken up by the Legislature, when it will be for it to consider whether, as it has prohibited the ordinary officers of the court from acting in any other capacity, receivers should not likewise relinquish all other pursuits. There is, however, this distinction that the other officers having secure and permanent employment may well be required to give up all other professions, while in the case of the temporary and precarious receiver, no such abandonment of former connections could be required. If, however, receiverships should be made permanent this distinction would vanish. Again, it may be necessary to consider whether receivers should be professional men or not, whether such appointments should be exclusively from a class of persons whose recommendation is that they have not anything else to do. Whether a knowledge of legal detail is not necessary, whether some additional guarantee is not obtained by the position of a solicitor, an officer of this court; whether it is necessary to re-consider the orders of the court, and whether a change which could be effected by a general order might not be beneficial. These questions involve most important considerations, and must be matters for further consideration. In the event of it so appearing it will be my duty to submit to the Master of the Rolls such alterations as the nature of the case seems to require, and to receive with the attention due to his experience the suggestions he may offer. It is also the duty of the Chancellor to give all weight to the opinion of those whose duties bring them in constant connection with these cases, and whose experience is therefore most valuable, the Masters of the court. If my opinion had been adverse, it would have been much shaken by the following certificate from Master Henn, the oldest of the Masters, one whose views are entitled to the highest consideration:—"I beg leave to state to your lordship as the result of my experience, derived from a practice for more than 29 years, during which I have, I am confident, passed at least five thousand receivers' accounts, and appointed at least one thousand receivers—that the best receivers I have generally found to be amongst the solicitors, and the worst amongst those called country gentlemen and esquires. There are exceptions, and many exceptions, both ways, but most assuredly so far as my experience goes, the majority of the good ones I have found amongst the solicitors, and the reasons are these—there are scarcely any of the country gentlemen receivers who are men of business, or who were trained or educated to be such. The consequence is, that they are as a class the most slovenly, slobbering and bungling receivers I have to deal with—not one of them ever thinks of framing his own account, few of them are capable of drawing them up in form, and it is even difficult to get from many of them the materials necessary to put them into proper form, and I have scarcely ever a first account from one of that class that I have not been obliged to send back once, twice, and sometimes a third time for amendment or correction; if they are, as they sometimes are, of the class of respectable farmers, they are constantly blundering from ignorance and scarcely

ever are kept right, except they have a solicitor at their elbow, who does not give his services for nothing; if they are of higher order of that class called country gentlemen, they frequently leave the greater part, if not the whole, of the business to be done by the bailiff and the solicitor. When I was Taxing Master, I have repeatedly had bills of receivers' costs to tax, whole pages of which consisted of reading letters from and answering letters to the receivers, and of attendance to pay the creditors and head landlords their interests and head-rents, all of which should have been done by the receiver himself, and since the introduction of poor-rates both these classes of receivers are constantly in the habit of either making wrong deductions or, as frequently happens, not making any deductions when paying the head landlord's rent. Now these errors, and blunders, and inaccuracies very rarely occur in those cases in which attorneys or solicitors are receivers. They are all trained in some degree to regular and business-like habits, and they are sufficiently acquainted with what country gentlemen receivers scarcely ever know, the rules and orders of the court in relation to their conduct; and they are both more regular in passing their accounts, and more punctual in the disposition of their balances; and more exact in executing the orders and certificates by which the Masters direct the application of the balances; and when I was a taxing officer, their costs were lighter than those of the country gentlemen, because they did without charging, or if they charged, without being allowed, what they were clearly entitled to when acting as solicitors merely, such as attendances on themselves, and other similar charges; while, as collectors of rents they were, and in my opinion are, quite as efficient and as honest—I speak of them as a class—as any other receivers I have had to deal with. Many of them reside principally in or near country towns, and are quite as well acquainted with country business and farming as any other class in the community with which I am acquainted." This is not a singular opinion among those who have to deal most with these matters. If the plaintiffs choose an inquiry on the principle above suggested, they may have it.

ROLLS COURT.

CULLY, Petitioner, v. LUCAS, Respondent, AND SEVERAL OTHER MATTERS.—May 29, & June 3.

Mortgage Act—Receiver—Conditional order does not attach rents.

Upon an order for a receiver under the mortgage act, 11 & 12 Geo. 3, c. 10, it is the absolute and not the conditional order which attaches the rents.

By indenture of mortgage, bearing date the 8th of June 1838, and made under the 3 & 4 W. 4, to secure to the Ecclesiastical Commissioners of Ireland the sum of £1090 6s. 7d., being the purchase money of the fee and inheritance of certain lands therein mentioned. The lands of Clontibred were limited to the use of her Majesty, her heirs and successors, subject to redemption upon payment of the said principal sum, with interest at the rate of £5 per cent. A considerable sum for interest having been permitted to grow due on foot of this

mortgage, on the 26th of April, 1848, a petition was presented for a receiver under the mortgage act 11 & 12 Geo. 3, c. 10,* and on the 28th of April an order was made, referring it to the Master to appoint a receiver unless cause be shewn within 10 days after service of the order. On the 4th of November 1848 an order was obtained that service of the conditional order on any of the respondents should be deemed good service upon them all. On the 6th of December a certificate of no cause was granted, and on the 26th of January, 1849, the conditional order for the appointment of the receiver was made absolute. On the 24th of June, 1847, a receiver had been appointed by certain judgment creditors of the respondent, over a portion of the lands comprised in the mortgage. This receiver was extended by a Mr. Martin, a judgment creditor—the sum of £217 8s. having been lodged in court to the credit of the same matters. This was an application on behalf of Martin Morris, petitioner in the 5th matter, for the sum of £107 6s. 5d. being the amount of rents received subsequent to the 6th of May, 1848, when the receiver was extended, and prior to the 20th of January, 1849, being the date of the absolute order for the receiver on foot of the mortgage. There was also a cross notice on behalf of the Ecclesiastical Commissioners that the entire sum in suit might be paid to them, as being rents received subsequent to the 28th of April, 1848, the date of the conditional order.

Mr. Hughes Q. C. and Mr. P. Blake on behalf of Morris, the judgment creditor, contended that the rents were not attached by the mortgage and the order of January, 1849, and referred to *Reilly v. Burke* (8 I. E. R. 660); *Murragh v. Lane* (8 I. E. R. 195); *Evans v. Blennerhassett* (13 I. E. R. 133); *Reilly on Receivers*, 139; *Es parte Wilson*, (2 V. & B. 252.)

Mr. Martley, Q. C., contra, moved the cross notice for the Ecclesiastical Commissioners, and contended that where an order for the appointment of a receiver is made absolute, it relates back to the date of the conditional order, and attaches the rents from that time, and referred to *Coleman v. Martin* (L. & T. 545); *Barry v. Wilkinson*, (3 I. E. R. 133.)

* An Act for rendering securities by mortgage more effectual, "Whereas by default of the punctual payment of the interest payable upon mortgages, and on account of the great delays in bills of foreclosure, securities by mortgage are fallen into disrepute; for remedy whereof be it enacted, &c., that from and after the 1st day of December, 1772, in all cases where one year and a-half's interest shall be due a Court of Equity, upon application in manner hereinafter mentioned, shall appoint a receiver to receive such part of the rents of the mortgaged premises, as shall be sufficient to pay such arrear of interest, and also the accruing interest of the said mortgage money, from time to time, one half-year when the other shall become due, until the whole of such interest due on the said mortgage shall be discharged, and no longer, together with such fees or salary as shall be appointed by said court for such receiver; as also the necessary costs out of pocket of such application, and the out of the sums so received, such interest, salary, and costs shall be ordered to be paid. Sec. 2. And be it enacted by the authority aforesaid, that such order shall be made on petition and affidavit, after reasonable time given to shew cause, and whether any bill has or has not been filed relative to the said mortgage."

121); *Bart v. Bernard*, (4 I. E. R. 428, S. C. Fl. & K. 414); *Moss v. Gallimore*, (Doug. 279.)

June 3.—MASTER OF THE ROLLS.—In this case Mr. Morris, a judgment creditor, the petitioner in the fifth matter, obtained an order to extend the receiver, which was made absolute. On the 28th of April, the Ecclesiastical Commissioners obtained a conditional order, on foot of a mortgage, which was not made absolute until the 20th of January, 1849, and the greater part of the sum in court is the produce of rents lodged previous to this date. The whole question is, whether the conditional or absolute order for a receiver on foot of the mortgage attaches the rents, and on the construction of the act of Parliament I do not think there is much difficulty. The 10 & 11 Geo. 3, provides that where one and a half year's interest shall be due, a Court of Equity, upon application in manner thereafter mentioned, may appoint a receiver; the mode of proceeding is regulated by the second section, which provides that "such order shall be made upon petition and affidavit, after reasonable time given to shew cause," &c. It appears to me that the conditional order cannot be considered as attaching the rents; the only order mentioned is one made after reasonable time to shew cause, and the conditional order is not made after time to show cause. I apprehend that the judgment creditor is entitled to all the rents received before the 20th of January, 1849. If any authority were wanting, the observations of Sir E. Sugden in *Bart v. Bernard*, (3 Dr & W.), shew that it is the absolute and not the conditional order which attaches the rents. These observations were made with reference to the Sheriffs' act; but I do not think there is one word which is not applicable to the mortgage act. In page 476 he says, "The conditional order is issued for the purpose of bringing the machinery of the act of Parliament into operation in the case. The first order is pronounced that the parties may have notice that unless cause be shewn within 10 days, the order for the receiver will be made. This is merely to carry the intention of the Legislature into effect, and to do justice between the parties. Suppose, instead of the issuing a conditional order, as at present, this court, in the exercise of its judicial consideration, were to fiat the petition thus:—'Let notice be given to the party, that unless he shew cause within ten days an order for the appointment of a receiver will be made.' Will any person argue that this fiat could be considered as an execution executed; or that it amounted to any thing but notice? Suppose, instead of the present chamber practice (which does not take place in the Court of Exchequer), this court should direct all parties to have notice, and to come prepared with the names of the denominations, the value of the property, and sufficient facts, so as to enable the court to make but one order and that a perfect one. Can any one deny that I have power to make such a fiat? and could it be argued that such was anything but notice? Why should the course which the court adopts to give the parties notice, and to save expense, be held to give the judgment creditor so great an advantage which the Legislature never intended to give him? My opinion, therefore, is,

that the conditional order is not 'the order' properly so called, but is merely notice to the party that an order will be made, unless he shews cause against it." These observations were made when the practice of the court was different from what it is at present, and it has since been altered in conformity with the suggestions of Sir E. Sugden, by substituting a notice for the conditional order. I think this authority is directly applicable to the case before me; the conditional order was in effect notice to the respondent, to give him an opportunity to shew cause, and the rents were not attached until the absolute order of the 20th of January, 1849. Mr. Morris is therefore entitled to the rents received before that time.

"Be it so on original notice, and be it so for transfer of residue of said sum of £217 8s., Gov. 3 per cent. consols, after said transfer to M. Morris to the Ecclesiastical Commissioners for Ireland; and let said Commissioners, and said M. Morris have their costs of said motion, as costs in said fifth and seventh matters."

Lib. 286, fo. 166.

MARTIN v. O'FLAHERTY.—*May 29th & June 3rd.*

Motion for receiver—An answer—Affidavit permitted to be used.

Bill filed to raise a charge, stated that a sum was due for interest; but did not interrogate the defendant on that point. The answer did not admit that any sum was due, or at all refer to the statement in the bill. Upon a motion for a receiver, Held, that the plaintiff was entitled to use an affidavit setting forth the sum due, in support of the motion.

The bill in this case was filed on the 18th of January 1849, and stated that Sir John O'Flaherty being seised in fee of certain lands in the county of Galway by articles, bearing date the 18th of June, 1764, and made in contemplation of a marriage then intended between the said Sir John O'Flaherty with Mary Royse, the sum of £1500 was covenanted to be charged on said lands, for the daughters or younger children of the said marriage; that by indenture bearing date the 15th of August, 1772, said lands were conveyed to trustees upon trust, amongst others, to raise said sum of £1500 for said younger children. That said marriage was duly solemnized, and there was issue thereof one son, and one surviving daughter Mary, who was the mother of the plaintiff R. J. Martin. That in October, 1806, said Mary married Robert Martin, and by articles of agreement bearing date the 5th of October, 1806, and reciting that the said Mary was entitled to said sum of £1500, same was vested in trustees, the interest to be paid to the said Robert Martin for his life, and after his decease to the said Mary in case she survived him, then amongst the children of the marriage, share and share alike on default of appointment. That the plaintiff Robert J. Martin was the only issue of said marriage, who upon the death of his mother became entitled to the said sum of £1500, subject to the life interest of his father therein. That said plaintiff married Eliza

Leeson, and said sum of £1500 was covenanted to be assigned to trustees upon certain trusts therein mentioned. That said Robert Martin was long since dead, and there was no issue of the marriage between the plaintiffs. The bill then stated that the estates charged were disentailed, and by demise became vested in the defendant George Fortescue O'Flaherty, who was then in possession. That the interest on said sum of £1500 was regularly paid by Sir J. O'Flaherty, and Thomas H. O'Flaherty his son, up to the first day of May 1847; and that interest on said sum from said last mentioned day was then due, and in arrear to plaintiff, except the sum of £10 received on account thereof, and that plaintiffs were desirous of having said sum of £1500, with the interest thereof, paid off and discharged, and for that purpose he made frequent applications to the defendant G. F. O'Flaherty. The bill then prayed an account of the sum due to the plaintiffs on foot of said charges, and that same might be paid, and in default, for a sale and a receiver.

The bill did not interrogate the defendant as to whether there was any sum due for principal or interest, on foot of said charge, or whether any payments had been made; and the defendant, by his answer, stated he believed the several deeds were executed, and referred to them; but did not admit that interest had been paid, or that any sum was due, or refer in any way to these statements in the bill. Some questions were raised by the answer, as to whether said sum was well charged on the lands. On the 29th of May, 1849, an affidavit was filed by the plaintiff, Robert J. Martin, which, after setting out the several matters in the bill mentioned, stated that the interest on said charge or sum of £1500 was duly paid from time to time by the said Sir J. O'Flaherty during his life-time, and up to the time of his decease, in the year 1808, to the parties then entitled thereto, and that from the decease of the said Sir J. O'Flaherty, his son T. H. O'Flaherty, regularly paid said interest unto plaintiff's father, during his life, and since the death of plaintiff's father, on the 20th of May, 1840, said T. H. O'Flaherty, from time to time, duly paid the interest on said charge unto plaintiff, and continued so to do up to May, 1847, and that such interest was, on several occasions, remitted to the plaintiff by the defendant George F. O'Flaherty, acting for and as the agent of the said T. H. O'Flaherty, as by the letters of said defendant in the possession of plaintiff might appear. The affidavit also stated, that the sum of £156 3s. as and for an arrear of said interest, being nearly two years, ending on the 1st of May, 1849, then remained justly due and owing to plaintiff, together with the said principal sum. That plaintiff had made several applications to the defendant, G. F. O'Flaherty, for payment of said interest, without effect. That said defendant, in reply to one of such applications, wrote a letter to plaintiff, bearing date the 29th of August, 1848, in which defendant made the following statement, "I am not unmindful of my promise, and am making the best arrangements I can for the purpose. I am even trying to obtain a loan in case the fair should not turn out

well. I am told I shall have no difficulty in case I make it a first charge, which I cannot do without paying you off. I am not disposed to do this, as I conceive you could not invest your money in a better way, and I shall not, unless I am by circumstances forced to do so." The affidavit then stated that previous to the filing of the bill, plaintiff's solicitor wrote to said G. F. O'Flaherty, stating that proceedings would be instituted to recover principal and interest, unless the interest was paid; and the said defendant, by his answer, bearing date the 28th of October, 1848, admitted his liability, and excused the non-payment of the interest. That plaintiff believed, unless a receiver was appointed, the arrear of interest would be in danger of being lost, and that the lands were charged with judgment debts to a considerable amount, subsequent to plaintiff's charge.

This was a motion on behalf of the plaintiff, that it might be referred to the Master to appoint a receiver on the answer and affidavit.

Mr. Deasy, Q. C. & Mr. Blake, for defendant, contended that the motion must be refused, as there was not any admission in the answer that interest was due, and the plaintiffs had no right to make use of the affidavit, as the defendant had not been interrogated whether there was any interest due, or whether any payments had been made. The answer must therefore be considered full, for by the rule a defendant need not answer any statement in the bill, unless specially interrogated therein. On motion like the present, an affidavit is permitted to be used only in cases where the answer is not full.

Mr. Hughes and Mr. Henderson for plaintiff.—The bill contains a statement of the facts, and the defendant is at liberty to contradict any statement in the bill, although he may not be interrogated to it. In *Bell v. M'Loghlin*, (11 & 12, 279), upon motion for a receiver on bill and answer, the plaintiff was permitted to use an affidavit, and it does not appear that there was any interrogatory granted to that particular fact. [*Master of the Rolls*.—That case was decided before the new general orders of 1843.] There is no case which decides that an affidavit cannot be used to supply the omission of a fact passed over in the answer; an affidavit cannot be used to contradict an answer, but that is not the case here.

MASTER OF THE ROLLS.—I think this motion would be refused in England, upon the authorities there, and if the defendant in his answer swore that no interest was due, I would not permit an affidavit to be used to contradict the answer. However, I will look into the matter.

JUNE 12.—The **MASTER OF THE ROLLS**.—His Lordship on this day referred to the cases of *Ury v. White*, (3 Beav. 357,) and *Castellan v. Blum*, (12 Sim. 47,) and said that although these were cases for injunctions, they were applicable to the case before him; also to the case of *Edwards v. Jones*, (13 Sim. 632,) and the same case on appeal before Lord Lyndhurst, (1 Ph. 501,) where it is laid down that on an interlocutory motion for production of documents founded on the answer, an affidavit cannot be admitted to prove a fact, although the

answer neither admitted nor denied it. His Lordship then said, It is perfectly plain that on the authority of the case before Lord Lyndhurst, this motion would be refused in England; however, in the case *Hogan v. Bodkin*, (1 Hog. 374,) Sir W. M'Mahon held that on a motion for a receiver upon answer, the plaintiff was entitled to use an affidavit ascertaining the amount of the arrears of an annuity due; and Sir M. O'Loughlin followed that authority in *Bell v. M'Loughlin*, (Fl. & K. 272.) These decisions are productive of considerable embarrassment; but I consider it is better to adhere to the practice in this country. In this case there is an omission in the interrogatory part of the bill, which does not enquire whether any interest is due. Under the general order, the defendant is not bound to answer any part of the bill to which he is not specially interrogated the answer is perfectly silent on that point, and it is insisted that the cases do not apply as the defendant is not called on to answer. You cannot use an affidavit to contradict an answer, or to deny any statement in it; but the cases in this country go to the length that you can use an affidavit to meet an evasive denial, or to supply an omission; and, in the present case, the affidavit is to supply an omission. When a defendant is not interrogated there is some difficulty; but I think it is a fine-drawn distinction, and it is better to follow the case of *Bell v. M'Loughlin*, and the case before Sir W. M'Mahon, although I admit they are directly opposed to the English authorities. In this case also I find that the defendant, by his answer, states that he believes the several deeds were executed, and refers to them, and that, I think, is sufficient on an interlocutory application, as, although there was an omission to interrogate as to whether interest is due, there is an admission of documents, from which it will appear that the interest is due. On the whole, I think it is better to follow the authorities in this country, as it is for the advantage of the public that the practice should be certain.

"Be it so, and let this order not be acted on for one month from the date hereof."

Lib. 286, fo. 362.

STAUNTON v. BARRINGTON.—July 6th and 7th.

Pauper—Costs.

Bill filed in January, 1842; 3rd of June plaintiff obtained a conditional order for liberty to sue in formâ pauperis; on the 28th of June defendant answered; on the 3rd of November the conditional order was made absolute; on the 13th of January, 1843, the bill was amended, and no further steps taken by the plaintiff. On the 10th January, 1845, defendant answered the amended bill, and on the 24th of June obtained an order dismissing plaintiff's bill with costs generally. In 1849, the plaintiff was arrested under an attachment for these costs. The order of June, 1845 was set aside, and the plaintiff ordered to be discharged.

A bill by a pauper plaintiff will be dismissed without costs, so far as relates to costs incurred sub-

sequent to the order admitting plaintiff to sue as a pauper.

Quere as to the costs incurred in the interval between the conditional and absolute order.

Quere as to costs before the order giving liberty to sue in formâ pauperis.

The bill in this case was filed on the 12th of Jan. 1842, for an account of the assets of John Staunton, deceased, against the defendant, Mathew Barrington, who was the sole acting executor and trustee, the other executors having renounced. On the 3rd of June, 1842, the plaintiff obtained a conditional order, for liberty to sue *in formâ pauperis*, and on the 3rd of November following, this order was made absolute. On the 28th of June, 1842, the defendant, Barrington, filed his answer; on the 13th of January, 1843, the bill was amended, and no further proceedings were taken by the plaintiff, who immediately afterwards went to reside out of the jurisdiction. On the 10th of January, 1845, the defendant, Barrington, filed an answer to the amended bill; and on the 24th of June, 1845, obtained an order to dismiss the plaintiff's bill with costs, for want of prosecution. The plaintiff having returned to this country in the present year, on the 20th of June, 1849, he was arrested under an attachment for non-payment of the defendant's costs. This was an application on behalf of the plaintiff, that the attachment should be set aside, and the plaintiff be discharged from custody.

Mr. B. Lloyd, and with him *Mr. Semple* and *Mr. B. Thompson* for the plaintiff.—The order to dismiss the bill with costs was irregular, as the plaintiff had obtained liberty to sue *in formâ pauperis*. A pauper plaintiff might be put in prison for filing an improper bill, *Pearson v. Belsher*, (4 Ves. 629); or be whipped, (1 Tidd. pr. 94); but a pauper could not be ordered to pay costs. (1 Dan. C. P. 783; 11 Hen. 7, c. 12, 23; Hen. 8, c. 15; 10 ch. 1, st. 1, c. 2, sec. 17, Ir.); *Gallop v. Ashe*, (reported in Beames on Costs, 80); *Davenport v. Davenport*, (1 Ph. 124); and the case of *Higgins v. Vaughan*, there cited; *Jones v. Peers*, (M. Clcl. & Young, 282.) The authorities at law are *Pratt v. De Larue*, (10 M. & W. 509.) [Counsel referred to *Church v. Marsh*, (2 Hare 652, Beames on Costs, 280); and *Paradise v. Sheppard*, (Beames on Costs, appendix, 252.)]

Mr. Rogers, contra, for the defendant Barrington, contended that in some cases, paupers are compelled to pay costs, and referred to *Wilkinson v. Belsher*, (2 Br. C. C. 272,) where a pauper plaintiff was not permitted to amend by leaving out defendants without paying their costs, and to the case of *Pearson v. Belsher*, (in 3 B. C. C. 87), where it was held that a pauper was not entitled to dismiss his bill against defendants, without payment of costs. [Counsel referred to Harrison, C. Pr. 391; 1 Sim. C. Pr. 710; Made. Pr. 740.]

July 7.—*Mr. Lloyd* in reply.—The case of *Pearson v. Belsher*, (3 B. C. C.) is misreported; the order to dismiss, in that case was made without costs. (Vide Br. C. C. by Belt, 87; and see 4 Ves. 629; Beames on Costs, 80); and a defendant cannot, by putting in an answer, be entitled to dismiss a bill with costs, without notice to the plaintiff.

MASTER OF THE ROLLS.—The facts and dates are as follow :—On the 12th January, 1842, the bill was filed ; on the 1st of June, 1842, a petition was presented, according to the then practice, for liberty to sue *in formâ pauperis*, and a conditional order made, which was served on the defendant on the 6th of June ; on the 28th, the defendant filed his answer. On the 3rd of November, the conditional order, giving liberty to sue *in formâ pauperis* was made absolute ; on the 13th of January, 1843, the bill was amended ; on the 18th of January, 1845, more than two years after, the defendant filed his answer ; and on the 24th of June, 1845, he obtained an order that the bill should stand dismissed, with costs, for want of prosecution. At the time that order was made, it appears that the plaintiff was out of jurisdiction, and the attention of the late Master of the Rolls could not have been drawn to the fact that the plaintiff had obtained an order giving liberty to sue *in formâ pauperis*. That circumstance should not have been suppressed. As has been contended, the last proceeding being in 1843, I am not sure that a question does not arise, how far the defendant was entitled to put in an answer in 1845, merely for the purpose of having the bill dismissed with costs ; but I need not now decide that point ; the plaintiff having lately returned to this country, was arrested for the costs of these proceedings. The general rule of law on this subject is laid down by Baron Parke in the case in Meeson and Welsby, to which Mr. Lloyd has referred, also in the case of *M'Donough v. O'Flaherty*, (Beattie, 54.) Sir Anthony Harte there says, "The rule of permitting a man to sue or defend *in formâ pauperis*, springs out of the benignity of our law, which provides that every man, however low and poor his station, shall be enabled to obtain the same measure of justice as the highest and most opulent ; it gives the pauper a right to come into court without expense, otherwise his poverty would preclude him coming there. The same commiseration protects him, if unsuccessful, from payment, because such an order would serve only to imprison him interminably." In that case, Sir A. Harte directed costs to be paid by the plaintiff, because a fund was realized. A pauper may not only carry on proceedings but is free from payment of costs, that is the general rule ; no doubt there may be cases which will disentitle a plaintiff to the benefit of the order, and if it is improperly obtained, it is well established that the court has power to dispauper the plaintiff, and compel him to pay costs ; but that is not the case here, for there is not any impropriety of conduct suggested, which would authorize the court in making such an order. The question is, whether the dismissal of the bill, or the submitting to the defendant's doing so, amounts to an admission that the plaintiff ought not to have taken any proceedings ? In case of non-suit, the court will not compel a pauper plaintiff to pay costs. As to the case of a bill being dismissed, although from a misreport in 3 Browne, C. C., there is some difference of opinion in the text writers ; in the case referred to, the decision was the opposite from what it is represented, and the bill was dismissed *without costs*, although on the application of the pauper himself,

which is stronger against him than if the bill was dismissed by a defendant. The case of *Walton v. Belsher*, (2 B. C. C.) was misunderstood ; in that case some costs were incurred previous to the order admitting the party to sue *in formâ pauperis*, and the observations of the court had reference to these costs. In the case of *Gallop v. Ashe*, referred to in Beames on Costs, which may be taken as a correct note, it was decided by the Vice Chancellor that if a bill by a pauper be dismissed for want of prosecution it must be without costs ; in this country there is the case of *Dogherty v. Dogherty*, (reported 2 L. Rec. O. S. Ex. 439,) it was an application by a defendant that the plaintiff's bill should be dismissed with costs for want of prosecution, and Baron Pennefather adverted to the distinction where a party dismissed his own bill, which was a voluntary act, and different from a dismissal by a defendant. Counsel in the case having pressed for costs up to the time plaintiff was admitted to sue *in formâ pauperis*, and referred to a case in this court ; Baron Pennefather, in giving judgment, said : "With every deference for the Master of the Rolls I differ from him in opinion ; were it meant to apply such a principle the order admitting the party a pauper would so provide, &c. Enter a dismissal without costs, plaintiff having been admitted a pauper." This is an authority that on the application of a defendant the court will not dismiss a pauper's bill with costs. There is this difficulty in the case ; the order of June, 1842, giving liberty to sue *in formâ pauperis*, was not made absolute until November following, and some of these costs were incurred in the interval, and am I to consider the date of the absolute or the conditional order as the time from which the plaintiff was entitled to sue as a pauper ? However it is not necessary to decide that now, for after the order, giving liberty to serve as a pauper, was made absolute, the bill was amended, and costs were incurred ; on the 6th of June, 1842, the conditional order was served, and on the 26th of June following the answer was filed ; it is without doubt that at least £50 costs were incurred subsequent to the absolute order, the attachment was, therefore, grounded on an irregular order, directing all the costs to be paid, and I cannot apportion these costs. In this case considerable costs were incurred after the order was made absolute, and the order dismissing the bill was made on a suppression of facts for which the defendant should suffer.

"Let the order of the 24th day of June, 1845, (the plaintiff by his counsel in open court undertaking not to bring any action at law), made in this cause, be set aside without prejudice to the defendant applying as he may be advised that the bill may stand dismissed with costs, incurred prior to the order admitting the plaintiff to sue *in formâ pauperis*, and let the attachment which issued in this cause be set aside, and the plaintiff be discharged from the custody of the sheriff of the County of Dublin, and let each party abide his own costs."

*Lib. 288, fo. 116.**

* By a consent order in this cause, made on the 23rd of July, the order of the 7th of July was varied, and the bill was directed to stand dismissed without costs.—*Reg. Lib. 445, fo. 54.*

COURT OF CHANCERY.

In re BELL, A LUNATIC.—April 17, 21.*Costs.*

A mortgagee's solicitor obtained the carriage of a sale in a lunacy matter, and wrote a letter to the committee's solicitor, promising to do his best to save expense to the lunatic. The sale took place within a very short time after the title had been investigated for the mortgagee by the same solicitor. Held that the solicitor was not entitled to charge part of the costs of preparing the abstract, or for any matters which he appeared to have previously performed when investigating title for the mortgagee. Semble, that even if such letter had not been written, he would not have been entitled to such charge a second time.

This was an application to review the taxing-master's report. In 1841, John Brooke, the petitioner, took a mortgage of the lands of Richard Bell, and employed Mr. Gausson as his solicitor, to investigate title, which was done. On the 13th May, 1843, Mr. Bell was declared a lunatic, and on the 2nd August, 1844, an order was made that his lands should be sold for the payment of the incumbrances upon them, and the carriage of this order was given to the petitioner. On the taxation of the costs of sale, the taxing-master, amongst other items, disallowed—First, a charge for comparison of those title-deeds, which had been, or should have been compared on the occasion of the loan, and, secondly, for reading and noting the abstract. The petition was in part directed against this ruling. The facts of the case so fully appear in the judgment of the Lord Chancellor, it is not necessary to state them more fully.

April 21.—LORD CHANCELLOR.—This application regards several classes of costs; on some I have expressed my opinion, on those I have reserved it, the case stands thus—Mr. Brooke, a mortgage creditor of the lunatic, in that character had obtained the carriage of the proceedings, and the entire conduct of the sale, by an arrangement in the office was given to Mr. Gausson, Mr. Brooke's solicitor, and the costs in question have been incurred in that character. In regard to these objections, it seems that Mr. Gausson charged for the preparation of the abstract of title, and for reading and noting it, or,—as in the rule settling costs it is termed,—for reading and abstracting the documents in the abstract, and he has further charged for comparing all the copies of deeds. It was objected to these charges, that in 1843 he was solicitor for Mr. Brooke, and had acted in the negotiation of his mortgage; that in that character he had, in the course of business, obtained from Mr. Babington, the solicitor of Mr. Bell, an abstract of title, and copies of the deeds, and that he then, in the discharge of his duty, investigated the title, or must be taken to have done so; that then he should have tested the copies by comparison with the deeds; and that having obtained payment of his costs in the former character, he cannot in the new character of solicitor for the vendor, and being the same person, charge for performing the same duties. It appears that the arrangement for the carriage of the sale was transferred

to Mr. Gausson, (nominally to Mr. Brooke,) to save expense. The title-deeds seem to have been handed to Mr. Brooke, to be used in the progress of the sale. In proof of the import of the arrangement, I may refer to a letter from Mr. Gausson to Mr. Babington, thanking him for his generosity, and holding out the expectation that he would do his best for the lunatic. It was contended that, in the abstract, it was the duty of Mr. Gausson to adopt every thing he had done as solicitor of the mortgagee, and that he could not charge a second time for any thing he had done then; and that it was not necessary for him to have again performed the same business. It struck me that such a case must often have occurred in practice, that a solicitor for a mortgagee must often have been shortly afterwards solicitor for the vendor, in cases of foreclosure. I was anxious to obtain information as to the practice on this point, but I could not obtain much. In principle it seems just that parties should not be allowed to charge twice for the same business; at the same time, no one is entitled to call on a solicitor to undertake business without remuneration. It was contended that the dealing of Mr. Gausson for the mortgagee was not the same, that it did not require so much strictness as when he was employed for the vendor, under the rule of this court. I do not take that view; a solicitor for a mortgagee is as much bound to protect his client, as a solicitor for a purchaser. His business is, not to run any risks, but to obtain a clear title, and he cannot found any claim for remuneration on his own omission to do his duty on the first occasion so fully as he should. It may be said, that after a long interval, after ten or twenty years, he might have forgotten the title, and might require to read it over again; but it would be strange on that account to hold that if only a few weeks or months had elapsed, he should be entitled to charge afresh for the same operation. In this case there is something more than the mere general principle, and it is manifest although the letter may not create an engagement capable of being enforced in a court of law, that he undertook the duty for the purpose of doing every thing as cheaply as possible. How, if Mr. Babington himself had been employed to conduct this sale, could he be entitled to charge again for these abstracts for comparing documents, &c., his object being to save expense? Looking at it in that light, I think the taxing-master has taken a just view of the case; he has allowed Mr. Gausson whatever appears additional to his former work, and has disallowed him all the old, all that he had done before. When I consider the nature of the case, and the letter of Mr. Gausson, I think the taxing-master right; even if that letter had not existed, I should have thought him right, though there may be a discretion on the subject. I have not found from the senior Master any case which was before him, but he sent me a case which seems very like this. *Scott v. King* (7 I. E. R. 483.) It is not easy to see whether the Master of the Rolls there went on the ground that the Master was right, or on the ground that it was not a case to be brought before the court. The application was on behalf of the plaintiff, that Master Gould might review his taxation of the plaintiff's

costs in the cause. It appeared that the plaintiff had, in 1838, lent a sum of money on mortgage on the estate of the defendant. On that occasion the title-deeds had been perused by the plaintiff's solicitor, for the purpose of making out the abstract of title, and the costs of that perusal had been paid. A bill was subsequently filed to foreclose the mortgage, and a decree for a sale obtained; the plaintiff's solicitor furnished a new abstract, being precisely the same as the former, deducting the title to 1843, the time of the proposed sale. In taxing the costs, Master Gould disallowed the solicitor his charges for perusal of the deeds and documents in the second abstract. It was contended for the motion exactly as on the present application, that the general order required the second perusal. But the Master of the Rolls said, "Whatever right the solicitor might have had to those costs is not for me now to consider, the case was fully before the Master, and he has exercised his judgment on the question. Am I now to disturb that taxation? The Master was of opinion that the abstract of title made out in 1838 was abundantly sufficient, and I am of opinion that in so holding he has done his duty; I shall, therefore, not now vary his report. Refuse the motion with costs." Whether he concurred with the Master, or was of opinion that the case did not involve any question of principle, it is a decision of Master Gould's, approved by the then Master of the Rolls. I sent for the costs in that case of *Scott v. King*, and found that they were exactly as stated. I can therefore by no means go the length of holding that, in ordinary cases, the Master would have been wrong in deciding as he has done; but I now decide chiefly on the letter. On these grounds I think this motion has failed, with regard to these two classes of costs.

CALLAGHAN v. CALLAGHAN.—May 3.

Practice—Costs—Special appearance.

A notice party having entered a special appearance under the nineteenth general order, Held to be entitled to her costs, under the special circumstances.

This case came before the court on report and merits. Esther Howe, a judgment creditor, had been made a notice party, and had entered a special appearance under the nineteenth general order. This party had appeared on a motion at the Rolls, of which notice had been served on her under the special appearance. By the order made thereon, the notice defendant obtained a priority as to certain funds in the cause, which she could not otherwise have obtained, and the order declared that she should have the costs of appearing on that motion as part of her costs in the cause. The judgment creditor afterwards appeared in the Master's office, and by virtue of the notice established such priority. The Master by his report referring to this order, reported the priority of the judgment creditor under it, and allowed her the costs of proving her charge without prejudice to her right to apply for her costs as a defendant at the final hearing of the cause.

Mr. Exham appeared for the judgment creditor and submitted that, under the foregoing circumstances, she was entitled to her costs as a defendant in the cause, properly and necessarily incurred, including the costs of the Roll's motion and of the final hearing.

THE LORD CHANCELLOR considered her to be entitled to them, and decreed accordingly.

C. H. B. 101, fo. 377.

MOLLOY v. FRENCH.—June 22nd.

Assignment of Choses in action.

A legatee assigned his legacy without giving notice to the executor or the person on whose lands the assets of the testator were a charge. The executor died; the legatee obtained administration de bonis non, wasted the assets, and became insolvent. Held, that notice to the debtor was not necessary to complete the assignment; that the mortgagees could not be taken to have purchased from the executor, the assignment being as between the parties complete before administration granted to the legatee; that if having been found that the assets wasted were received as assets it could not be considered as payment.

This case came before the court on report and merits. The Master had found specially that St. George French made his will, dated the 3rd of November 1837, reciting that he was entitled to a sum of £10,000 Irish, secured by certain securities affecting the George estates, which "he gave, devised, and bequeathed as follows: viz. he gave and bequeathed to his brother, Patrick French, £3000, together with all his interest in and to his house, No. 1, August Place, Rathmines, County of Dublin;" and then proceeded to give other legacies, and appointed Dr. Gregory his residuary legatee, and Dr. Gregory and Captain Caulfield his executors. The Master found that St. George French died, and that Dr. Gregory alone proved the will. The Master found that his property amounted to £10,797. That Dr. Gregory possessed himself as executor of £1024, which he applied in a due course of administration. That Dr. Gregory died in 1840. That Patrick French in August, 1840, obtained administration de bonis non of St. George French. That by deed of the 8th of February, 1838, P. French assigned to William Hare Maunsell and Thomas Billing the £3000 legacy, and the residue of the estate on certain trusts. W. H. Maunsell was solicitor in the cause for P. French. The sum of £3000 came to the hands of P. French as personal representative of St. George French £4478. 3s. 7d. with the assent and knowledge of W. H. Maunsell. The Master found that the payments to P. French were made in ignorance, by the party making of the deed of the 8th of February, 1838, that the first intimation given by the said William Hare Maunsell or P. French to C. St. George French person liable to pay the money which formed assets of the said St. George French, was on the 24th of December, 1844, after which no payment was made by the said Christopher St. George French of the assets without an order, and that Christopher St. George French had stated on oath that if he had

made aware of the deed he would not have made any of the payments. The Master found Patrick French entitled to credit for the sum of £5563. 15s. 3d. properly disbursed by him, that there was a deficient fund, and that P. French was an insolvent debtor, and that it had been submitted to him that the entire loss should be borne by the legacy of £3000, which he refused to do not being authorized by the decree in the cause.

To this report exceptions were taken, raising the question of liability to bear the entire loss.

The Lord Chancellor having felt much doubt on the first argument, it was again argued by

Mr. Serjeant O'Brien for the exceptions.

Mr. Martley, Q. C. for the assignees of Patrick French.

June 22nd.—LORD CHANCELLOR, (after stating the case).—It is contended that the assignees of P. French's legacy must abide by the rule which would have obtained if there had been no assignment; that the deficiency must be charged to the account of the legacy. The case in *Molloy, Hopkins v. O'Brien*, (Moll. 562,) and other cases leave no doubt that a legacy when assigned must be taken subject to the equities which affected it previously, the same rule applying to it as to other choses in action, and that if the executor who assigned the legacy prove a debtor to the estate that affects his assignees. It is contended that the present case is the same in principle. At the hearing there was a direction to inquire in what capacity P. French had received the money, and the Master found that he had received it as administrator *de bonis non* of St. George French, that he had received it from the general administration of the estate, and that he had distributed it in different proportions to the legatees. The plaintiff's bill was originally framed to restrain Patrick French from meddling with the assets of the testator, which was undoubtedly a course he had a right to take. In 1843 the plaintiff having obtained a payment from Patrick French, made an arrangement with him by which he was left free to deal with the estate as he pleased. So far, therefore, the plaintiff must be considered privy to French's receiving the assets, and disentitled to complain of money getting into his hands as administrator. Maunsell appears to have been French's solicitor, and also privy to the receipt of this money, and it was so found by the Master; but the other legatees do not appear to have been so much involved with French as the plaintiff and Maunsell, but none seem to have interfered to prevent his receiving the money, and he seems to have acted with the assent of all parties, express on the part of the plaintiff, tacit or perhaps more on the part of the others. In the result there proves to be a deficiency of assets, and the question arises whether the assignees are to bear the entire loss, as French would have done if there had been no assignment, the assignees having become so before French received the funds, or became administrator. Now, though the assignee of choses in action takes them subject to all equities which affect them in the hands of the assignor, it is equally certain that those equities must not be collateral equities. On a former occasion I referred to cases at law respecting bills of exchange which struck me as bearing on that

question. That being so the question is, what is the nature of this deficiency of French in relation to the assets, and early in the case I thought that unless the receipt of assets by French amounted to payment of so much of the legacy the exceptions could not be sustained. There was much argument upon the doctrine of notice, and it was said that there was not notice to Gregory, the former executor, and that therefore the assignment was not complete. Now it is true that if the question were between Gregory and the assignees, Gregory having made subsequent payments to French or if it were between those assignees and subsequent assignees who had given notice, they could not claim. That was settled by *Foster v. Cockerill*, (9 Bl. N. S. 332.) It is contended that the assignment is not complete until notice. It is complete between the assignee and assignor between the assignee and trustees. It can only be understood to be incomplete as between conflicting claimants under the same assignor. Besides there is no question as to anything in the life time of Gregory; the controversy has arisen as to events which took place after Patrick French took out administration, as far as that the trustees had notice; for Patrick French, as assignor, had notice when he took out administration, no one could be defrauded by any act done by the administrator in ignorance of the assignment. Why serve a formal notice on French? could that place the case on a different footing? To whom should notice have been given, I cannot say that a person is bound to go beyond the legal owner of a debt, and is bound to give notice to the debtor. It was argued that if notice had been given to some one (whom I know not) French would not have been allowed to take out administration. If notice had been given to Gregory all that could have been done would have been accomplished, and that notice would have died with him. I cannot see how notice to any one would have made any difference. It is then said that the assignment became complete only when administration was granted to Patrick French, and that it must be considered as then commencing. I do not accede to that. It would be forcing on the parties a position which they did not contemplate. To hold it affected with an equity as if then made, would be, as I said, forcing a new contract upon them. I come then to the simple question, is this deficiency to be considered as payment on foot of the legacy; and I must consider the character in which Patrick French received this money as that of administrator. It cannot be contended that when he received this money it would have been payment on foot of the legacy. When did it become so? It is in the result, rather a question of set off which here could not have any weight. For these grounds, I do not think this can be considered as payment of this amount to French on foot of the legacy; but it is to be considered as if the assignees were legatees. He is a trustee for them as well as for the legatees, I cannot decide otherwise without infringing on the principles of assignments of choses in action, and forcing on assignees the result of conditions of affairs which had existence only subsequently to the assignment. It is a case full of doubt and

not yet free from it; but, on the whole, this is the best opinion I can form.

ROLLS COURT.

FAWCETT v. BIGGS.—July 17.

Practice—Costs in stayed suits—Plaintiffs personally liable.

Several suits having been instituted, a decree was obtained in *Fawcett v. Biggs*, upon motion, to stay the plaintiffs from further proceedings in the other causes. On the 14th of February, an order was made to stay those suits, with liberty to the plaintiffs to come in under the decree in the first cause, and prove their demands, together with their costs, and such costs as they were liable to pay the defendants in the stayed suits.

Mr. Sherlock, for Samuel O'Mara, plaintiff in the sixth cause, now moved to vary this order, and that such of the defendants as had charges on the estate might prove their costs in said causes with their demands, and that the plaintiffs might pay the costs of such of the several defendants as had not charges on the estate, and could not prove.

[Counsel relied upon *Levinge v. De Montmorency*, (1 Ir. Jur. 251), and the manuscript note of *Lofstie v. Forbes*, then cited, from which it appeared that where several suits are instituted in the Court of Chancery, the plaintiff in a stayed suit is not personally liable to the costs of all the plaintiffs, but only such of them as cannot prove in the cause.]

Mr. Drury, contra, relied on the case of *Lofstie v. Forbes*, (as reported in 2 I. E. Rep. 443,) and contended that the practice thereby established should not be disturbed, as such a practice tended to prevent the institution of unnecessary suits.

MASTER OF THE ROLLS.—In the case of *Levinge v. De Montmorency*, a manuscript was produced to the Court of Exchequer, stated to be a note by Sir M. O'Loughlen of the case of *Lofstie v. Forbes*. This manuscript was never heard of before, and I will not act on it without knowing something more precise concerning it. The case of *Lofstie v. Forbes* was very well considered, and having called for the affidavits, I think the report is correct, although not very full, and that case has also been followed by the Lord Chancellor on appeal. Nothing is so injurious as to change the practice of the court, and my great anxiety has been to keep it as well settled as possible. I am not prepared to dissent from Sir M. O'Loughlen, and I think that the reasons given for his decision in *Lofstie v. Forbes* are stronger than those given by the Court of Exchequer in the case which has been cited, the practice of filing a number of bills is to be discouraged when parties can prove their demands in other suits.

"Refuse this motion with costs."

Lib. 288, fo. 387.

[The following report of the case of *Lofstie v. Forbes*, cited by V. Scully, Esq., one of Her Majesty's counsel, in *Levinge v. Montmorency*—and to whom we are indebted for it—is taken from a note-book in the hand-writing of the late Sir Michael

O'Loughlen, M. R., and is transcribed therefrom *verbatim*.]

HARE v. LORD FORBES.—Feb. 10, May 4, 1840.

Mr. O'Hara moved for the defendant, O'Key, that the plaintiff may be obliged to pay him £24, his taxed costs. He was made a defendant in this suit, the further prosecution whereof is stayed by an order in *Lofstie v. Lord Forbes*, and the plaintiff is ordered to prove his demand, and costs of his suit, and of the defendant, to whom he is liable to pay costs under the decree in that cause; he is bound to pay the costs of the defendant, and prove them with his own demand; if he should die, the defendant would lose them.

Mr. Rolleston, contra.—O'Key here is the personal representative of Lord Granard; he must wait for the final decree in *Lofstie v. Forbes*, and get costs out of the fund. (2 Molloy, 463, 466, 469.)

SIR M. O'LOUGHLEN, M.R.—I ordered the motion to stand until next term, and to be then moved in both causes, in order that I may see whether there were any funds in *Lofstie v. Lord Forbes* to pay these costs.

May 4, (Easter Term).—*Mr. O'Hara*, for defendant, O'Key, moved that defendant should be paid by plaintiff his costs in this cause. On the 13th of June, 1838, on the motion of the plaintiff in *Lofstie v. Lord Forbes*, who had obtained a decree to account, the proceedings in this cause were stayed, and the plaintiff ordered to be at liberty to prove his demand, and his costs, and the costs of such of the defendants in this cause as he (as plaintiff in this cause) was liable to pay. *Croker v. Copley*, (2 Molloy, 469.) The 7th of June, 1839, is the date of the decree in *Lofstie v. Lord Forbes*. On the 25th May, 1839, O'Key moved to dismiss the bill for want of prosecution, which motion was refused with costs. O'Key is personal representative of the late Lord Granard, for whose debts the suits were instituted, and unless the court now orders payment of the costs, the defendant O'Key cannot get them. Plaintiff called upon us to tax those costs.

Mr. Rolleston contra.—There is a question here, whether defendant would, even if the suit were prosecuted, be entitled to costs against the plaintiff. The words of the order here are only to costs which the plaintiff may be liable to pay, and the case in Molloy does not decide the case in favour of the application; it is an authority for me. *Jackson v. Curtis*, (2 Mol. 463.) In that cause the suit in the Exchequer had terminated. The practice appears from the cases, *Jackson v. Leaf*, (1 Jac. & W. 230, S. C. 2 Mer. 481; *Packwood v. Maddison*, (1 S. & St. 232), shews that if there be a decree to account, a party should move to stay proceedings, and not answer a bill filed by another creditor. *Paxton v. Douglas*, (8 Ves. 520); *Talbot v. Spinner*, (24th January, 1831, in this court.) On the 8th of May, 1837, bill in *Lofstie v. Forbes* was filed, but Hare, the plaintiff in this suit, was not a defendant; in November, 1837, bill in this cause was filed. In what priority is the plaintiff to have these costs? Is it according to the priority of his

mand, or the demand of the defendant seek- costs?

Darley (for Lord Granard, the inheritor,) that the inheritor may, in this manner, be d with costs to which he would not be ulti- liable.

O'Hara in reply.

M. O'LOGHLEN, M.R.—In the case of *Loftie d Forbes*, a bill was filed on the 8th of May, by a judgment creditor of the late Earl of rd, for a sale of his property, for payment of intiff's debts, and the debts of all other cre- of the Earl; and on the 7th of June, 1838, a was pronounced in that cause for an ac- of the real and personal estate of the Earl, 'his debts. In November, 1837, Hare, the ff in this suit, who was not a defendant tie's cause, filed his bill as a creditor of rl, praying similar accounts; and after seve- sers had been filed, namely, on the 13th e, 1838, an order was obtained in both , on the motion of Loftie, the plaintiff first suit—the person representing the estate an infant, and the trustees in the will of Lord s not objecting to staying the proceedings in uit, and giving the plaintiff liberty to prove mand under the decree in the first cause, to- r with such costs as he might be liable to pay, ling also his costs on the motion. On the May, 1839, defendant, O'Key, who is the per- representative of the Earl of Granard, moved miss this bill for want of prosecution, and as roceedings were stayed by an order of the , his motion was refused with costs. He now s for an order on the plaintiff to pay these and the question is, is the plaintiff to pay now, or must the defendant wait until the in the cause of *Loftie v. Lord Forbes* are ctive? There are difficulties at both sides of ession; on the one hand it is perhaps a severe to compel the plaintiff, whose proceedings ayed, to pay costs now, which, at all events, ould not be liable to pay until the termination i suit, and which, perhaps, even then he might e bound to pay; on the other hand, the de- nt has a right to say he should not be obliged ut until the second suit shall be determined yment of his costs; there may not be funds at cause to pay him; he may not be a defend- herein, or entitled to make any claim as a cre- under the decree in that cause; the remedy is costs may be lost by the death of the plain- or his own death. These, and many other ns might be urged on his behalf. It appears e, on the whole, to be the better course, to hold the plaintiff is bound to pay their costs to the dants, when the proceedings have been stayed n order like the present, than to hold that they o have no remedy for them, until the proceed- in the second suit are terminated. Every suitor g a bill in this court, institutes his suit subject ch liability as the rules and practice of the t impose; one of these rules is, that if before uit is brought to a hearing, there is a decree r which he can have effectual relief, the court stay his proceedings, and oblige him to come

in under the decree; and according to the case of *Croker v. Copley*, (2 Mol. 469,) the suitor whose proceedings are so stayed, must pay the costs of the defendants in his suit, if there is not an avail- able fund for payment of these costs. The case of *Talbot v. Spinner*, in this court, in January, 1831, which has been cited, is not an authority to the contrary. I have been furnished with the papers in that cause, and from them it appears that it was stated in an affidavit used on the motion, that the cause in the Exchequer would be finally heard in the next term, and a fund produced to pay the costs, and that the defendant who moved for his costs would be paid sooner than if the suit was prosecuted. The order allows the defendant to renew the application, clearly shewing that the court did not consider the motion untenable, and only decided that it was not brought forward at the proper time. In considering the rule to be followed, regard should, I think, be had to the effect that an order for the payment of costs may have in preventing creditors from putting the owners of embarrassed estates to unnecessary and ruinous costs, by instituting several suits when there is one pending, in which the rights of all the credi- tors may be adjusted and enforced; a creditor, if he is to be exposed to a liability to pay costs when his proceedings are stayed, will consider well be- fore he files a bill, as in the present case, six months after the institution of a suit for the sale of the estates, for the purpose of paying all creditors. I give no opinion as to the right of the plaintiff in the present case to have the costs to which I consider him liable, paid out of the fund in *Loftie v. Lord Forbes*; he may show he may be so entitled. It may be necessary hereafter, in making orders to stay proceedings in creditor suits, to state specially in each case by whom, or in what manner, or out of what fund the costs of defendants are to be paid. In the present case the plaintiff must, in my opi- nion, pay the costs of the defendant O'Key.

HARE v. FORBES, LOFTIE v. FORBES.

May 15.—*Mr. Rolleston* for Hare.—Plaintiff in one of the causes, moves that he may be paid out of the funds in *Loftie v. Forbes*. The costs which he is liable to pay to the defendant in this cause, and also his own costs in that cause, he has been ordered to pay the defendant's costs though his proceedings have been stayed by an order. On the 4th November, 1837, Hare's bill was filed as ex- ecutor of J. Atkinson to recover a judgment to the amount of £13,000, due by the late Earl of Granard. The bill in *Loftie's* cause was filed by a judgment creditor of Lord Forbes, and was filed in the life time of the Earl of Granard, who died in July, 1837; O'Key, the executor of Lord Granard, was not made a party in *Loftie's* suit until 1838, six months after Hare's bill was filed, no answer was filed in *Loftie's* cause when Hare filed his bill; we, suing as executors, for so large a sum as £13,000, cannot be said to have instituted an un- necessary or vexatious suit, we were not parties to the first cause, no answer was put in for a long time, the first answer was filed the 17th of January,

two months after we filed our bill; in June, 1838, after the decree in Loftie's case our proceedings were stayed. Two principles in our favour until a decree is pronounced. Every creditor has a right to institute a suit. *Anonymous*, (1 Hogan, 69), puisne creditors, not parties, may, if there be any delay in the prosecution of the suit, file a bill. *Robinson v. Grady*, (1 Hogan, 147); *Thackaberry v. Christian*, (1 Hogan, 109); *Paston v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, (18 Ves. 469); *Croker v. Copley*, (2 Mol. 469); *Anonymous* (2 S. & S. 424); as to the costs up to the time of notice of the decree, *Brook v. Skinner*, (2 Mer. 481.)

Mr. Blackburne, contra.—The restraining order is the 13th June, 1838, in our cause a receiver had been appointed and an order made for a reference to the Master to ascertain how the rent should be applied; the plaintiff in Hare's cause should have waited for the result of our proceedings and not have instituted a suit, the prayer of our bill included an account of all encumbrances affecting the estate. Lord Forbes, who was the eldest son of Lord Granard, had a conveyance of the estate from his father, besides the plaintiff Hare has proved all the costs, as well the defendant's as his own, under the decree in our cause in pursuance of the order of the 13th June, 1838.

SIR M. O'LOGHLEN, M.R.—I was of opinion that I ought to order the receiver in the cause of *Loftie v. Lord Forbes*, to pay the costs of the defendant in Hare's cause, which costs I had, on the former motion, decided to be payable by Hare when taxed, though his proceedings were stayed by the order of the 13th of June, 1838. Loftie's cause was one instituted with the concurrence of the trustees in the will of Lord Forbes, for the purpose of having the estate of the late Lord Forbes under the control of the court, in order to have the rents applied to pay all creditors according to their priority, and to prevent the institution of several suits. I could not say that Hare's suit was one vexatiously or unnecessarily instituted, there was a sum of £13,000 due to him as executor of another—a large sum—which he, as executor, was bound to call in. The proceedings in Loftie's cause had not been carried on very vigorously. No answer had been enforced, though the bill was filed nearly six months before Hare's was filed, and Hare was not a defendant in that suit. The restraining order was obtained nominally on the part of Loftie; but, really and substantially, for the benefit of the estate. Loftie being a person whose name is used by the trustees of Lord Forbes' will. If then, the estate was to be benefitted and protected by the restraining order, it appears to be but reasonable that it should now pay those costs to which it would be ultimately liable; for Hare was allowed by the restraining order to add them to his demand, and prove the amount in Loftie's cause. It would, I thought, be hard to stay his proceedings for the benefit of the estate and make him pay the costs of the defendants in his suit: in the first instance, leaving him to wait until the termination of the suit in *Loftie v. Forbes* for repayment. The proper order appeared to me to be that suggested by the late

Master of the Rolls in *Croker v. Copley*, and accordingly I ordered the receiver in *Loftie v. Forbes*, to pay the costs of the defendants in Hare's cause as taxed, and the costs which he had paid to one of them under my former order in *Hare v. Forbes*.

QUEEN'S BENCH.—EASTER TERM.

AGRICULTURAL CATTLE INSURANCE COMPANY
v. CUFEN—April 24th.

Demurrer—Guarantee—Principal and Surety—Matters of Evidence need not be set forth in Declaration—What shall be deemed a sufficient Request.

Declaration in assumpsit charged that in consideration that the plaintiffs would appoint J. B. to be one of their agents, the defendant undertook and promised the plaintiffs that J. B. would account from time to time for all sums of money he should receive for the plaintiffs, according to the terms and regulations contained in the instructions which he might from time to time receive from them. Averment, that J. B. received £500, and did not account for the same according to the instructions received by him. Breach, that the defendant did not pay the £500, or indemnify the plaintiffs against the loss they sustained by the default of J. B. On demurrer to the declaration, Held, that the instructions given to J. B. formed part of the plaintiffs' evidence, and that the counts omitting them were properly framed. Held, also, that the words in the declaration, "Although then and there requested so to do," constituted a sufficient averment—a request being made, and of the time and place at which the request was made.

Assumpsit.—For that whereas heretofore, to wit, on the 31st July, 1845, at, &c., in consideration that the plaintiffs at the special instance and request of the defendant, would appoint one John Brinsden, to be one of the agents of the plaintiffs for transacting the business of the plaintiffs, in and about the district of Newcastle, and other places in that vicinity, he the defendant undertook, and then and there faithfully promised the plaintiffs, that the said John Brinsden should and would from time to time account to the plaintiffs for all sums of money which he, the said John Brinsden should receive for or on account, or on behalf of the plaintiffs, according to the terms and regulations contained in the instructions, which he might receive from the plaintiffs or from any agent or attorney duly authorized by the plaintiffs, to furnish such instructions as aforesaid. And that the said John Brinsden should and would pay to the plaintiffs, or in such manner as directed by such instructions as aforesaid, all such sums of money at the times mentioned in such terms. And that if the said John Brinsden should not duly pay to the plaintiffs any sum or sums so received by him as their agent, the defendant would within one calendar month after notice thereof given to him, pay the whole amount to the plaintiffs; and that the defendant would indemnify the plaintiffs against all loss or damage which might accrue or be occasioned to them by the default or misconduct of the said J. Brinsden as such agent. That the plaintiffs consid-

ing in the said promise and undertaking of the defendant, on the 1st of August, 1845, at, &c., did appoint the said John Brinsden to be one of their agents for transacting their business in and about the district of Newcastle and other places in that vicinity. And that on the day last aforesaid the said John Brinsden received from the plaintiffs instructions containing the terms and regulations according to which, and the times at which he should account to the plaintiffs for the moneys which he should receive for them, or on their account or behalf as such agent. And that while the said John Brinsden was so in the employment of the plaintiffs, he received as such agent sums amounting to £500; and that although the time for his accounting for and paying the same to the plaintiffs, according to the terms and regulations contained in the said instructions so received by him from the plaintiffs has long since elapsed, &c. That the said J. Brinsden hath not accounted for or paid to the plaintiffs, or in such manner as directed by the said instructions, or at all the said sum of £500, or any part thereof, and has made default in so doing, although often requested by the plaintiffs so to do. Of all which on the 1st of July, 1847, due notice was given to the defendant by the plaintiffs; and although one calendar month and upwards has elapsed since the said notice was given to the defendant, yet the defendant hath not paid the sum of £500, or any part thereof to the plaintiffs, nor in any manner indemnified the plaintiffs against the loss or damage which has accrued or been occasioned to them by the said default of the said John Brinsden as such agent, although requested by the plaintiffs, but has hitherto neglected and refused, and still neglects and refuses so to do; and the said sum of £500 remains unpaid to the plaintiffs. The second count was substantially the same. The third count stated that on &c. in consideration that the plaintiffs, at the request of the defendant, would appoint J. Brinsden to be one of their agents for &c., the defendant undertook and promised the plaintiffs to indemnify them against any loss or damage which might accrue or be occasioned to them by the default or misconduct of the said J. Brinsden as such agent. And the plaintiffs confiding &c. on &c. at &c. did appoint the said J. Brinsden to be one of their agents for &c. And while the said J. Brinsden was so in their employment he received for the plaintiffs sums of money amounting to £500, but did not pay the said sum or any part thereof to the plaintiffs, although the time for paying the same to the plaintiffs has long since elapsed, but has made default in paying the same, although often requested so to do, of all which premises the defendant had due notice, but he did not nor would pay the said monies or any part thereof to the plaintiffs, or indemnify them from the loss or damage which has so accrued to, or been occasioned to them by the said default of the said J. Brinsden as such agent, although then and there requested so to do; and the said sum of £500 still remains due to the plaintiffs. The declaration also contained the money counts. Demurrer to the first and second counts, assigning for causes (*inter alia*) that the terms and regulations contained in the instructions in said counts are not stated therein. That it does not

appear with sufficient certainty, or at all, from said counts that the time for accounting for and payment of the money mentioned therein hath elapsed, according to the terms and regulations therein stated, nor what time was thereby appointed for that purpose. That the entire contract is not stated in said counts, and that the breach as stated on the part of J. B. is uncertain, and is in the alternative. That consistently with the breach, J. B. may have paid, though not according to the terms and regulations contained in the instructions. That it does not appear in what respect J. B. departed from or omitted to observe the instructions. The causes of demurrer to the third count were, that it did not state at what time J. B. was to pay the sums in that count mentioned; that it did not appear that J. B. was guilty of any default; that it did not appear with sufficient certainty or at all that J. B. was requested to pay the sums in that count mentioned; that no special request is stated therein by the plaintiff to the defendant to pay; that no breach on the part of J. B. appears or that the defendant had notice thereof. Joinder in demurrer.

Sir C. O'Loghlen, (with him *Mr. D. R. Kane, Q.C.*) for the demurrer. We will deal with the third count first, and we submit that it should have averred a special request. A count against a surety cannot be maintained unless a special request is expressly alleged. (*Vin. Abr. tit. Action of Assumpsit, A. A. 8; Cro. Jac. 500.*) The plaintiffs ought to have shewn that the principal had failed, and a demand on the defendant. The action is grounded upon collateral matter, namely, the default of a third party; and the mere general request is not sufficient where a special request is necessary to be alleged. The first two counts are bad for uncertainty; the default of the principal is not stated with sufficient certainty. The declaration should shew with certainty that the principal was in default. So much of the instructions ought to be set forth as to shew the time had really elapsed within which the principal was bound to account. [*Blackburne, C. J.*—The question is, whether the declaration contains sufficient averments to proceed against the principal himself.] It is a special contract to pay at the time mentioned in the instructions. It must appear that the plaintiffs have a cause of action; the mere averment of it by them is not sufficient. (*Com. Dig. Pleader, 76;*) *Clarke v. Gray and others*, (6 East. 567, 568.) Here the plaintiffs have set forth the breach, but have not set forth the time within which the contract ought to have been performed. *Lord Arlington v. Merricke*, (3 Saund. 403; Stephens on Pleading, 384.) We admit that where setting forth a document would lead to long pleading, then it need not be set forth, but the plaintiffs should have set forth sufficient to shew the nature of the instructions, and the time within which the principal was bound to account. *Andrews v. Whitehead*, (13 East. 102;) *Higgins v. Highfield*, (Ib. 407.) If we had gone to trial, they might have given in evidence any form of instructions; they were not tied up to any one in particular. *Beard v. Foran*, (1 L. Rec. 2 S. 164.)

Mr. Ormsby, and *Mr. Napier, Q.C.* contra—A special request was not necessary, and even if it

were, we have made one, the words "*then and there*" make it a special request. *Dennison v. Richardson*, (16 East. 291.) In *Atkinson v. Carter*, (2 Chit. 404,) Lord Tentenden says "no notice or demand was necessary, for that a surety was bound to enquire and inform himself whether or not the principal had paid." *Lilley v. Hewit*, (11 Price, 444.) Where the count is on an agreement to indemnify, no notice to the surety is necessary; he is bound to look after his principal. *Cutler v. Southern*, (1 Saund. 115.) The contract is not to pay on request. *Parget v. Lloyd*, (2 Ventr. 278.) The first and second counts can be maintained on two principles. First, because it is not necessary to state in pleading what must be proved in evidence; the plea of the general issue would have put us upon proof of the facts stated: and secondly, because if we set out these instructions the declaration would be prolix. *Cryps v. Baynton*, (3 Bulstr. 91;) *Parsons v. Cottrell*, (Sir Thomas Raym. 399.) The proof of all these affirmative propositions would be upon us at the trial. *Lord Arlington v. Merricks*, (2 Saund. 403,) cited at the other side is conclusive against the defendant. The principal or his surety is bound to have these documents, or if they had them not, they could have got a copy of the guarantee or the instructions by an order of the court. It is said we have not set out the time within which the principal was to account, but he was to account from time to time with the plaintiffs, according to the instructions which he might from time to time receive. In *Simpson v. Manley*, (2 Cr. & Jr. 12;) *Apothecaries Hall v. Calvert*, (6 I. L. Rep. 186;) *Craig v. Byrne*, (7 I. L. Rep. 500,) the general rule is to lay the breach in the terms of the contract, and all that was necessary to aver, was that he received a sum of money and did not account. *Shum v. Farrington*, (1 Bos. & Pul. 643.)

Mr. D. R. Kane in reply.—No time is stated in the third count within which the principal was bound to account, and there is no averment that a reasonable time had elapsed. *Sansom v. Rhodes*, (6 Bing. N.C. 261.) Nor is there any averment as to the time when he was to pay the money, whether within a reasonable time or at a precise time. They aver that the principal received the money, but they do not show a request. [*Perrin J.*—Why should there be a request? the obligation is to pay immediately. *Crampton J.*—The contract is silent as to time.] Upon the question of special request we submit, the defendant should have been requested by the plaintiffs, and they should have averred the time and place, and the person by whom the request was made; the word requested is the material part, and the special request must be shown to have been made by the plaintiffs in proceeding against the surety. The

averment in the first and second counts is that the principal received certain instructions containing the terms which he was to follow, and they should have set out the precise regulations which he violated. The terms and regulations might be such as he could not carry into effect. The instructions are not put in issue; there is nothing to identify them. They allege that the time limited has expired; the principal was to account according to the instructions, and these are facts peculiarly within the knowledge of the plaintiffs. *Lawes v. Shaw*, (5 Ad. & Ell. N. S. 322;) *Warren v. Bickford* (7 Price 550;) *Hill v. Montagus*, (2 M. & Sel. 377;) *Parkinson v. Whitehead*, (2 Man. & Gr. 329;) *Fannin v. Anderson*, (7 Ad. & Ell. N. S. 811.) It ought to have been alleged by whom and to whom the special request was made.

BLACKBURNE, C. J.—So far as the demurrer applies to the third count, it plainly must be overruled, for that count contains a distinct averment, that the plaintiffs then and there requested the defendant to pay the monies or to indemnify them. There was therefore a demand made upon the defendant, and made by the proper persons. With respect to the demurrer to the two first counts it is to be observed that the declaration states the contract, and assigns the breach in the terms of that contract. The contract was that John Brinsden would pay to the plaintiffs all moneys which he should receive on their behalf, at the times mentioned in the instructions which he was to receive from them. The terms and regulations contained in those instructions were to govern his conduct and his liability. The declaration then avers that John Brinsden received sums of money, and that he neither accounted for or paid them to the plaintiffs, as directed by the instructions. It is said that these instructions should have been set forth; we are not told to what extent. Counsel for the defendant says so much of them should be set forth as would avoid prolixity, but the principle to be collected from other actions such as actions of covenant, applies to the present one and it is plain that these instructions would properly form part of the plaintiffs' evidence at the trial. Upon their production it would then appear whether the general allegations in the declaration could be sustained, nor can I see that the defendant would in any way be prejudiced by such a course of proceeding. For these reasons I am of opinion that the demurrer to the first two counts of the declaration must also be overruled.

CRAMPTON, PERRIN, and MOORE, J. J., concurred.

Demurrer overruled.

ROLLS COURT.

GUINNESS v. FITZSIMONS.—April 22nd.

Bankers' Acts.

A creditor who appears in court to oppose the confirmation of the certificate of a banker under 33 Geo. 2, c. 14 and 40 Geo. 3, c. 22, will be restrained by injunction from proceeding at law for recovery of his debt pending the proceedings for the allowance of the certificate.

The bill was filed on the 19th of April, 1849, and stated that for several years prior to the year 1848, and until the 3rd of July in that year the plaintiff had carried on the trade or business of a banker, and kept a public shop for his banking business, and for several years paid the regular banker's license, and was known and recognized as a banker of the city of Dublin, and after stating various instances of banking, and the mode of carrying on business, submitted that the plaintiff was a banker within the meaning of the bankers acts, (33 Geo. 2, c. 14, Ir. and 40 Geo. 3, c. 22, Ir.) and stated that he stopped payment on the 3rd of July, 1848, and in pursuance of the said acts had vested his whole, real, and personal estate in Samuel Vignoles, and Edward Berwick as trustees for the payment of his debts, and defraying the expenses of executing the trust, that he had in all things conformed to the provisions of the acts, that the trustees had given a certificate of his conformity, which was signed by more than the number of creditors required by the acts; that on the 20th of December he had presented his petition to the Chancellor to allow and confirm his certificate, which petition was heard on the 3d of February, 1849, when but two creditors, representing not a fiftieth part of the debts, appeared to oppose, namely Patrick E. Reilly and the defendant. A reference was directed by the Chancellor to Master Litton to inquire whether plaintiff was a banker within the meaning of the Acts, and whether he had in all respects conformed to them. Under the order of reference the plaintiff had filed his charge, and the defendant a discharge, which stated that the defendant, who was an attorney, was a creditor to the amount of about £200, balance of a bill of costs. After the plaintiff's stoppage the defendant was sent notice of the trust arrangement, and called on to prove; he, however, declined doing so, and brought his action in the Court of Queen's Bench, to which the defendant being unable to plead the certificate, put in a plea of the general issue, accompanied by a notice of the proceedings taken to obtain the certificate, and cautioning the defendant from proceeding further at law; the same course was pursued at every subsequent stage of the action, and a trial was ultimately had at the sittings after Hilary Term, when there was a verdict for Fitzsimons. On the first day of term he entered a rule for judgment on the *postea*, and would be entitled to issue execution on the 21st. The bill stated the various proceedings in the Master's office, the plaintiff pressing on the case, and the defendant retarding it, as the bill alleged, for the purpose of delay, to enable him to issue execution, and prayed that the defendant might be restrained from proceeding to mark judgment on the *postea*, or, if the same were marked, from issuing

execution or taking further proceeding until the order of the Court should be pronounced on the plaintiff's petition.

Mr. Butt, Q.C. moved for the injunction.—In the first place we contend that on the true construction of the 40 Geo. 3, the plaintiff is entitled to complete protection from the moment of the vesting of his property in trustees. [*Master of the Rolls*—On that construction of the act, you could have pleaded the certificate at law and you have no ground for coming into a Court of Equity.] It was not possible to defend the action at law; and secondly, we contend that the defendant having made himself a party to the proceeding in the petition matter should not be allowed to proceed at law. This is an application of the first impression, but interpleader cases and cases in which a Court of Equity grants an injunction to prohibit pirating with copyrights and patents pending the adjudication of the right before another tribunal are analogous; [*Master of the Rolls*—Lord Cottenham states that he is slow to interfere where the question depends on restraining the exercise of a legal right. What position do I place the creditor in if not allowed to issue his execution? the plaintiff may leave the country.] Undoubtedly there are cases in which a Court of Equity interferes to restrain the exercise of a legal right, here the court takes the case out of the plaintiff's control, and it should not allow the defendant to oppose the adjudication in this court to enable him to gain an unjust advantage at law. In Bankruptcy a creditor will not be allowed to oppose the certificate and proceed at law, *ex parte Bozannet* (1 Rose.)

Mr. J. D. Fitzgerald, Q.C. and *Mr. Berkeley*, contra.—We are at a loss to ascertain the equity to prevent the creditor pursuing his legal remedy; the first ground put forward by the other side is clearly unsustainable, the defence would have been good at law, and when the trustees had signed the certificate there could have been a plea *puis darreign* continuance. [*Master of the Rolls*—The whole equity turns upon the defendant being a party in the petition matter.] Their remedy is misconceived, they should have applied by motion to the Chancellor. There is a distinction between this case and one in Bankruptcy; we are altogether opposing the proceeding, not coming in under it, when a creditor in Bankruptcy opposes the certificate he has previously made his election, there is an important question raised here which the Court of Exchequer have decided in *Stafford v. Henry*, (ante p. 134,) and it is against the plaintiff. In analogy to a creditor's suit, the court has no right to restrain before decree, so here not until the right that the plaintiff claims (but which we altogether dispute) to have the benefit of these acts, has been decided. Besides, they come too late, and are in the same position as if, under the old practice, they were to come for a special injunction, not having applied for the common one. *O'Donnell v. O'Donnell*, (1 Hog. 176); *Franklin v. Squire*; *Thomas v. Densey*, (3 Mer. 225.) They should have applied before judgment was marked. *Taylor v. Christy*, (8 Price.) *Moses v. Lewis*. See *ex parte Joseph*, (18 Ves.)

Mr. Hickey in reply.—There is no common injunction now; but, in fact, we could not have come earlier. It appears by the bill that it was agreed at the last meeting before the Master that the defendant should be communicated with, whether he would undertake not to issue execution, and his answer was not given until the 17th. The circumstances of this case require this injunction which is "a writ framed according to the circumstances of the case, commanding an act which this court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience." Applying the latter part of this definition, would it not be an unconscientious advantage to allow the defendant to proceed at law and oppose in equity? and unjust for the court to take the administration of Mr. Guinness' affairs out of his hands, and hand him over, divested of every shred of property, to a hostile and perseveringly litigious creditor? If the decision be against the plaintiff, and he is declared not to be a banker, no doubt the defendant may be delayed; but that inconvenience is not comparable to the injury Mr. Guinness would sustain, if, pending the inquiry, and it were to terminate in his favour, he were thrown into prison; in the one case there would be a loss of liberty, in the other but a short delay, (for the court can require security for Mr. Guinness' appearance,) and we have laid at all events a *prima facie* case of the plaintiff being a banker, which would entitle us to an injunction until answer. The case put by the other side, that the court does not interfere in creditors' suits until decree, only applies to distinct proceedings by separate creditors, but if a creditor were in any way to make himself a party in any suit by opposition or otherwise so as to accelerate a proceeding of his own, would it be arguable that the court would not have jurisdiction over him? The early cases in Bankruptcy are not applicable, the bankrupt code being at first framed in a spirit of harshness to the debtor; but that has been relaxed, and it is now settled that a creditor cannot oppose under the bankruptcy and arrest at law, and the bankrupt court can order an *ad interim* protection. The bankers' acts were remedial statutes; the plaintiff has complied with them strictly, his protection is delayed by the act of the court and of the defendant.

May 23rd.—The MASTER OF THE ROLLS having adverted to the statements in the bill, the appearance of the defendant before the Chancellor, his name being taken down in the order as opposing, the terms of that order of reference of the 3rd of February, the charge of plaintiff, and the discharge of the defendant, in which he not only denied that the plaintiff was a banker within the meaning of the acts, but also that he had conformed to their provisions, and that, pending the reference, the defendant insisted he was entitled to issue execution, and having read the second section of the 40th Geo. 3, cap. 14, stated that it had been argued at great length by counsel for the plaintiff that the certificate of the trustees entitled the plaintiff to protection, although it had not been allowed by the Lord Chancellor, but that it appeared to him that there was no foundation for that argument, that the provisions of the statute nearly corresponded with those in the Irish Bankrupt

Act, (11 & 12 Geo. 3, c. 8,) which was passed in the interval between the two bankers' acts, and having referred to the 43rd, 46th, and 49th sects. of the 11 & 12 Geo. 3, c. 8, (folio edition,) said that the decisions on the English Bankrupt Act were express. *Webb v. Marsh*, (7 T. R. 227,) where Lord Kenyon said, "As to the certificate being signed, but not allowed, it operates nothing." *Tudway v. Bourne*, (Bur. C. C. 19,) and *Stapleton v. Mucbar*, (7 Taunt. 589.) Upon the second branch of the case a question arises whether the defendant, having appeared on the motion before the Lord Chancellor, and rendered the reference necessary, should not be bound to await the result, or can be allowed to proceed at law pending this reference. There are two courses in Bankruptcy open to a creditor: having proved under the commission he may oppose the confirmation of the certificate; or he may proceed adversely to supersede the commission; a third course a creditor cannot be allowed to resort to; not having proved, oppose the allowance of the certificate, and take the bankrupt in execution. His Honor then referred to *Ex parte Bostock*, (1 D. & Ch. 383); *Ex parte Lord*, in *re Stephens*, (2 Rose, 421); *Ex parte Joseph*, (1 Rose, 189; S. C. 18 Ves. 340,) and said he considered it would be unreasonable to allow the defendant to oppose the certificate, and at the same time to proceed at law, and take the plaintiff in execution. In *Ex parte Hardenburgh*, (1 Rose, 204,) the bankrupt had obtained his certificate, but whilst it was before the Lord Chancellor for allowance, a creditor who had obtained a judgment for £200, and had not gone in under the commission, presented a petition impeaching the commission, and praying that it might be superseded; upon this petition an inquiry was directed, there was also a sum due for costs to the same creditor, who having issued an attachment for them, arrested the bankrupt, and the latter petitioned for his discharge; the Lord Chancellor, in giving judgment, said, "There is not in this case the difficulty which has been urged on the point of jurisdiction, whether if a creditor comes here merely to remove the commission or certificate out of the way of his proceeding at law, I should consider him as coming in under the commission, and restrain him from proceeding at law, for in this case the creditor goes farther, he prays an inquiry into circumstances impeaching the validity of the commission with a view to supersede it, or in case that the commission should not be superseded that there may be a new choice of assignees, and that he may be permitted to prove; now it seems exceedingly clear that pending this inquiry, he himself proposing it, he must abide by the alternative, and stop till the result is ascertained." In the present case the defendant goes farther by his discharge than the opposition to the certificate, for he requires proof of the execution of the deeds vesting the estate in the trustees; he also insists that even if the plaintiff is a banker he has not complied with the requisitions of the statutes, and renders it necessary for the plaintiff to go into evidence to prove this alternative inquiry. If the defendant had not appeared before the Chancellor I might have no jurisdiction, but, having done so, I will grant this injunction.

Lib. 285, fo. 334.

MASTER'S OFFICE.

IN THE MATTER OF R. S. GUINNESS, PETITIONER.

A party trading openly as a banker found to be a banker within the meaning of the Acts, 33 Geo. 2, c. 14, and 40 Geo. 3, c. 22, notwithstanding that he carried on another more ostensible business than that of banker.

Held that the 33 Geo. 2, c. 14, and 40 Geo. 3, c. 22, extend to all bankers, as well those whose banks are not of issue, as those which are so.

The reference was proceeded with before Master Litton, the charge of the petitioner stating nearly the same facts as to banking as those charged in the bill, and averring that he assumed openly, notoriously, and manifestly the character of a banker, kept open shop or place of business, was known by common repute as a banker, received lodgments on accountable unstamped receipts, paid drafts or cheques of persons having banking accounts with his firm, that his drafts were taken in lodgment by other bankers, that he issued letters of credit on bankers in England, and on the continent of Europe, charged the usual banker's commission in his dealings with foreign bankers, discounted bills, paid banking license until the year 1843, when he was informed it was not necessary to pay license except he issued notes, that his name appeared as a banker for several years in the public Directories, and sheet almanacks, that his books were kept strictly as banking accounts, and distinct from his business as Land Agent, that his transactions were very large, exceeding in some years a million sterling, that for some time he acted as agent to the Agricultural Bank, and that his house was the only house in Dublin where their notes could be retired until a change in the law removed the restrictions imposed on Joint Stock Banks. That his house of business was open every day, except Sundays and the usual bank holidays, from 10 to 3. The discharge traversed some of these statements, and stated that the petitioner drew cheques on Messrs. La Touche as a private person and not as a banker, that his house of business had not the appearance of a banking establishment, that he held himself out as a land agent and not as a banker, that he was not at the time of his stoppage duly licensed, that any banking business which he carried on was merely incidental to his business as a land agent, and for the convenience of the parties with whom he was so connected, that after diligent inquiry the defendant could discover no instance of the plaintiff having acted as a banker, and that he never issued notes.

The petitioner examined more than twenty witnesses and the defendant six; several of the former proved that they kept Banking and no other accounts with the petitioner, and that they, in fact and truth, believed him to be their banker. It was also proved by a number of witnesses that his house had the appearance of a banking establishment; that he received lodgments on accountable unstamped receipts, paid drafts or cheques; issued letters of credit; discounted bills in the same way as other bankers; that the forms of dockets, cheques, pass-books were the same as those used by bankers; that his house was open from ten until three for re-

gular business, and from three to four for the payment of bills; that a cashier was always ready to receive and make payments; and 18 witnesses, including Mr. Alexander Boyle and Mr. Wm. Digges Latouche, swore, that he was known by common repute as a banker. It was also proved that his cheques were taken in payment by other bankers and other bankers cheques by him; his books were produced, and there were distinct ledgers for the land agency and banking accounts. Various almanacks, directories, bankers licenses, forms of drafts, receipts, dockets and cheques, which passed through other banks, were also given in evidence. The defendant's witnesses proved that the defendant's firm kept an account with the Bank of Ireland, and that when he opened the account he designated himself as Land Agent and Barrister-at-Law. The secretary to that bank stated that he never directly had any communication with the petitioner or his copartners in the capacity of bankers; that he always understood him to be a Land Agent, and believed that he discounted bills to accommodate some of his friends, and did not think he was known by the public as a banker, and did not believe that the petitioner came under the denomination of a banker. On cross-examination, after examining the various documents used by the petitioner in his business, he stated that if documents similar in form represented *bonâ fide* transactions, he would say that the firm of R. S. Guinness and Co., were conducting the business of bankers, and that it was customary for bankers in the city of Dublin to keep accounts with the Bank of Ireland. Two other gentlemen connected with the Bank of Ireland, and Mr. Richard Williams, gave nearly similar evidence in their direct examination, and qualified it on cross-examination. Mr. Henry Beaumont and Mr. Wm. D. Latouche, who were both examined by the defendant swore, both on direct and cross-examination, that they believed the petitioner to have followed the business of a banker, and that he was reputed to be such in the course of business in the city of Dublin. The defendant also gave in evidence the answer of the petitioner to a cross bill, filed by the widow and minor children of his deceased partner, for discovery of the accounts of the partnership, and also the deed of partnership executed in 1838, in which the firm became partners as Land Agents, and the dissolution of that partnership in the Dublin Gazette as Land Agents. It appeared by the answer that it had general reference to partnership transactions, and the petitioner in one passage spoke of his present business as "banker and land agent," and in another of charging interest "according to established mercantile custom, and to the usage of bankers."

Mr. Hickey for the petitioner.—It will be necessary to prove two points, first, that the bankers' acts apply to banks of deposit as well as banks of issue, and, secondly, that the petitioner was a banker within their meaning, and that his trading was not incidental to his other business, but a distinct, substantial and known occupation. There are three statutes that it will be necessary to refer to: the 8th Geo. 1, c. 14; 33rd Geo. 2, c. 14; 40th Geo. 3, c. 22. In none of them is the word "banker" defined, nor can

any reason be deduced why it should be used in a restricted and not the ordinary acceptation of the word. Banks of deposit existed long before banks of issue were known; the first application of the word "bank" was confined to banks of deposit, and of "banker" to those who kept such banks. Doctor Johnson defines a bank "to be a place where money is laid up to be called for occasionally," and banker "one that trafficks in money, one that keeps or manages a bank," and Toulmin, "The monied goldsmiths first got the name of bankers in the reign of King Charles, II., but bankers now are those private persons in whose hands monies are deposited and lodged for safety, to be drawn out again as the owners have occasion for it." The Lombard Jews were the first bankers, and the term "bank" is derived from the benches on which they sat to transact business. This being the true derivation of the word, it must be assumed, apart from legislative glossary, that the word "banker" has been used in its known, legal, and ordinary signification. There might be more difficulty in arguing that it included a banker of issue, (a banker of issue being the novelty,) but none that the word bears the meaning it always bore. The 8th of Geo. 1, is more comprehensive than its title, "An Act for the better securing the Payment of Bankers' Notes," and exactly defines what a banker is, "that where any person or persons doth or shall follow or exercise the trade or calling of a banker, by keeping a public house or office for the receipt of the money of such persons as are willing to deposit the same in his or their custody." There is no part of this definition to issue notes, and the fourth section applies to all creditors and all bankers, not merely to those who were holders of notes; and this construction was given to those sections and the 8th section of the 3d Geo. 2, c. 14 in *Hayden v. Carroll*, (3 Ridg. judgment, p. 593-597.) If the words "all creditors" were held to apply to those of every class, not merely holders of notes, who were ostensibly the object of legislative interference, the words "all bankers" in the same act should apply to every class of bankers. That act was repealed by the 3d Geo. 2, the title of which is larger, "for the Security and Payment of Debts due by Bankers." Throughout, the words everywhere are "all bankers, any banker, no banker;" it speaks of their stopping payment, but never ceasing to issue notes. It was designed to be of universal application, and called in the subsequent statute, "the Bankers' Act." The 15th section is conclusive that the Legislature were aware a man might be a banker and yet not issue a note; it imposes a penalty on persons in certain public employments who shall "follow the trade or business of a banker, or by himself, or by any person authorized by him, issue or give any note or accountable receipt as a banker, or in partnership with any banker, or for profit or reward discount any promissory note or accountable receipt." There were three separate things prohibited: to act as a banker, to issue a note, to discount a bill. If the three were necessarily involved in the calling of a banker it would be sufficient to impose the penalty on a public officer acting as a banker. Whatever doubt there could be raised on the two first statutes there can be none on the 40th of Geo. 3. It is "An Act for the Protection of Bankers who shall stop Payment,"

emphatically a remedial statute, to be construed liberally and not narrowly. That this reading of the statute is correct is much strengthened by the fact that when the 33rd of Geo. 2 was passed there was no bankrupt code in Ireland, the first Irish bankrupt act being the 11 & 12 Geo. 3, c. 8, and, therefore, no means of administering the estates of bankers for the benefit of their creditors. It cannot be supposed that the Legislature confined the Bankers' Act, which is in itself a bankrupt code, to a section and not to the whole body of bankers; and it is very important to bear in mind also that between the passing of the 33rd Geo. 2 and the 40th Geo. 3, not only a bankrupt act was passed, but the Bank of Ireland was incorporated, the 15th section of which was designed to give to it a practical monopoly in the issue of notes. Therefore, by this intermediate legislation, the property of bankers could be administered for the benefit of their creditors, and banks of issue were restricted; and yet it is contended that the 40th Geo. 3 can only apply to bankers of issue, a class whose extinction was rapidly taking place. It is impossible to hold so absurd a construction. On the second branch that Mr. Guinness was a banker, it is only necessary to refer to the evidence given by men of all ranks, classes and professions: barristers, attorneys, tradesmen, men in public office, merchants, bankers, stockbrokers, bank-directors. He did everything that any private banker ever did as a banker, no land agent ever kept books as he kept them, issued letters of credit, paid duty to the Government, had his name put in almanacks and directories, and did everything in his power to hold himself out as a banker. The transactions in evidence cannot be considered as incidental to the business of a land agent; incidental means either necessarily connected with, or casual, fortuitous, accidental; the evidence is entirely the other way: first, that the banking business was separate from the land agency, next, was constant, systematic, and extensive. The quantum of trading is of no consequence in a case of bankruptcy; *Vaughan v. Patman*, (1 T. R.) *Ex parte General Wyndham*, (1 M. D. & De Gez. 146.) Why should there be greater strictness here? The army agent's case, so much relied on in *Stafford v. Henry*, is in fact a decision in our favour; the opinion of the Chancellor in directing the issue as to what may constitute a banker is clearly so. In *Richardson v. Bradshaw*, (1 Atk. 128,) the books were not kept as banker's books, the jury found the first part of the issue, "that he was a trader within the meaning of the bankrupt laws," and it was unnecessary to find the disjunctive that he was a banker. In *Hankey v. Jones*, (Cowp. 747,) in allusion to *Richardson v. Bradshaw*, Lord Mansfield observes, "I was counsel in that case; I do not remember there was any motion for a new trial, but a very material circumstance there was, that Wilson kept other people's money," in other words, that he was a banker. The facts in this case are as dissimilar as possible from those in *Stafford v. Henry*; there, to make a forfeiture it was attempted to invest Labertouche with a character which he swore he never assumed, the money paid out on checks was overmarked as the proceeds of stock; in his case his acting as a banker would have subjected him to a

penalty; if he did so act his trade was furtive, clandestine, illegal; here open, avowed, legal; there the attempt was made to despoil a creditor of a *bonâ fide* security, here to upset an arrangement in which the great body of the creditors have acquiesced, and deprive a gentleman, who has divested himself of every shilling he possessed on earth, of that protection to which the laws of his country have entitled him.

Mr. Berkeley, (Mr. J. D. Fitzgerald, Q.C., was with him but did not address the Master through unavoidable absence.)—These acts only apply to banks of issue, it is clear the first act could only have been intended for banks of issue and, in fact, none other existed in this country. It is a curious fact, mentioned by Baron Pennefather during the argument in *Stafford v. Henry*, that at the time of the Union there was no bank in Dublin except banks of issue. The business of this country was carried on through the medium of banker's promissory notes and accountable receipts, which were, in fact, notes and very different from the accountable receipts of the present day. In consequence of the failure of Mr. Malone's Bank, the Legislature repealed the 8 Geo. 1, and passed the 33 Geo. 2, which was more comprehensive and carefully prepared, and by its preamble recites "that the trade and manufactures of this kingdom are, in a great measure, carried on and supported by the means of promissory notes and accountable receipts given by bankers, and the credit of such bankers and the currency of their notes will be promoted by giving a more effectual security to the creditors of such bankers than they have at present;" that is the key to the intention of the Legislature, to provide security to holders of bank notes. Many of the provisions are highly favourable to creditors, especially at a time when there was no bankrupt code, and others to which we object are not so; for example, the banker may select his own nominees to be trustees, and the conformity of the banker and the certificate is an effectual protection against the world. Minds are so differently constituted that the 15th section relied on by the other side, appears to me conclusive to shew that banks of issue only are intended; for the tripartite division alluded to, is merged at the end of the section and but two penalties are imposed, the one for issuing notes, the other for discounting bills. All the business of a banker is included in one penalty, that which might be exercised without being a banker in the other. The 5th and 13th sections apply solely to banker's notes. Assuming, secondly, that the acts comprise all classes of bankers; to come within their meaning the primary occupation must be that of a banker, occasionally doing some acts like a banker which are ancillary to and referrible to other business, will not bring the petitioner within their scope. His primary business unquestionably was that of a Land Agent. The fact of a few persons drawing cheques upon him and dealing with him as a banker will not bring him within the meaning of these acts, and the decision in *Stafford v. Henry* is to that effect. If the petitioner were a banker it is incredible to believe that the secretary to the Bank of Ireland would not have known it. Then the partnership deed and the dis-

solution in the *Gazette* are decisive upon the view which the petitioner took of his own business, there is no allusion whatever in them to that of a banker.

Mr. O'Neill, for Patrick E. Reilly, an opposing creditor—relied on the same points, that the primary business was that of a Land Agent; that the collection of bills and other acts alleged as acts of banking were merely incidental to the agency business, and that there were various entries in the books which showed that the banking and land agency accounts were intermixed.

Mr. Hickey in reply.—As to there being no bank in Dublin in 1800, except a bank of issue, that may have been the case, though it is extremely unlikely, and in the contemporaneous almanacks there are certainly the names of many country bankers who never issued a note; the banking licences authorized the petitioner to issue notes, he paid for the privilege, but there was no use in issuing them if the public would not take them. Whatever may have been the exact state of the business of bankers in 1800 it is certain that there have since been bankers of deposit, that the laws regulating them have undergone frequent changes, that as they now stand it is impossible for a private banker to issue notes, and amid these various alterations these acts for the protection of bankers have remained unrepealed; the construction put on them by the other side would make them practically a dead letter. The accounts were kept perfectly separate, where a banking and land-agency account were opened with the same person, there may appear to be entries which belong rather to the one class than the other, but even these are of rare occurrence, and the evidence of the cashier and accountant shews that they were certainly intended to be kept separately.

MASTER LITTON.—I have heard this case very ably argued by counsel on both sides, and I have arrived at the conclusion that Mr. Guinness, the petitioner in this matter, was a banker within the meaning of the Acts of Parliament which have been referred to in the Chancellor's order, and that it was not necessary that he should have kept a bank of issue to bring him within the scope of their provisions. This last question was not adjudicated upon in the leading case decided in the Court of Exchequer, which has been so much referred to in the argument of this case—the case of *Stafford v. Henry*. In the case of *Stafford v. Henry*, which is almost the only decision we have upon the subject, Mr. Labertouche was considered not to have been a banker, chiefly upon the ground that the banking business transacted by him was but incidental to his principal or primary trade of a stock-broker. Mr. Labertouche did not hold himself out to the public as a banker, having traded as a merchant it would have been illegal for him to have done so, and this naturally induced both himself and his clerks to give to his transactions the character of the trade of stock-broking and not of banking. It does not appear that either he or his creditors ever considered him as anything more than a stock-broker, or that he ever held himself out as a banker. But Mr. Guinness did hold himself out to the world as a banker, and proclaimed himself to be such, and

although he did some acts which, taken separately, may have appeared inconsistent with his character as a banker, yet, on the whole of the case, there can be no doubt, unless we discard the whole body of evidence which has been laid before me, that he did carry on the trade and business of a banker. I entered upon the consideration of this case with an impression the other way, from my never having heard in the course of any proceeding before me or otherwise that Mr. Guinness had been a banker, and from my having had judicial knowledge that he had long carried on the business of a land-agent. It appears also that his counting-house externally had not the same appearance which the leading private banks in the city of Dublin present. But it appears in evidence that the house was open for business during the usual banking hours, and that a person was always in attendance to pay cheques and receive lodgments of money, and that at three o'clock, when the other departments of the house had closed, the banking department remained open for payment of bills, according to recognized banking usage. With this evidence before me the question arises, whether a man, to bring himself within the provisions of these acts of Parliament, is bound to present himself to the public with all the array which distinguishes the transactions and the place of business of a great and eminent banker. In my opinion this is not necessary. The difficulty in this case has arisen from the fact that Mr. Guinness was most extensively engaged as a land-agent, and that the business of land-agency was his principal occupation. But I find that his books contain series of accounts solely conversant about banking transactions; that he not only received money on lodgment and repaid it on cheques, but that he transacted foreign bills of exchange; that he discounted bills; that the forms and documents made use of in his business are proved to have been such as are in general use amongst bankers; that he was registered as a banker; paid money to the Crown; was described as a banker in almost all the almanacks and directories (though not in all), and in some not only in the portion set apart for merchants and traders, but also in that in which are enumerated the private banks. A vast number of witnesses, some of them merchants, have deposed to his being a banker, and it appears that many of them kept banking accounts with him, and no accounts with him as land agent. I was peculiarly struck with the great weight of the evidence on this part of the case, from the fact that some of the witnesses examined by the opposing creditor, swore that they believed him to be a banker, and others who deposed that they did not know him to be such, on cross-examination, when the forms and documents to which I have adverted were put into their hands, stated that if these documents represented *bonâ fide* transactions (which there can be no doubt they did) they would consider the petitioner a banker. With this great mass of evidence, I cannot come to any other conclusion than that the petitioner traded as a banker, and held himself out to the public as such. For the purpose of shewing that this case does not come within the authority of the Exchequer decision, I will read a few passages from the judgments of the

learned Barons by whom that case was decided. The Chief Baron says—"It appeared in evidence that Labertouche was a stock-broker and notary public, and that he collected and occasionally discounted bills—the collection of bills, of course, must have been part of his business of a notary." The collection of bills by Mr. Guinness constituted no part of his business of land-agent. Baron Pennefather says—"If any person assumes openly, notoriously, and avowedly the character of a banker, I should be very reluctant to hold that he was not within the meaning of that act..... In the present case the bankrupt, Labertouche, was not only a stock-broker and notary public, but also an extensive merchant, in which latter capacity he would have been liable to heavy penalties if he were also a banker..... In this case Labertouche himself positively swears he never was a banker, while on the other side it is only shewn that he occasionally acted like a banker, and not that he ever held himself out to the public as being one." It appears, no doubt, in evidence, that many persons did not know that Mr. Guinness was a banker, but this was not attributable to any act or to any omission of his, for he took all reasonable means to make his character of banker public; and the evidence is abundant to shew that the portion of the public who dealt with him knew him as a banker. In my opinion a sufficient number of persons knew his trade to be that of banker, to represent "the public" in the eye of the law. On the whole of this branch of the case I am of opinion that no jury could, upon their oaths find otherwise than that the petitioner was a banker. Having thus given my judgment upon the principal question, it now becomes necessary for me to express my opinion upon that which the Court of Exchequer was not called upon to decide, namely, whether bankers not keeping banks of issue come within the scope of these acts of Parliament. Upon this part of the case I am of opinion that they do so, and that the law in this respect also is in favour of the petitioner. The 8 Geo. I. undoubtedly applied only to banks of issue; but this act was repealed, and there is a series of subsequent legislation, and in it no distinction is made between banks of issue and banks of deposit. The various acts of a banker, enumerated in 33 Geo. 2, do not and cannot be considered to apply exclusively to banks of issue. The characteristics of a banker's business are not so much the issue of notes, as the discounting and collection of bills, receiving deposits, paying cheques, issuing letters of credit, and the various other branches of business in which bankers engage. Can we suppose the Legislature to have been so thoughtless as to have meant only banks of issue, and yet to have used the words "all and every banker and bankers," without a single word to qualify or modify these expressions, which I believe to have been deliberately introduced, inasmuch as the Legislature cannot be supposed to have forgotten the 8 Geo. I. Nothing could have been more easy than to have introduced the expressions "banks of issue," if the intention had been that these acts should have had so limited an operation; but the policy of the Legislature was obviously to include both classes of banks; nor is

there one word to shew why the one should have been included and the other excluded. I am of opinion that discounting bills, paying cheques, and issuing letters of credit, are acts fully as indicative of the banking character as issuing notes. The last statute on the subject was a remedial act, and ought to be construed liberally, and I am of opinion that the Legislature intended that its provisions should extend to all bankers, as well to those whose banks were not of issue, as to those whose banks were of issue. Upon the whole case, and upon the grounds I have stated, I am of opinion that the petitioner was a banker within the meaning of these acts of Parliament, and I rule accordingly.

QUEEN'S BENCH.—EASTER TERM.

LESSEE PEACOCK v. O'GRADY.—*May 2, 5.*

Ejectment—Stamp on lease—Grant of trees—Relation of landlord and tenant within the meaning of the ejectment statutes—Effect of the lessor of the plaintiff ceasing to have a reversion as to a part of the premises.

Premises were demised for three lives, renewable for ever, at a yearly rent and a fine. In a subsequent part of the lease, the timber trees growing upon the premises were conveyed to the lessee. The stamp upon the lease was admitted to be sufficient for the rent and fine. Held, that the grant of the trees, which had been already demised, did not change the character of the lease, so as thereby to render it a conveyance, and, consequently, that no additional stamp was required.

At the time of bringing the ejectment, the title of the lessor of the plaintiff to a portion of the premises, sought to be evicted, was for the same lives as were contained in the defendant's lease. Held, that as to so much of the rent as issued out of that portion of the premises, the plaintiff ceased to have a reversion, and that a verdict which passed for the entire of the premises, and for the whole of the rent, could not be maintained.

Ejectment for non-payment of rent.—At the trial before Richards, B., at the last Spring Assizes for the county of Limerick, the lessor of the plaintiff gave in evidence the lease under which the defendant derived. The lease bore date the 28th June, 1832, and was made for the lives of Thomas J. Peacock, the lessor, the lessee, and George Peacock. It contained a covenant for perpetual renewal, and conveyed to the lessee the timber trees upon the premises. The yearly rent was £361, and £2,000 was paid as a fine. The lease was impressed with a stamp of £12 10s. Counsel for the defendant objected to the reception of this deed in evidence, as being insufficiently stamped, and contended that it should have contained a further stamp to cover the conveyance of the trees. The learned Baron, however, admitted the evidence, and saved the point for the defendant. The defendant then gave in evidence the lease under which the lessor of the plaintiff derived. This lease was dated the 20th December, 1798, and was made for the lives of Thomas J. Peacock, the lessor, William Peacock

and George Peacock. Evidence was then given to shew that William Peacock, one of the *cestui que vie*s, died after the execution of the lease of 1832, but before his brother, Thomas J. Peacock, the lessor; and the defendant then submitted that the present lessor of the plaintiff had no reversion, inasmuch as the surviving lives in the leases of 1798 and 1832 were the same, and insisted that the plaintiff was not entitled to bring an ejectment for non-payment of rent on the lease of 1832. It further appeared from the evidence, that the lands comprised in the lease of 1798 formed but a part of the premises comprised in the lease of 1832. The learned Baron directed a verdict for the plaintiff, with liberty to the defendant to move the court above to have the verdict for the plaintiff turned into a verdict for the defendant. A rule nisi having been obtained to set aside the verdict for the plaintiff, and to enter one for the defendant, or for a non-suit, or that a new trial be had, grounded on objections taken at the trial on the part of the defendant, and the points saved.

Mr. Latouche (with him *Mr. Henn, Q. C.*) now shewed cause. The stamp impressed upon the lease is sufficient, the leading character of the instrument is, that it is a lease, and it is conceded that, as a lease, it is properly stamped for the fine and rent. Upon enquiry at the stamp office, the stamp was considered sufficient. In the next place, we submit that the lessor of the plaintiff had a sufficient reversion to maintain this ejectment. *Lessee Jackson v. Jackson*, (Hayes & J. 442); *Lessee Delacour v. McCarthy*, (ibid. 474); *Doe & Hills v. Morris*, (6 Jur. 326; referred to in *Fur. L. & Ten.* 1126); the note to the case of *Hughes v. Howlin*, (1 *Fox. & Sm.* 24.)

Mr. Molesworth and *Mr. J. D. Fitzgerald, Q. C.* contra.—The stamp is only adequate for a lease, and the conveyance of the timber comes under the head of a conveyance not otherwise charged. The stamp for £12 10s. is exhausted by the rent and fine. [*Perrin, J.*—If the £2,000 was given for the trees, you do not want a further stamp.] If £1,500 was given for the land, and £500 for the trees, there should be an *ad valorem* stamp. *Lessee Murphy v. Connolly*, (6 *Ir. L. Rep.* 116); *Corder v. Drakeford*, (8 *Taunt.* 382); *Lessee Boothe v. McGowan*, (4 *Ir. L. Rep.* 188; *Lant v. Poace*, (8 *Ad. & Ell.* 248.) [*Perrin, J.*—Here is a lease of trees for lives renewable for ever, and then it has a clause enabling him to cut down trees.] *Lessee White v. White*, (7 *Ir. L. Rep.* 50), may be relied on at the other side, but that was a case under the recent statute, (5 & 6 *Vic. c.* 82.) The lease is perfect, with all the appropriate covenants, and then comes another conveyance, a conveyance of the trees. [*Blackburne, C. J.*—The timber is part of the soil and freehold.] With respect to the second point, if a man makes a lease for a longer term than he has himself, it is a conveyance; the relation of landlord and tenant can only subsist where there is a reversion. *Pluck v. Digges*, (5 *Bligh's P. C.* 31); *Lessee Fawcett v. Hall*, (11 *Ad. & Nap.* 248); *Lessee Porter v. French* (9 *Ir. L. Rep.* 514.) A landlord in the ejectment statutes means a landlord having a reversion. The lease having

a covenant for renewal makes no difference, and as to the reversion, being in a part of the premises, in an ejectment for non-payment of rent, the entire of the premises must be evicted. *Lessee Swift v. Allanson*, (Batty, 826, note); *Lessee Jackson v. Jackson*, (2 Law Rep. N.S. 36,) is distinguishable from the present case; per Crampton, J., in *Lessee Delap v. Leonard*, (5 Ir. L. Rep. 298.) The condition for re-entry cannot be apportioned. *Lessee Warrington v. Hodgins*, (Batty, 315); *Lessee Purcell v. Kirby*, cited in (2 Fur. L. & Ten. 1129.) The landlord must have his relation not to a portion, but to the entire of the premises. *Hughes v. Howlin*, (1 Fox & Sm. 7,) is not in point, for that was an action of covenant, and the question turned upon a point of pleading. The extinguishment of part of the reversion would defeat the legal relation of landlord and tenant.

Mr. Henn, Q.C., in reply.—With respect to the stamp, the consideration must be expressed in the instrument, and no part of the consideration in this lease is applicable to the sale of the timber. The fine and rent were the consideration for the lease, and it is properly stamped for them. There can be no *ad valorem* duty, except where the consideration is expressed. *Murphy v. Connolly*, (6 Ir. L. Rep. 116,) does not apply; for that was a mortgage, and contained other matters not incident to a mortgage. It is merely the extension of a grant already made. Upon the second question, up to the time of the decision in *Pluck v. Digges*, the general opinion was, that an ejectment would lie under circumstances like the present. Lord Tenterden puts it upon the ground that it was only a rent-charge. *Lessee Fawcett v. Hall*, (Al. & Nap. 248,) is decided upon the authority of *Pluck v. Digges*. All these cases are materially different from the present one, for in none of them did the relation of landlord and tenant exist in any other part of the lands sought to be evicted. There was no rent service. Secondly, there was no controversy but that the party had granted for the same lives that he held himself. It becomes an important question whether there is not in this case an estoppel. *Lessee Fawcett v. Hall*, (Al. & Nap. 254, note); *Gilman v. Hoare*, (1 Salk. 275.) If a landlord takes upon himself to grant a lease for a greater interest than he has himself, is not the tenant estopped? Where there is a covenant for perpetual renewal, would not that support an ejectment for non-payment of rent? The rent reserved was a rent service. Suppose the landlord had distrained upon any part of the lands that was not held under the demise of 1798, then the doctrine laid down in *Pluck v. Digges* would not apply. It is said that a condition of re-entry cannot be apportioned; that is a mistake. — v. —, (4 Leon. 27, 28.) There is no authority to show that there should be a reversion to enter at common law for condition broken. (Com. Dig., title

Condition.) I do not see why, at common law, the lessor might not have entered for condition broken into the lands demised by the lease of 1798; he had different reversions, and the rent was one entire rent issuing out of every part of the premises. The rent was issuing out of both in point of render, though only issuing in part as respects the remedy. It is not shown that the landlord has ceased to have an interest, but only a reversion. It is an entire rent, a rent-service as to the part in which the landlord has a reversion, and a rent-charge as to the part in which he has not a reversion. *Lessee Purcell v. Kirby*, (referred to in 2 Fur. L. & Ten. 1129) is not in point, for there, by reason of the settlement, the reversion was divided by act of the parties, and the rent would have to be divided, whereas here no other person claims the rent; we are entitled to the whole. I have a right to re-enter for condition broken into a part, and therefore avoid the entire instrument, although as to a part, I have ceased to have a reversion. If all the lives were gone, we would have a reversion as tenant from year to year. (2 Fur. L. & Ten. 1142.)

Cur. vult. adv.

May 5.—BLACKBURN, C. J., now delivered the judgment of the court. In this case two objections have been relied on by counsel for the defendant. The first applies to the insufficiency of the stamp impressed upon the lease, and we are of opinion, for the reasons we have suggested in the course of the argument, that that objection is not well founded. The trees had been already demised, and the subsequent conveyance of them could not change the character of the lease, so as to render it a conveyance within the meaning of the statute. My brother Crampton properly likened it to the case of a demise of a bog, with liberty to cut turf. We think, however, the second objection must be allowed. The lessor of the plaintiff has declared for all the premises comprised in the lease of 1832, and for the whole of the rent. Now as to a portion of these premises, he ceased to have a reversion on the death of William Peacock, one of the *cestui que vies*, on and from which event the title of the lessor of the plaintiff and lessee were for the same lives, and from that period the relation of landlord and tenant was at an end. An entire rent was reserved, and so far as that rent issued from that part of the lands which was held under the lease of 1798, no reversion existed. The verdict, therefore, which passed for the entire of the premises, and for the whole of the rent, upon the authorities of *Pluck v. Digges* and *Porter v. French*, cannot be maintained.

Rule absolute to set aside the verdict for the plaintiff, and to enter one for the defendant. No costs of the motion.

EQUITY INDEX.

UNT. Accounts, Reference to Take before Hearing. *See PRACTICE.*

A defendant, a brother of the plaintiff's, having for thirteen years maintained them, and received the rents of their freehold, which were very small, under the special circumstances of the case, the plaintiffs were refused, an account of the rents during the time they were so maintained. *Dooner v. Dooner*, 99.

Where a receiver does not account within the time limited by the general orders, although the court may grant poundage, the costs of accounting will not be allowed. *Bessonnet v. Waller*, 150, *Lawson v. Griffin*, 225.

KNOWLEDGEMENT IN WRITING NOT SIGNED—*See LIMITATIONS.*

ISTRATION—*See ASSETS.*

AVIT, on motion for a receiver on answer; affidavits permitted to be used. *Martin v. O'Flaherty*.

A. Agent ordered to lodge in court money admitted to be due in answer. *Blake v. Comins*, 330.

ER. Upon motion for a receiver on answer, affidavit permitted to be used. *See RECEIVER.*

IT—*See BANKRUPT.*

'S. The time from which to calculate the misapplication of personal assets is when the specialty debts have been paid, not the testator's death. *Elard v. Cooper*, and others, 27, Eq. Ex.

NMENT, COVENANT AGAINST—*See COVENANT.*

'Chose in Action—*See CHOSE IN ACTION.*

CHMENT, for interfering with rents when a receiver has been appointed. *See RECEIVER.*

r non-payment of rent. *See RECEIVER.*

RNEY APPOINTED RECEIVER. *See RECEIVER.*

RNEY-GENERAL—*See PARTIES.*

A suit instituted against a charity or the crown by the Attorney-General ought to be fully apprised of the proceedings. *Potts v. Turnley*, 57.

Attorney-General having been made a notice party in respect of a recognizance by a receiver, as if within the 15th and 23rd General Orders, where he should have been an answering party, counsel for the Attorney-General appearing at the hearing, and consenting to be bound, the court made a decree. *Abbott v. Abbott*, 155.

ER. A., being a stockbroker and notary public, received money on deposit, and paid it out on checks like a banker, and in some other respects acted as a banker, he did not hold himself out to the public as such, nor did it appear he was generally believed to be one, and in his books the alleged banking accounts were mixed with others, as a stockbroker and trader. Held, that he was not a banker within 33 G. 2, c. 14, requiring the enrolling and registry of banker's deeds. *Stafford v. Henry*, 133.

Where, does that Act apply to bankers not issuing notes. *Ib.*

Creditor who appears in court to oppose the confirmation of a banker's certificate, under 33 G. 2, c. 14, and 40 G. 3, c. 22, will be restrained by injunction from proceeding at law for recovery of his debt, pending the proceedings for the allowance of the certificate. *Guinness v. Fitzsimon*, 357.

A party trading openly as a banker, found to be a banker within the meaning of the 33 G. 2, c. 14, and 40 G. 3, c. 22, notwithstanding that he carried on another more ostensible business than that of banker. *Ib.*, (Masters Office,) 359.

Held, that 33 G. 2, c. 14, and 40 G. 3, c. 22, extend to all bankers, as well those whose banks are not of issue, and those which are so. *Ib.*

RUPT. A bankrupt is privileged from arrest, under section 136 of the 6 W. 4, c. 14, only when actually coming to surrender, and therefore where a bankrupt returned from Liverpool on the 20th, was arrested on the 23rd, the court refused to dis-

BANKRUPT, (continued.)

charge him. *In re Christopher Wall*, 1.

An unregistered mortgage has priority over the subsequent certificate of appointment of assignees duly enrolled. *Leech v. Law*, 41.

Where mortgaged premises were insufficient to pay the debt, on the assignees submitting they were ordered to convey the equity of redemption to the mortgagee, in consideration of obtaining a release from the debt. *Ex parte Dickson*, 250.

BEQUEST—*See WILL.*

CARETAKER, refusal to give possession by. *See INJUNCTION.*

CAVEAT. A caveat was entered, and allowed to expire; the plaintiff enrolled the decree without giving notice to the defendant. Held, not irregular. *Tilly v. Browne*, 258.

A caveat should be renewed after 28 days. *Ib.*

CHARGING ORDER. Where a charging order has been obtained by a judgment creditor upon funds reported to a creditor in a cause, the court, where there is no controversy as to the right to the fund charged, will direct it to be paid to the petitioner without a bill being filed. *Fulton v. Farran*, 66.

Semble, when there is a conflict of right the fund will not be transferred on motion. *Ib.*

COSTS, of. *See COSTS.*

CHARITY, in a suit against, Attorney-General should be fully apprised of the proceedings. *Potts v. Turnley*, 57.

CHOSE IN ACTION. A legatee assigned his legacy without giving notice to the executor, or the person on whose lands the assets of the testator were a charge; the executor died, the legatee obtained administration *de bonis non*, wasted the assets, and became insolvent. Held, that notice to the debtor was not necessary to complete the assignment, that the assignees could not be taken to have purchased from an executor, the assignment being as between the parties complete before administration granted to the legatee, that it having been found that the funds wasted were received as assets, it could not be considered payment. *Molloy v. French*, 350.

CODICIL—*See WILL.*

CONDITION, in restraint of Marriage—*See MARRIAGE.*

CONDITIONAL ORDER for Receiver. *See MORTGAGE.*

CONSENT, defendant appointed Receiver on. *See RECEIVER.*

Marriage with—*See WILL.*

CONVEYANCE. The court has no jurisdiction, under the 28 G. 3, c. 35, to order the master to execute a conveyance to a purchaser where the heir of the conuzor is a minor resident out of the jurisdiction. *M. Grehan v. Rankin*, 2.

The 28 Geo. 3, c. 35, which provides that in some cases the court may order the execution of conveyances by the master does not apply to the case of a married woman, resident out of the jurisdiction. *Nugent v. Piers*, 211.

COSTS, GENERALLY. The court will not allow a claim for costs to be interfered with by any set off not actually arising in the cause, although the set off arises in another suit concerning the same matter. *Reilly v. Shiel*, 31, Eq. Ex.

In a possessory suit for an injunction, the rule, that costs of suit are not given, does not apply to the costs of the motion shewing cause, and if the cause is insufficient, the defendant becomes liable to the costs of the motion. *Coppinger v. Carnegie*, 27.

Semble, costs in Equity are not in the nature of damages but of debt. *Archbishop of Dublin v. Lord Trimleston*, 49.

Costs were given against a trustee, who, having a benefit under a deed, compelled a plaintiff to establish a will by which it was revoked. *Irvine v. Rogers*, 74.

In taxing costs allowances were claimed, which the taxing master refused to make, the question not being raised by the requisition. Order made refer-

COSTS GENERALLY, (continued.)

- ing it to taxing master to make such allowance if any. *Walsh v. Sheehy*, 78.
- Costs of receivers account not passed in time disallowed. *Bessonet v. Waller*, 150.
- A Court of Equity will direct a taxation, although all the costs be for conveyancing. *Limerick and W. Railway v. O'Ferrall*, 193.
- An overpaid creditor puisne to the plaintiff has no right to his costs, though he was not paid off at the time of putting in his answer. *Meredith v. Creed*, 210.
- Administrator by his answer put forward accounts which were completely falsified; he was charged with the costs of the suit. *Orr v. Milliken*, 217.
- A bill filed on behalf of a lunatic in pursuance of the master's report, to clear away doubt from the lunatic's title, which without suit could not have been done, and the lunatic having succeeded, held that under the circumstances the principal defendants, trustees of a charity, were entitled to the costs out of the lunatic's estate. *In re Turnley*, 257.
- A decree of the Court of Chancery in Ireland directed that the plaintiffs who resided in England should pay to a defendant her costs of suit. This defendant, previous to exemplifying the decree, issued a subpoena out of the Irish Court of Chancery, and caused it to be personally served on the plaintiffs. Held that this proceeding was unnecessary, and the costs of this personal service were not allowed. *Stamer v. Nesbitt*, 298.
- Semble*, the 41 Geo. 3, c. 90, s. 6, which provides for the exemplification of Irish decrees in the Court of Chancery in England, applies to decrees or orders which direct payment of costs generally, as well as those in which a particular sum is named. *Ibid.*
- The court will order a solicitor to attend and tax his costs, and if the taxing master has been unable to proceed on account of his non attendance, he will have to pay the costs of the motion. *In re Kelly*, 329.
- A mortgagee's solicitor obtained the carriage of a sale in a lunacy matter, and wrote a letter to the committee's solicitor promising to do his best to save expense to the lunatic; the sale took place within a very short time after the title had been investigated for the mortgagee by the same solicitor. Held that the solicitor was not entitled to charge part of the costs of preparing the abstract, or for any matters he appeared to have previously performed when investigating title for the mortgagee. *In re Bell*, a lunatic, 349.
- Semble*, that even if such letter had not been written, he would not have been entitled to such a charge a second time. *Ibid.*
- A notice party having entered a special appearance under the 19th general order, held entitled to her costs under the special circumstances of the case. *Callaghan v. Callaghan*, 350.
- Contribution to—See DECREE. See RAILWAY COMPANY.
- Of pauper—Bill filed in January, 1842, 3rd of June. Plaintiff obtained a conditional order for liberty to sue in *forma pauperis*. On the 28th of June the defendant answered; on the 3rd of November the conditional order was made absolute; on the 13th of January, 1843, the bill was amended, and no further steps were taken by the plaintiff. On the 10th of January, 1845, the defendant answered the amended bill, and on the 24th of June obtained an order dismissing plaintiff's bill with costs generally. In 1849 the plaintiff was arrested under an attachment for these costs. The order of June, 1845, was set aside, and the plaintiff ordered to be discharged. *Stanton v. Barrington*, 347.
- A bill by a pauper plaintiff will be dismissed without costs so far as relates to costs subsequent to the order admitting plaintiff to sue as a pauper. *Ibid.*
- Quere, as to the costs incurred in the interval between the absolute and conditional order. *Ibid.*

COSTS GENERALLY, (continued.)

- Quere, as to the costs before the order giving liberty to sue in *forma pauperis*. *Ibid.*
- Of petitions—Neither the costs of a petition to charge a fund in court, nor of a cross motion to draw money so charged under the 23rd section of 3 and 4 Vic. c. 105, will be granted in a case where the respondent does not appear.—*King v. Brownrigg*, 81.
- Of a petition for a receiver by a notice party pending a suit—See RECEIVER.
- Of continuing proceedings in a petition matter—When the original proceedings in a receiver matter have been by a trustee, and an assignment has thus been rendered necessary, the court will not give the costs of a motion to continue. *Weir v. Ormsby*, 283.
- Of the appointment of a receiver—See RECEIVER.
- Of a petition by a notice party pending a suit—See RECEIVER.
- Of an ejectment by head landlord when a receiver has been appointed. See RECEIVER.
- Of receiver not accounting within time limited by general order. See ACCOUNT, RECEIVER.
- Of purchaser—Where several objections to the title have been taken by a purchaser, some of which are allowed, and others overruled, on motion to discharge the purchaser, and that he be paid his costs, the costs of the objections which have been overruled will be set off against those which have been allowed. *Raskell v. Church*, 259.
- Of retainer of solicitor—The case of *in re Bracey* (14 L. J., C. 299), where it was held that under a common order directing the reference of a solicitor's bill for taxation, the taxing master has jurisdiction to decide a question of retainer, will not be followed. *Belas v. Norris*, 267.
- Of stayed suits—Where there are several suits, and a decree having been obtained in one, proceedings in the others are stayed. The plaintiffs in the stayed suits are personally liable in the first instance to pay the costs of the several defendants, who are not obliged to wait till the funds are realized under the decree. *O'Keefe v. Holmes*, 78.
- Confirmed on appeal, 125.
- Where a creditor's suit has been stayed by reason of a prior decree having been obtained in a similar suit, and the plaintiff ordered to pay the costs in the stayed cause, he will be entitled to be repaid them only in the same priority as his own demand. *Tangay v. Holmes*, 162.
- Semble*, except those of prior encumbrancers, as to which he may make out a case to entitle him to be paid in the same priority as the encumbrancers themselves. *Ibid.*
- When a creditor's suit, instituted in the Court of Chancery, has been stayed by reason of a prior decree to account in the Exchequer in a cause of a similar frame, and between the same parties and the plaintiff in the stayed suit had paid the costs of one of the defendants, the court will not order the receiver in the first cause to pay the plaintiff in the stayed suit the amount of the costs so paid to the prejudice of prior encumbrancers. *Levinge v. De Montmorency*, 251 Eq. Ex.
- In such a case the plaintiff in the stayed cause is personally liable to the costs of prior encumbrancers if the fund proves deficient, and puisne creditors are only entitled to their costs in the same priority as their demands, but this court will restrain the defendant from proceeding against the plaintiffs in the stayed suits for their costs therein until the fund is realized. *Ibid.*
- The Courts of Chancery and Exchequer exercise a concurrent jurisdiction, and the rule as to the enforcement of costs under staying orders is the same, whether the suits are instituted in the same or different Courts of Equity. *Ibid.*
- In stayed suits, plaintiffs personally liable. *Farrer v. Biggs*, 352; and see *Lastie v. Forbes*, 352.
- Solicitor's lien for—Though a solicitor discharge him-

COSTS GENERALLY, (continued.)

self, the court will not direct him to deliver up to his former client documents on which he claims a lien, unless a case of pressing necessity or danger of loss be made out. *Limerick and W. Railway v. O'Ferrall*, 193.

Where a solicitor has a general lien upon papers of his client, which are required for the purposes of a suit, the court has the power of forcing him to bring in the deeds, and of preserving his rights as they existed on the papers. *Levinge v. Montmorency*, 285, Eq. Ex.

Security for—A mortgagee resident out of the jurisdiction, presented a petition for a receiver, and a conditional order was obtained. Upon a petition to show cause, the respondent objected to the petitioner being heard without giving security for costs. The petitioner was allowed to proceed, his solicitor personally undertaking to pay any costs which the court might direct. *Prater v. Portarlington*, 259.

COVENANT, not to assign, waiver of. *See LEASE*.

CROWN. *See ATTORNEY-GENERAL*.

DECREE, service of deemed good. *See PRACTICE*.

A decree against two for payment of costs is joint and several, and the registering of such decree under 3 and 4 Vic., c. 105, s. 27, does not alter its effect. *Archbishop of Dublin v. Trimleston*, 49.

Where a decree declared that the defendants A and B should pay to the plaintiff his costs of the cause when taxed and ascertained. Held that the effect was not necessarily to establish contribution in moieties between the parties; such contribution will depend on the circumstances of the case. *Ibid*.

An enrolment will not be opened for a party who delays the application. *Tilly v. Browne*, 258.

See CAVIAR.

DEMURRER for multifariousness. *See PLEADING*.

Demurrer allowed under 64 general order; motion to amend refused, the costs of the demurrer not having been paid. *Sherlock v. Disney*, 127.

To a bill by an uncertificated bankrupt. *See PLEADING*.

DEPARTURE. *See PLEADING*.

DEVISE. *See WILL*.

DOCUMENTS, production of. In a suit to set aside an assignment of a mortgage, the court refused to order production of an alleged means assignment to the assignor, stated to have been made by endorsement on the mortgage, and not mentioned in the bill. *O'Keefe v. Lanyon*, 210.

As to production of title deeds, *see Murphy v. Balfie*, 218.

EJECTMENT. Where a plaintiff by his bill states a legal title, and shows the existence of outstanding terms, it is almost a matter of course for the court to remove temporary bars, for the purpose of enabling him to bring an ejectment. *Maturin v. Wilson*, 281.

Ejectment where a receiver has been appointed. *See RECEIVER*.

ELECT, rule to. *See PRACTICE*.

ERROR, writ of. Where a *quo warranto* had been brought in the Queen's Bench to try the right to an office in the Court of Chancery, and the questions having been decided in favour of the relator, a writ of error was brought. Held that the relator was not admissible to the office pending the writ of error. *Ex parte Kelly*, 1.

Writ of error pending petition for receiver. *See RECEIVER*.

EVIDENCE. Evidence of a defendant who might have been made a co-plaintiff is admissible for the plaintiff under the 6 and 7 Vic., c. 83. *Kelly v. Bennisson*, 17.

A defendant claiming under a deed impeached by the bill may be examined in support of the deed on behalf of co-defendants. *Irwin v. Rogers*, 17.

The 97th general order, allowing documents to be proved by affidavit, does not apply when the existence of the instrument is denied by the defendant's answer. *Bagnall v. Horne*, 33.

EVIDENCE, (continued)

Where a bill stated leases and outstanding terms, and the answer admitted a belief of their existence, but ignorance as to where they were, or by or to whom granted, held to be sufficient evidence of their existence to enable the court to grant relief. *Maturin v. Wilson*, 281.

A defendant against whom a bill has been taken *pro con.* may be examined for plaintiff. *Kelly v. Fox*, 21.

Deaf witness permitted to read depositions. *See WITNESS*.

FEE FARM RENT. A bill having been filed to recover a fee farm rent a receiver was granted, the bill containing a statement that there was a loss of title deeds, and confusion of boundaries. *Ogleby v. Campbell*, 108.

FINES. *See RENEWAL FINES*.

GENERAL ORDERS—*See PRACTICE*.

GOOD FAITH. Bill filed contrary to. *See JURISDICTION*.

GUARDIAN AD LITEM. When a defendant has been found a lunatic by commission, the court will not, on the application of a plaintiff, appoint a guardian *ad litem* to file an answer for the lunatic. *Dooly v. Harding*, 330.

INCUMBERED ESTATES ACT. Suit pending, meaning of, under 67th section. *Ex parte Hutton*, 34.

On a petition for a sale under, trustees representing unborn issue in tail, should have notice. *Ex parte Lord Blaney*, 35.

Form of order of reference. *Ex parte Hutton*, 107.

Receiver, under. *Ex parte Johnson*, 132.

Primary fund for payment of debts, suppression of material facts. *Ex parte Kennedy*, 147.

Fee to counsel allowed on petition. *In re Darcy*, 212.

INCUMBRANCE, sale subject to. *See PRACTICE*.

INJUNCTION against railway company. *See PRACTICE*.

Where a person put into possession of a gatehouse as caretaker after several years refused to give possession, in order to raise the question whether such a bill would lie, a conditional order for an injunction was granted against him. *Moore v. Marsh*, 42.

Injunction against corporation of Dublin to restrain them from applying Pipe Water Rate in payment of interest on debentures refused, the majority of the debenture holders not being before the court. *Jackson v. Corporation of Dublin*, 177.

Upon such application court will take into consideration the balance of inconvenience, and although the act complained of is improper, if the granting the injunction is attended with injustice or inconvenience to third parties, the motion will be refused. *Ib*.

See BANKER. Costs of. *See COSTS*.

INTEREST. Interest on Renewal Fines. *See RENEWAL FINES*.

JUDGMENTS. Judgments of the Exchequer rank in the same priority with those of other courts obtained in or as of the same term, the Exchequer judgment having relation to the first day of term, although the day of the plaintiff's appearance named in the declaration be subsequent to it. *Smith v. Chichester*, 65.

A. having obtained a judgment in respect of a salvage advance, extended a receiver appointed by B. a prior judgment creditor. Held, that on petition, the court will not decide the question of priority, B. insisting on his right to be paid in the priority of his judgment. *O'Grady v. Glover*, 153.

Subpoena to Hear. *See PRACTICE*. *See CHARGING ORDER*.

JUDGMENT CREDITOR. Proceeding at law with notice of a decree to account. *See PRACTICE*.

H. sold horses at prices above their real value to G., a young man, entitled to a remainder in tail, expectant on his father's life estate, G. gave security for the price by judgment, on a bill filed by a person claiming through G., the judgments were ordered to stand as security for the real value of the horses only, although it appeared that the sale had not been

merely colourable, or for the purpose of raising money. *Hunter v. Lord Limerick*, 273.

See LIMITATIONS.

JURISDICTION. Where a bill has been filed contrary to good faith. *Semble*, the court has, at the instance of a defendant, summary jurisdiction to take the bill off the file. *Nugent v. Leyden*, 139.

LEASE. Ecclesiastical lease, interest on fines. *See* RENEWAL.

Lease in 1819 containing a covenant, that the lessee, his heirs and assigns, should not set, sell, alienate, or otherwise dispose of any part of said demised premises, without the consent in writing of the lessor. In case of breach a penal rent was reserved; in 1824 the lessee assigned with consent; in 1845 there was another assignment without consent. Held, that the consent to the first assignment was not a general waiver of the covenant, and the lessor was entitled to the penal rent. *Steward v. Hassard*, 291.

LEGACY, assignment of. *See* CHOSE IN ACTION. *See* WILL.

LIBEL BOND, proceedings on. *See* PRACTICE.

LIMITATION OVER. *See* WILL.

Executory. *See* WILL.

LIMITATIONS, Statute of.

An acknowledgment by a mortgager in writing of the payment of interest on the mortgage, and not signed by him, Held, insufficient, within the 40th section of the 3 & 4 W. 4, c. 27, to take the case out of the Statute. *In re Commissioners of Wide Streets, Cork*, 9.

Where a testator devises lands, subject to the payment of his just debts, directly to the devisee, and without the intervention of trustees. Held, that there is no trust created so as to save a debt from the operation of the Statute. *Dundas v. Blake*, 121.

A judgment creditor cannot avail himself of the pendency of a foreclosure suit, as keeping his debt alive, when it is barred by the Statute of Limitations. *Bennett v. Bernard*, 145.

A judgment creditor revived against the heir, but not against the executor of the consor, after an allocation order in a suit to administer the consor's estate, upon motion on notice to all parties, the judgment creditor obtained leave to come in and prove. The fund in court was produced by a sale of the testator's personal estate. Held, that the master was precluded from going into the question, whether the judgment was barred as against the executor, and the proper time for raising the question was on the application for liberty to prove. *Hutchins v. O'Sullivan*, 325.

LUNATIC. *See* GUARDIAN.

Costs of making Title to a Lunatic's Estate. *See* COSTS.

MAINTENANCE, allowance for, court refused to appoint a receiver over. *Gardiner v. Bessington*, 250.

MARRIAGE, condition in restraint of. Bequest of an annuity to A. V. C., a widow, for her life, provided she did not marry again. Held, that the annuity determined on the second marriage of A. V. C., and the proviso that she should not marry again, was not a condition subsequent, so as to be void as in restraint of marriage. *In re Corkers*, 316.

With consent. *See* WILL.

MARRIED WOMAN, conveyance by. *See* CONVEYANCE.

MINORS, substitution of service on. *See* PRACTICE.

MISJOINDER. *See* PLEADING.

MORTGAGE. Upon an order for a receiver, under the Mortgage Act, 11 & 12 Geo. 3, c. 10, it is the absolute, and not the conditional order, which attaches rents. *Cully v. Lucas*, 344.

See Bankrupt Registry Act.

MULTIFARIOUSNESS. *See* PLEADING.

NOTICE. Every notice should state not only the names of the solicitors, but also the persons for whom they act. *Dower v. Roxane*, 58.

Notice of motion for a particular day should state that

NOTICE, (continued.)

the motion will be moved at the sitting of the court. *Graves v. Graves*, 155.

Notice parties. *See* PARTIES, Costs.

PARTIES. When a person not an idiot or lunatic, but of a weak mind, files a bill to recover the arrears of an annuity, by his son and next friend, without a commission of lunacy having been issued, Attorney General is not a necessary party. *Carr v. Osborne*, 2. At the hearing, a bill was allowed to stand over for amendment by adding parties. The plaintiff added the necessary parties by supplemental bill, which contained new matter affecting the parties to the original suit. Held that they were necessary parties. *McCnamara v. Blake*, 317.

Where a bill was filed subsequent to March, 1843, and by a supplemental bill judgment creditors were made notice parties, a decree was made, giving them liberty to surcharge and falsify the accounts taken in the original cause, and in default that they should be bound by the proceedings. *Williams v. Walker*, 331.

PAUPER, costs of. *See* COSTS.

PERPETUITY, purchase of. *See* RENEWAL FINE.

PLEADING (Demurrer). A bill against an executor to carry into execution the trusts of a will, and for payment of annuity thereby granted, stated that an agreement had been entered into by the defendant with one E. R., by which he was to pay the annuity, and that certain premises had been assigned to secure same; that after the death of E. R., S. M. R. procured from defendant an assignment of said premises. The defendant by his answer stated that the annuity had been assigned to him by the plaintiff. The bill was amended, and prayed that the assignment should be declared fraudulent and void. Held on demurrer that the case made by the amended bill was no misjoinder, nor was there any departure from the case made by the original bill. *Tomkinson v. Cox*, 17.

Bill by A., B., and C., to foreclose a mortgage against X., tenant for life, and Y. tenant in tail in remainder. Y. files a bill against A., B. and C., also against D. solicitor for the plaintiffs in the first cause, praying that the bill may be taken as a cross bill against A., B., and C., and that the mortgage and other deeds executed to give effect to same might be declared fraudulent and void, and that A., B., and C. might be directed to account as mortgagees in possession, and that an account might be taken of the sums due on foot of a judgment obtained by D., subsequent to the mortgage, and that certain bills of costs which formed part of the sum secured by the judgment might be taxed. Demurrer by A., B., and C. for multifariousness. Another demurrer by D. Both demurrers allowed. *Crofts v. Altman*, 113.

Bill by an uncertificated bankrupt to raise the arrears of an annuity, making the assignee a defendant, and charging that the arrears due amounted to £946; that of the creditors who proved under the commission, all had signed a composition deed save one, to whom £130 was due, and also charging specific collusion between the assignee and the debtor. Demurrer by the assignee allowed, without costs. *Wye v. Waters*, 130.

Plea—Bill stated that, in 1838, J. W. made a will; that in 1845 he made another will, by which the former one was revoked; that in 1846 the second will was destroyed by the direction of J. W., and in 1846 J. W. died intestate, and plaintiff, as heir at law, entered into possession of all his real estate, and prayed that the evidence of the witnesses to the will of 1845, and of the person who destroyed same, might be perpetuated. Plea, that there were tenants in possession of some of the real estate who had not paid rent to or acknowledged plaintiff, and the matters in dispute could be immediately tried by action at law against same. Plea allowed. *Lindsay v. Lindsay*, 218.

PLEADING, (*continued.*)

Overruled on appeal, 289.

Where a bill charges that a defendant is connected with the preparation and execution of certain fraudulent leases, and seeks a discovery of the matters alleged to be fraudulent, the defendant cannot, by a plea of professional confidence, protect himself from discovery. *Kelly v. Jackson*, 233.

Plea to bill of revivor. See RENEWAL.

Semble, a supplemental bill cannot pray to modify the original decree. *Macnamora v. Blake*, 317.

As to judgment creditors made notice parties by supplemental bill. *Williams v. Walker*, 331.

Bill filed to raise a fee farm rent. A receiver granted, the bill containing a statement that there was a loss of title deeds, and confusion of boundaries. *Ogleby v. Campbell*, 106.

A bill to raise a judgment was taken *pro con.* A motion for a receiver was granted, although the bill did not pray for a receiver. *Richardson v. Austen*, 20.

POLICY OF ASSURANCE. Mortgagee is not bound to account for the sums paid to him on foot of a policy of assurance effected in Ireland on the life of his debtor, when the premiums have been paid out of his own money, and there is no contract between mortgagee and mortgagor on the subject. *Bell v. Ahern*, 153.

POOR-RATE. A judgment was obtained by the guardians of a poor-law union for rate due by the defendant as immediate lessor after the proceedings at law; a receiver was appointed over the defendant's interest in the lands, out of which the rate became due, upon application by the guardians that the receiver might pay this rate. Held that the judgment against the immediate lessor did not prevent the guardians from proceeding against the occupier, under the 6 and 7 Vic., cap. 92, s. 3. and that the receiver was bound to pay the amount. *Montgomery v. Pratt*, 315.

POWER OF REVOCATION. See REVOCATION.

PRACTICE. See CAVEAT, CONVEYANCE, RECEIVER, COSTS, EJECTMENT, NOTICE.

Amendment—After demurrer allowed as to one defendant by the operation of the 64th general order, the plaintiff having paid the costs to that defendant, amended the bill, and issued a subpoena against the defendant, who appeared. Held that the plaintiff could not take the bill *pro con.* against him. *Hornebrooke v. Ware*, 117.

A demurrer allowed under 64th general order; liberty to amend refused, the costs not having been paid. *Sherlock v. Disney*, 127.

Second amendment after demurrer allowed. *Lord Cork v. Blennerhasset*, 164.

Where the plaintiff at the hearing has obtained leave to amend, he cannot again set down the cause without discharging the order, or amending the bill. *Baker v. McDermott*, 162.

An order to amend without prejudice to an order *pro con.* will not be granted when the amendment might prejudice the plaintiff. *Ibid.*

Where a demurrer, not having been set down for argument, was allowed under the 64th general order, the court will not permit the record to be amended by reintroducing upon it the defendant, against whom the bill was dismissed, a new defence having arisen since the filing of the original bill. *Sherlock v. Disney*, 195.

Replication amended. *Rowland v. McDonnell*, 195.

Notice of motion to dismiss served on the 14th of April. On the same day notice of amendment was served, but the bill was not amended till the 16th. Held that the amendment was no answer to the motion to dismiss. *Seaver v. Fives*, 258.

Striking out a plaintiff is not such an amendment as may be made by the Deputy Keeper of the Rolls under the 49th general order. *Vance v. Ranfurly*, 284.

After issue joined and witnesses examined by the de-

PRACTICE, (*continued.*)

fendant, the plaintiff will not be permitted to amend the bill by introducing new matter, which will alter the frame of the suit, and to which an answer is required. *O'Keefe v. Lanigan*, 328.

Continuing proceedings under sheriff's act—Where a notice pursuant to the first order under the 154th general order has been served, and before the second order has been made, the court cannot continue proceedings, under the 5 and 6 Wm. 4, c. 55. *Lawlor v. Lowry*, 251.

The court has authority to permit the assignee of a judgment to continue the proceedings in his own name, but where the original proceedings have been taken by a trustee, and an assignment has thus been rendered necessary, the court will not give the costs of the motion to continue. *Weir v. Ormsby*, 283.

Depositions—Where by mistake of the examiner a witness was not examined to two interrogatories, a re-examination was allowed after publication had passed, and the cause was set down for hearing. *Molony v. O'Brien*, 20.

A defendant against whom a bill has been taken *pro con.* may be examined for the plaintiff. *Kelly v. Fox*, 21.

Proof of documents by affidavit. See EVIDENCE.

Deaf witness permitted to read depositions. See WITNESS.

The court will not make an order to suppress depositions on the ground that some of the interrogatories were leading, unless it is shown what part of the deposition is an answer to the leading interrogatory, and then only so much will be suppressed. *Kirkwood v. Lloyd*, 325.

That a deposition is not evidence is an objection for the hearing, and is not to be taken by motion to suppress depositions. *Ibid.*

The court is not bound to suppress depositions in all cases of irregularity, and where by accident the defendant's solicitor gave but two days' notice of examining a witness, instead of four, as required by the 87th general order, the court permitted the deposition to stand, with liberty to the plaintiff to cross-examine the witness. *Guirey v. Loughnane*, 283.

Elect, rule to—If a plaintiff proceeds at law and in Equity, a defendant cannot, immediately after a short or evasive answer, enter a side-bar rule to elect. Such a rule is entered at the peril of the defendant, and if upon exception the answer is found not to be full, the rule will not be effectual. *Read v. Dublin and D. R. Co.*, 19.

General orders—The general orders are binding on the court, but may be relieved against in cases of fraud or inevitable accident. *Downing v. Hodder*, 137.

Under the 93rd general order the term vacation is referable to the period when the court is not sitting. *Anderson v. Mulvany*, 154.

A. B. devised property to his wife for life, and after charging with legacies, and amongst others to T. V., he directed the residue, after his wife's decease, to be divided among the legatees in the same proportion as the legacies. The testator also authorized his wife to appoint trustees to carry the will into execution. By her will the widow appointed trustees for that purpose. After her death a suit was instituted to carry the will of A. B. into execution, and a decree for a sale pronounced. Held that the trustees did not sufficiently represent T. V. to bring the case within the 24th general order, and in his absence a good title could not be made to a purchaser. *Rusnell v. Church*, 185.

Injunctions—Where a railway company, having agreed to purchase lands, entered and carried on their works without the leave of the vendor, or having paid or lodged the money in bank, the court granted an injunction until the money was paid. *Anderson v. Newry and Warrenpoint Railway Co.*, 11, Eq. Ex. Costs of injunction in possessory suits. See COSTS.

Answer filed on the 31st of March; exceptions taken

PRACTICE, (continued.)

on the 18th of April, which were abandoned; a motion to continue an injunction was too late, not being within the time directed by the 62nd rule. *Jordan v. Grey*, 315.

Injunction, proceedings by creditor after decree.

A judgment creditor proceeding at law with notice of a decree to account in a suit to administer assets, will be restrained. *Belmore v. Auchinleck*, 217.

When a decree has been pronounced in an administration suit, creditors will be restrained from proceeding on foot of civil bill decrees against the administratrix, so far as relates to the assets of the intestate; but the decrees being in the nature of judgments *de bonis propriis* of the superior court, the creditors will not be prevented from proceeding against the administratrix personally. *Powell v. Powell*, 284.

Bill to administer assets; after a decree to account one of the creditors, with notice of the decree, served upon the executrix, a civil bill for a debt due by the testator, alleging promises by the executrix, an injunction was granted, and the creditor directed to pay the costs of the motion. *Irwin v. De Massy*, 243.

Ne exeat, writ of.—Where a defendant's intention to go abroad arises, or is first discovered in the course of a cause, a writ of *ne exeat* will be granted, although it is not prayed by the bill. *Murdoch v. Murdoch*, 284.

Payment into Court.—Bill filed against an agent for an account, admission in the answer of a sum due, ordered on motion to be paid into court. *Blake v. Comins*, 380.

Pro confesso.—The court will not make an order that a bill be taken *pro con.* against a married woman, there being no order that she should answer separately. *Green v. Mc Clintock*, 235.

Publication.—Replication filed the 1st of March; amended the 5th; rule for publication entered the 1st of May; set aside for irregularity; and an application that this rule might be permitted to stand, notwithstanding the irregularity, was refused. *Mc Dermott v. O'Connell*, 330.

Where a notice to respite publication has been served if the solicitor for the opposite party pass publication before the motion comes on, he does so at his peril. *Kelson v. Lewis*, 228, 243.

Report.—The court on the hearing, though there has been no exception, can vary a report, the error being apparent on the face of it. *Barry v. Cronin*, 297.

Sale.—In a judgment creditor's suit, under 3 & 4 Vic., c. 105, a sale may be decreed, subject to incumbrances. *Kieran v. Corr*, 9.

The court will not allow a solicitor, who has acted in a cause, to bid, even though he discharge himself. *Keogh v. Keogh*, 226.

Sale.—Upon a sale under a decree plaintiff was allowed to bid, and also to retain the carriage of the proceedings, the only other solicitor in the cause having, upon a former sale, raised objections to the title, and obtained a purchaser's discharge. *Bridge v. Egan*, 43.

Motion for a reference before hearing to take accounts, and ascertain priorities refused, there being another suit for sale of the same lands set down for hearing in the Chancellor's list. *Mc Dermott v. O'Connell*, 106.

Service, substitution of.—In the case of a minor the court will not substitute service of subpoena out of the jurisdiction, but the provisions of the 4 & 5 W. 4, must be complied with. *Tyke v. Walsh*, 36, Eq. Ex. Service of a decree, and memorandum, under the 104th General Order, deemed good, under the circumstances. *Hillas v. Phillips*, 41.

In a suit for foreclosure and sale of lands vested in trustees upon trust to sell, R. F., one of the trustees, by power of attorney, authorised R. N. T. to sell the lands, service of subpoena to appear, and answer upon R. N. T. deemed good service of R. F. *Steele v. Frazer*, 139.

PRACTICE, (continued.)

One of three consors of a recognizance, while out of the jurisdiction, filed a bill against one of the others, and obtained a receiver, *in a sci. fa.* on the recognizance, service of the writ, on the attorney of the plaintiff in the suit, deemed good service on the plaintiff, a copy having been sent through the Post Office. *Regina v. Brown*, 162.

As to service on defendants out of the jurisdiction by a plaintiff in person. *Helsham v. Burton*, 164.

Staying suits.

The bill in the first cause was filed to raise two judgments obtained in 1846, subsequent to a voluntary settlement of the same year; the second suit was to foreclose a mortgage of 1845, affecting the inheritance, decrees to account in the first cause declaring the judgments to have priority over the settlement; an application to stay the second cause was refused, though the plaintiff, a defendant in the first cause, had appeared at the hearing, and had not insisted upon being redeemed. *Foster v. Kerr*, 57.

The court will not in general interfere with the discretion given by the 115th General Order to the remembrancer, as to the examination of parties by interrogatories in the office. *Putland v. Evans*, 66, Eq. Ex.

Where two suits are instituted to raise charges upon an estate, and a decree pronounced in one, if important questions are raised by the defendant in the second suit, the court will not stay proceedings in it, and deprive the plaintiff of the benefit of the Lord Chancellor's opinion at the hearing. *Hamilton v. Synges*, 201.

As to costs of stayed suits. See COSTS.

Subpoena to hear judgment.—Under the 94th General Order ten days must intervene between the day of the service of the subpoena to hear judgment, and the first day of the ensuing term. *Malony v. O'Connell*, 265.

In proceeding on a libel bond, under 1 W. 4, c. 73, the court will only grant a conditional order in the first instance, which must be served on the Attorney-General. *Anon.* 21, Eq. Ex.

Generally.—After the report and final decree in a cause the court will not, at the instance of the plaintiff, permit judgment creditors to come in and prove, with liberty to object to the accounts and proceedings had, unless with consent of all the creditors. *Hort v. Bloomfield*, 68, Eq. Ex.

Attachment for interfering with rents after appointment of receiver. See RECEIVER.

As to certificate of *lis pendens*. *Reilly v. Sheil*, 226, Eq. Ex.

The clerk in court will not be directed to file an answer for a minor unless the defendant has been regularly served. *Porter v. Vesey*, 235.

Motion to dismiss. See AMENDMENT.

The proper time to raise a question upon the Statute of Limitations is when a creditor applies for liberty to prove. *Hutchins v. O'Sullivan*, 325.

In a minor matter it is not necessary to apply to the court by motion in order to obtain a reduction of rent. *Alston v. Alcock*, 282.

PROFESSIONAL CONFIDENCE. Plea of. See PLEADING.

PROTECTION from Arrest. See BANKRUPT.

PUBLICATION. See PRACTICE.

PURCHASE MONEY lodged in Court of Exchequer pursuant to the 6 Vic., cap. 18, will be transferred to the Court of Chancery in a lunatic matter. *In re Turnley*, 244, Eq. Ex.

Purchase by receiver. See RECEIVER.

Purchase deed. See also CONVEYANCE.

PURCHASER, right to arrears. See REAT.

Costs of objections of purchaser. See COSTS.

As to lodgment of promissory note by. See HARRY v. Lawlor, 283. See also CONVEYANCE.

RAILWAY COMPANY, injunction against. See PRACTICE.

RAILWAY COMPANY, (*Continued.*)

When R., the occupier of premises, agreed to give them up to a company for a certain sum, but afterwards refused, stating that another person had also an interest, the company lodged the money in court to his separate credit. Upon petition by R., Held that the money having been lodged to his separate credit, was an admission of his title, and that he was entitled to be paid without a reference; that the tender being insufficient and warrant defective, the company was not entitled to the costs, nor was the petitioner entitled to costs, as his proceedings were tainted with *mala fides*. *In re Irish S. E. R. Co. ex parte Kelly*, 155, Eq. Ex.

RECEIVER, notice to pay rent.

Where the order to pay rent has been served by a receiver on all the tenants of lands, and A. subsequently entered into possession of part of the lands, to obtain an attachment for non payment of rent against A. it is not necessary that he should have been served with the order to pay rent. *Roche v. Collins*, 282.

Purchase by—A receiver, during the life time of the father, purchased a younger child's portion, not payable until the father's death, but charged on the lands over which the receiver had been appointed. There was no evidence of undervalue, on bill filed after 13 years by the inheritor, who during the interval had been principally out of the jurisdiction, against the personal representatives of the receiver. The court set aside the purchase. *Kelly v. Bonyng*, 3, Eq. Ex.

Replevin—When a tenant under the court, relying on a technical legal irregularity, has replevied goods distrained by a receiver, the court will restrain the replevin suit, even though the receiver has voluntarily taken steps in it, and will direct an account of the rent due to be taken by its own officer. *Whitelaw v. Sandys*, 150 Eq. Ex.

Where tenants have admitted that rent is due, and paid sums on account, the court will make an order restraining them from proceedings in replevin. *Morrison v. Fitzpatrick*, 225.

Seemingly, if the tenant plead *non tenuit*, the court will not interfere. *Ibid.*

The court will not make an order to stay proceedings by a tenant in a replevin suit, unless there has been some irregularity therein, and the receiver is likely to be defeated on technical grounds. *O'Brien v. Bernard*, 266.

Security by—Where the rental is considerable, a receiver will be permitted to divide his security among several, and the entire sum in which the sureties qualify need not exceed double the rental. *O'Connor v. Malone*, 177.

See also *Scott v. Harman*, 267.

The court will not make an order permitting a receiver to give security by a guarantee society. *Campbell v. Brown*, 267.

Generally—Receiver granted on answer where a person of weak mind, not an idiot or lunatic, files a bill by his son and next friend, without a commission of lunacy having issued, the property being small. *Carr v. Osborne*, 2.

If a receiver be appointed in a plenary suit in Chancery, the Court of Exchequer will restrain a receiver appointed in a petition matter in the latter court from interfering with the land over which he is appointed till the Chancery suit be concluded. *Cochrane v. Fitzpatrick*, 10 Eq. Ex.

Pending a creditor's suit, a petition was presented by a judgment creditor, defendant in the suit, for a receiver over the lands in the pleadings mentioned. Held that the pendency of the suit was not sufficient cause against the appointment of the receiver, and the petitioner was entitled to his costs. *Townshend v. Barry*, 19.

A bill to raise a judgment debt was taken *pro con.* A motion for a receiver was granted, although the bill did not pray for a receiver. *Richardson v. Austen*, 20.

RECEIVER, (*Continued.*)

A receiver will not be appointed under 5 and 6 Wm. 4, c. 55, pending a writ of error on a judgment at law, although the petition be presented before the issuing of the writ of error, and security for costs has not been entered into, the plaintiff in error being plaintiff in the court below. *Nugent v. Waters*, 35.

Where a receiver has been appointed in a suit, if a judgment creditor who is a notice party, and might obtain full relief in the suit, present a petition to extend the receiver, he shall not have the costs of the petition, although there may be suspicion of collusion between the plaintiff and defendant in the suit. *Honan v. Galway*, 36 Eq. Ex.

Where an ejectment is brought against lands over which a receiver has been appointed without leave of the court, the proceedings will be stayed. If the receiver had funds applicable to the payment of the rent, he may be liable to the costs. *Callaghan v. Callaghan*, 48.

Where bill to recover fee farm rent. See **FREE FARM RENT**.

Where a receiver has been appointed, an attachment will be granted against a third party, who, before service of the order on the tenants, interferes with the rents, when he has had notice of the appointment of the receiver. *M'Alpine v. St. George*, 129.

If a receiver does not account within the period limited by the general orders, although the court may grant his poundage, the costs of accounting will not be allowed. *Bessonnet v. Waller*, 150. *Lawson v. Griffin*, 225.

The court will not make an order permitting a receiver to account but once in every five years, although the property over which he is appointed produces but £10 per annum. *Darley v. Hunter*, 194.

The court refused to appoint a receiver on the petition of a judgment creditor over an allowance directed by the court to be paid to the inheritor for maintenance. *Gardiner v. Blossington*, 250.

As to continuing proceedings under 5 and 6 Wm. 4, c. 55. See **PRACTICE**.

Although in general a motion to set lands in the occupation of a defendant should not be made by a receiver, yet where a receiver, having advanced a sum to pay head rent, and save the lands from eviction, obtained an order to set lands in possession of the defendant, the court refused to set the order aside, on the ground of its having been obtained on motion of the receiver. *Phibbs v. Farrell*, 265.

Upon consent, a defendant in a cause was appointed receiver. *Belcher v. Belcher*, 266.

The court having on the hearing expressed a strong opinion in favour of the plaintiff, had, however, at the request of the defendant, left the plaintiff to bring an ejectment, in which the defendant obtained a verdict. This verdict was set aside as against evidence. The Lord Chancellor subsequently made an order for a receiver, unless the defendant secured the rents to be received by him. *Scott v. Scott*, 297.

On the 5th of February, 1848, an order was made in the Court of Exchequer referring it to the remembrancer to appoint a receiver over certain lands. On the 30th of June an order was made in Chancery for a receiver over same lands. This order was set aside, it not having been stated to the court that the order in the Exchequer had been made. *Bryan v. Richardson*, 298.

A receiver will not be permitted to become tenant under the court, of the lands over which he is appointed, even upon consent of the parties in the cause. *Stanislaus v. French*, 299.

An attorney or solicitor ought not to be appointed a receiver, and the court will remove a receiver on that ground. *Geale v. Nugent*, 319.

Overruled on appeal, where held that a solicitor may be a receiver, 341.

When several judgments are vested in the same person, separate petitions for receivers should not be pre-

RECEIVER, (Continued.)

sented on foot of each. They should be included in one petition. *Ibid.*

Any solicitor who nominates a solicitor's clerk or apprentice as receiver will be suspended. *Ibid.*

As to the opinion of the masters on the appointment of receivers, see 322.

Bill filed to raise a charge stated that a sum was due for interest, but did not interrogate the defendant on that point; the answer did not admit that any sum was due, or at all refer to the statement in the bill. Upon motion for a receiver, Held that the plaintiff was entitled to use an affidavit setting forth the sum in support of the motion. *Martin v. O'Flaherty*, 345.

Under mortgage act. See MORTGAGE.

REGISTRY ACT. An unregistered mortgage has priority over the subsequent certificate of appointment of assignees, duly enrolled. *Leach v. Law*, 41.

REGISTRATION OF DECREE.—See DECREE.

REMAINDER VESTED.—See WILL.

RENEWAL FINES.—The immediate lessee of an ecclesiastical lease purchasing the perpetuity, under 3 & 4 W. 4, c. 37, is entitled to interest on the renewal fines, payable by the sub-tenant. *Brabazon v. Lord Lucan*, 116.

RENT.—A purchaser is not entitled to arrears of rent due before the lodgment of his purchase money, but not received till afterwards. *Hutchins v. O'Sullivan*, 161.

After the interest in lands has been evicted, the head landlord will be paid the arrears due, out of a fund in court, received out of these lands. *Donovan v. Sweeney*, 165; see also, *Elliott v. Elliott*, Eq. Ex. 165; also *Sherlock v. Roe*, 177.

Notice to pay.—See RECEIVER.

See FEE-FARM RENT.

In a minor matter it is not necessary to apply to the court by motion, in order to obtain a reduction of rent. *Alston v. Alcock*, 282.

REPLEVIN by tenant under the court. See RECEIVER.

REVIVAL.—A defendant to a bill of revivor appeared to it regularly, an order to renew was obtained afterwards; within a month from his appearance the defendant filed a plea. Held, confirming the decision of the Master of the Rolls, that the order to revive did not preclude the filing the plea. *Hamilton v. Hamilton*, 241.

REVOCATION.—W. assigned property upon trust, with a power of revocation; H. afterwards by his will, directed his executors to have the assignment set aside as fraudulent, and made a different disposition of the property in the deed. Held an execution of the power of revocation. *Irvine v. Rogers*, 74.

SALE subject to incumbrances. See PRACTICE.
Plaintiff allowed to bid and retain carriage of proceedings. See PRACTICE.

SALVAGE MONEY. See JUDGMENT.

SECURITY for costs.—See COSTS.

By Receiver. See RECEIVER.

SEQUESTRATION.—In 1818 a decree was pronounced directing a defendant to perform an agreement to pay certain sums of money; a sequestration was granted to compel performance; upon the application of a creditor by judgment of 1839, Court refused to interfere with the possession of the sequestrators. *Reeves v. Cox*, 169, reversed an appeal. —, 193.

SERVICE of subpoena, substitution of.—See PRACTICE.

Of Decree deemed good.—See PRACTICE.

Of Subpoena deemed good.—See PRACTICE.

Of *Scire Facias* deemed good.—See PRACTICE.

SET OFF. See COSTS.

SUBPOENA, substitution of service on a minor.—See PRACTICE.

To hear judgment.—See PRACTICE.

SUIT PENDING. See LIMITATIONS.

TENANT under the court, replevin by. See RECEIVER.

Receiver not allowed to be. See RECEIVER.

TITLE, costs of objections to. See COSTS.

TRUST in will for payment of debts. See LIMITATIONS.

TRUSTEE, costs against. See COSTS.

There is no objection to the appointment of two trustees in the place of a sole trustee. *Meredith v. Creed*, 210.

VACATION, meaning of.—See PRACTICE.

VESTED INTEREST.—See WILL.

WAIVER of Covenant not to assign.—See LEASE.

Waste.—The erection of a building, even of small size, for a purpose different from that contemplated on demise of the lands, is waste. *Hunt v. Hodges*, 33.

WILL.—Bequest to A. on attaining 21 or marriage, provided it were with consent, to B. C. and D., in similar terms; further bequest to A. and the others of the residue, with cross remainders if any should die under age and unmarried. Held, that A. having married under age, without the consent required, was unmarried within the meaning of the testator. *Hackett v. Ozmanston*, 25.

By codicil in case of marriage, without consent, the specific legacies were revoked, and it was directed that the interest only of such legacy should be paid to the legatee for life, marrying without the required consent; and after the death of the legatee, they should go and be paid to and for the use and benefit of all and every the child and children of the legatee marrying without consent, the same to be equally divided to and among them, share and share alike, if more than one, and to be paid to such children at 21 or marriage. Held vested interest in a child dying under 21 unmarried. *Ibid.*

A. by his will bequeathed one-seventh of a fund to B. for life, remainder to her daughter; the residue of the fund was bequeathed to the sisters of B. for life, with remainder to their children, and an executory limitation over in default of children, in the nature of cross remainders; by his codicil A. revoked the bequest of one-seventh to B. and her daughter, and declared his intention that they should take no benefit under the will. Held, a revocation of the interest of B. under the executory limitation. *Murray v. Richardson*, 73.

A testatrix who died, possessed of a mortgage in freehold lands, after reciting that she was possessed of several sums of money, lent to several persons, charged on freehold, and other lands, gave, and devised same to S. D., and G. H. O., upon the several trusts therein mentioned, and, after several primary and specific legacies, proceeded thus—"I leave all the rest, residue, and remainder of my property, of what nature and kind soever I may die possessed of, to the said G. H. O., in trust for the children of W. O. Held, that the legal estate in the mortgaged premises passed to S. D., and G. H. O. *Dwce v. Dopherty*, 220, Eq. Ex.

Devise in a will clear is not cut down by an ambiguous codicil. *Stannard v. Lodge*, 221, Eq. Ex.

A testatrix bequeathed £2,800 sterling out of her funded property. Held, to be a general legacy. *Berry v. Cronin*, 297.

Bequest of chattels real to A. for life, with remainder to his lawful issue, to be disposed of to them as he may think fit, and on failure of his lawful issue, over. Held, to vest the absolute interest in A. *Delp v. Hall*, 312.

Will, trust in, for payment of debts. See LIMITATIONS.

WITNESS having an interest. See EVIDENCE.

Re-examination, as to matter omitted by mistake. See PRACTICE.

A defendant against whom bill taken *pro om.* See PRACTICE.

Court will permit a witness to read the interrogatories to which he is to be examined, notwithstanding the 90 general order, when it is sworn he is dead, and could not otherwise be examined. *Nangle v. Nangle*, 78.

A

DIGEST OF THE CASES

DECIDED IN

THE COURTS OF COMMON LAW

In Ireland,

AS REPORTED IN THE FIRST TEN VOLUMES OF THE IRISH LAW REPORTS,
AND THE FIRST VOLUME OF THE IRISH JURIST.

BY

JOHN BLACKHAM, ESQ.,

BARRISTER-AT-LAW.

DUBLIN:

EDWARD J. MILLIKEN, 15, COLLEGE GREEN.

1850.

LAW INDEX

TO THE

Irish Jurist;

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE Courts of Common Law in Ireland,

AS REPORTED IN THE FIRST TEN VOLS. OF THE IRISH LAW REPORTS.

The letters at the conclusion of each paragraph indicate the titles of the Reports digested, thus—Ir. L. Rep., Irish Law Reports;—Q. B., Queen's Bench;—C. P., Common Pleas;—Ex., Exchequer;—Ex. Ch., Exchequer Chamber;—D. P., House of Lords;—Com. C., Commission Court;—Bl. D. & O., Blackham, Dundas, and Osborne;—H. & B., Hudson and Brooke;—Jon., Jones' Exchequer Reports;—J. & S., Jebb and Symes;—J. & C. Jones and Carey.

The four last Reports, being contemporaneous with the first two volumes of the Irish Law Reports, are occasionally referred to.

ABATEMENT—*See* PRACTICE.

Pleas in.—*See* CRIMINAL LAW. PLEADING AT LAW.

ABDUCTION—*See* CRIMINAL LAW.

ACCEPTANCE—*See* BILL OF EXCHANGE.

ACCORD & SATISFACTION—*See* PLEADING.

To the general *indebitatus* counts, the defendant pleaded that the promises were made jointly with one T. P. H. and the defendant, and that the plaintiff sued the said T. P. H. for not performing the identical promises in the declaration mentioned; and the jury then assessed the damages of the plaintiff for the non-performance of the said promises, which were the same identical promises in this declaration mentioned, at £350, and the said T. P. H. said and satisfied the said sum so assessed, and the said plaintiff then accepted the same in satisfaction and discharge of the said damages. The plaintiff replied that he did not accept and take the said monies in the said last mentioned plea in that behalf alleged, in satisfaction and discharge of the said causes of action in the said declaration mentioned. Held, on special demurrer, that the replication was bad, not being a direct traverse of the plea, but that the plea was bad, not being an answer to the declaration. *Small v. Drummond*, 4 Ir. L. Rep. 92.

ACCOUNT—*See* ELEGIT. SEQUESTRATOR.

ACCOUNT STATED—*See* ASSUMPSIT. DEBT. TITHE COMPOSITION.

ACKNOWLEDGMENT OF DEBT—*See* STATUTE OF LIMITATIONS.

ACKNOWLEDGMENT OF MARRIED WOMEN—*See* HUSBAND AND WIFE.

ACT OF PARLIAMENT—*See* PUBLIC COMPANY. STATUTE.

ACTION—*See* ASSUMPSIT, CASE, COVENANT, DEBT, EJECTMENT, REPLEVIN, TRESPASS, TROVER.

Where it lies.—Where A. holding B.'s bill which had been dishonoured, agreed to take one half in cash, and a renewal for the remainder, upon the terms of C., who was a party to the arrangement, guaranteeing the payment of the renewal, and having been paid the half in cash, gave up the bill; C. having afterwards refused to guarantee payment of the renewal. Held, that an action on the case for deceit lay against C., and that it was not necessary his promises should be in writing. *Barrett v. Hyndman*, 3 Ir. L. Rep. 109.

The declaration stated that B. (the defendant) wrongfully, maliciously, and without any probable cause, procured A. (the plaintiff) to be arrested and imprisoned, under pretence of a decree in the Assistant Barrister's court, for the sum of £10 debt, and 6s. costs, by the procurement of the defendant in the name of one C., but without the authority, consent, or knowledge of said C.; and to be kept and detained in prison for the space of six months. At the trial it appeared that B. had caused A. to be served in the name of C. as the plaintiff therein, with a civil bill for "£20 due for timber and plates, sold and delivered by C. to A., which A. promised to pay, and other £20 due on foot of an account

stated and settled by and between C. and A. which sum A. promised to pay." A decree was obtained thereon "in the sum of £10 for timber and slates, sold and delivered by C. to A." under which decree B. procured A. to be arrested. For the defendant it was contended that the civil bill was void, as it included two demands, which together exceeded the jurisdiction of the Civil Bill Court; that the decree founded thereon was also void, and that the action should therefore have been trespass and not case. Held, that without deciding whether trespass would or would not lie, an action on the case could be sustained irrespectively of the question as to the validity of the civil bill process, inasmuch as the decree obtained thereon was for a sum within the jurisdiction of the Civil Bill Court, and as it was not competent for B. to avoid his own acts by setting up the nullity of the civil proceedings. *Ryan v. Shee*, 7 Ir. L. Rep. 536, Ex.

Quære, if it had appeared that the decree had been obtained against a third person, might it not have been so used against the plaintiff as to enable him to maintain the present action against the defendant. *Id.*

An Act of Parliament empowered vestries to present sums for certain purposes to be raised off the inhabitants, and to appoint proper persons to applot and levy, and to allow them poundage on the sums so applotted and levied. Held, that the persons so appointed could maintain debt for the sums applotted. *Brady v. Bellow*, 6 Ir. L. Rep. 348, C. P.

ADMINISTRATION—See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATOR—See EXECUTOR AND ADMINISTRATOR.

ADMISSIONS—See EVIDENCE.

ADVERTISEMENTS—See EVIDENCE.

AFFIDAVIT—See EVIDENCE, PRACTICE.

To obtain Security.]—See SECURITY FOR COSTS.

To hold to Bail.]—See ARREST.

To obtain an Attachment.]—See ATTACHMENT.

To substitute service.]—See PRACTICE (CAP. AD RESP.)

That service of Ejectment be deemed good.]—See EJECTMENT.

To issue Scire Facias.]—See SCIRE FACIAS.

Intitling.]—Affidavits must be fully entitled with both the Christian and surnames of plaintiffs and defendants. *Lewis v. Lawton*, 5 Ir. L. Rep. 135, Ex. [*Cobbett v. Oldfield*, 16 M. & W. 469.]

Prolixity.]—An affidavit on the law side of the Exchequer cannot be referred for prolixity, without an order of the court, obtained on motion. *Kavanagh v. Sexton*, 1 Ir. L. Rep. 236, Ex.

A motion to refer an affidavit for prolixity is too late, after the application in support of which the affidavit was made is disposed of. *Kenney v. Aglmer*, 6 Ir. L. Rep. 203, Q. B.

Jurat.]—The jurat of an affidavit must state that it was sworn before a commissioner of the Court. *Creal v. Dickson*, 1 Ir. L. Rep. 375, Ex.

[*Menden v. D. of Brunswick*, 4 C. B. 321; 4 Dowl. & L. 807; *Graham v. Ingleby*, 1 Exch. Rep. 651.]

It is not incumbent on the officers of the superior courts in an affidavit made before them by an illiterate person to state in the jurat that the affidavit was truly read and explained to him. *Franks v. Acheson*, 8 Ir. L. Rep. 184, Ex.

An affidavit sworn before the *Chargé D'Affaires*, though he be not authorized under the 6 Geo. 4, c. 87, will be received. *Nimmo v. Codrington*, Bl. D. & O. 3, Ex.

Service of Notice.]—Affidavit of service of notice of motion should state that the notice was served at the registered lodgings of the attorney, and not at his dwelling-house. *Pepper and another v. Newsham*, 1 Ir. L. Rep. 9, Q. B.

The omission of the hour at which the rule for judgment was served is not such an irregularity as will vitiate the subsequent proceedings; there being no allegation that it was served after the hour prescribed by the 32 G. R. 1832. *Farrell v. Ely*, 6 Ir. L. Rep. 147, C. P.

Using.]—Where affidavits are irregularly sought to be used and it is plain the court would, on application, have permitted their use. The court will permit them to be used without putting the parties to the expense of an application. *Anonymous*, 2 Ir. L. Rep. 167, Q. B.

Semble, an affidavit entitled in one court cannot be used in another, though filed and sworn before the proper officer of the latter, and though attested copies have been taken out by the party against whom they were used. *Perrin v. Bullen*, 6 Ir. L. Rep. 180, Ex.

Affidavit sworn before a foreign authority.]—On a motion for liberty to issue a *scire facias* to revive a judgment, the affidavit was sworn before President of the Civil Tribunal, and the signature of the plaintiff, attested by the Mayor and *Sous Prefet* of Verdun in France; and the French Consul resident here by affidavit stated that there was no British Consul or Notary Public resident in Verdun, and that the Civil Tribunal was a recognized Court of Justice, and he also verified the seals attached to the affidavit; the order was made. *Hawzelle v. Watson*, 9 Ir. L. Rep. 40, Ex.

An affidavit sworn before the *Chargé D'Affaires* will be received though he be not authorised to take affidavits under the 6 Geo. 4, c. 87. *Nimmo v. Codrington*, Bl. D. & O. 3, Ex.

Commissioners for taking affidavits.]—When a commissioner for taking affidavits neglected to enrol the commission upon his appointment the court allowed it to be enrolled *nunc pro tunc*, in order that the suitor should not be prejudiced by such neglect. *Symes v. Ejector*, 4 Ir. L. R. 381, Q. B.

The court will not grant an application for the appointment of a commissioner for taking affidavits unless there be an attorney in attendance who will vouch for the petitioner. *In re Hinton*, 10 Ir. L. Rep. 79, Ex.

An attorney will not be appointed a commissioner for taking affidavits, though the commissioners of the locality for which he seeks the appointment consent thereto. *In re Loughnan*, 9 Ir. L. Rep. 447, C.P.

AGENT—*See* PRINCIPAL AND AGENT.

AGREEMENT—*See* CONTRACT, DEED,
LANDLORD AND TENANT.

AMENDMENT.

- I. PROCEEDINGS IN GENERAL.
- II. PROCEEDINGS IN EJECTMENT.

I. PROCEEDINGS IN GENERAL.

Amendment of Process.]—A plaintiff having sued out writs of *capias ad respondendum* against a defendant, and having duly filed and continued them, pursuant to the 3 & 4 Vic. c. 105, s. 7, in order to defeat the bar of the statute of Limitations, will be permitted, on payment of costs, to amend formal errors in the indorsement, return, and form of the said writs, even after the plea of the statute pleaded by the defendant, provided he have substantially complied with the provisions of the statute. *Clanmorris v. Lambert*, 1 Ir. Jur. 267, Q. B.

The court will amend a writ of *capias ad respondendum* by changing the name of Margaret to Martha where the refusal would cause the claim to be barred by the statute of Limitations. *Ryan v. Sheehy*, Bl. D. & O. 212, Ex.

Declarations and Pleas.]—The court will permit a count for interest to be added to a declaration after the expiration of the second term from the bringing of an action for money lent. *Reynolds v. Brady*, 1 Ir. L. Rep. 27, Ex.

A declaration may be amended without prejudice to the rule to plead, by adding the name of either counsel or attorney, although a motion be made to take it off the file of the court for irregularity. *Lindsay v. Vaughan*, 1 Ir. L. Rep. 159, Q.B.; *Keene v. Graham*, *Id.*

A defendant in replevin will be allowed to amend by adding additional avowries, where it appears that the necessity for the amendment is recently discovered, and the delay which occurred is owing to a compromise which had been pending between the parties. *O'Connor v. Bentley*, 1 Ir. L. Rep. 79, Q. B.

On motion to amend a declaration, by averring notice of dishonour of a bill of exchange to the personal representative of A. instead of to A. It appeared that the declaration was filed as of Michaelmas Term, 1837, that the defendant pleaded, and issue was joined, that no further proceedings having been taken by the plaintiff the defendant applied for judgment as in case of a non-suit, which the plaintiff answered by a peremptory undertaking to

go to trial; that in advising proofs for trial the mistake was discovered which it was now sought to remedy. The application was held to be too late. *Hughes v. Parker*, (2 Ir. L. Rep. 282, Q. B.)

The court allowed a plea to be amended after argument and judgment upon the demurrer, the question being doubtful, though there was no positive affidavit of merits. *Hoyle v. Hogan*, 2 Ir. L. Rep. 331, Q. B.

Where a *scire facias* did not issue until after the expiration of 20 years from the entry of the judgment, although a conditional order for liberty to issue it had been obtained before the expiration of that period, and the defendant pleaded two pleas under which he could avail himself of the 8 Geo. 1, cap. 4, and also two other pleas for the purpose of relying on the 3 & 4 W. 4, c. 27, and a special demurrer was taken to the latter pleas. The court refused to permit them to be amended upon any terms, there being no affidavit of merits, and it appearing that the effect of the proposed amendment would be to enable the defendant to contend that the plaintiff must not only apply for and obtain liberty to issue the *scire facias* within 20 years, but that it must issue within that time, or the judgment will be barred by the 3 & 4 W. 4, c. 27. *Graham v. Shaw*, 1 Ir. L. Rep. 373, Ex.

Where the defendant pleaded the general issue, and gave notice of set-off they were permitted to amend by adding a plea of set-off upon terms of amending the plaintiff's copy of the pleas, and withdrawing the notice of set-off. *Darley v. Murphy*, 2 Ir. L. Rep. 383, Ex.

Where an amendment of the declaration will deprive the defendant of a defence he could have set up under his plea, he is entitled to have the rules to plead served anew. *Reynolds v. Kelly*, 3 Ir. L. Rep. 186, C. P.

If a party served with notice tenders a consent to do that which the court on motion will order, he will be entitled to the costs. *Id.*

Where a special demurrer is allowed to a declaration the plaintiff is entitled to amend generally, and he need not confine his amendments to the points demurred to, or specify the amendment he seeks to make in his notice of motion. *Anonymous*, 3 Ir. L. Rep. 216, Q. B.

The court will allow a second amendment to be made in pleas to a *scire facias* after demurrer filed where no trial has been lost by the defendant's default, and although he does not swear that the judgment was ever paid. *O'Callaghan v. Creagh*, 3 Ir. L. Rep. 270, C. P.

In an action of *scire facias* the attorney of a purchaser pleaded jointly for three tenants, one of whom having given him no authority to do so, now disclaimed, and the remaining two were anxious to withdraw their defence, the court refused an application by the plaintiff to take their pleas off the file, but allowed them to be amended by striking out the name of the disclaiming party. *Lytleton v. Ivie*, 3 Ir. L. Rep. 364, C. P.

In an action of replevin when the defendant was a pauper residing in England the court refused him permission to file an additional avowry on the usual terms, unless the costs were paid, and all proceed-

ings were stayed until then. *Mann v. Edwards*, 3 Ir. L. Rep. 378, C. P.

To an action of debt upon an English judgment the defendant pleaded, first, *nil debet*; secondly, that the judgment in the original action had been recovered on a bond conditioned for the payment of an annuity, and that no memorial of such bond had been enrolled pursuant to the 53 Geo. 3, c. 141, s. 2, Eng., whereby the bond was void; third plea same as second. A motion to amend was refused, the pleas not being such as to be entitled to the favour of the court. *Sims v. Thomas*, 3 Ir. L. Rep. 415, Ex.

A cross motion to rescind the rule to plead several matters was also refused, the court being unwilling, except in extreme cases, to exercise a summary jurisdiction by ordering objectionable pleas to be expunged upon motion. *Ib.*

A motion to amend pleas is not *ex debito justitiæ*, although made before demurrer to replication, and if the proposed amendment be not conducive to the justice of the case the application will be refused. *Ib.*

The court will, in some instances, permit the amendment of a declaration in a matter that does not open a new defence, without requiring the rule to plead to be entered *de novo*. *Carroll v. Maher*, 3 Ir. L. Rep. 470, C. P.

Where a special demurrer was overruled, the defendant applied for leave to plead, but the court refused the application, holding that it should be the subject of a distinct motion after an argument upon demurrer. *Kenny v. Simpson*, 4 Ir. L. Rep. 42, Q. B.

A declaration in debt on an annuity deed, contained two counts: the first for four years' arrears, due May, 1840; the second for five years, due May, 1841. The court refused to strike out the first, it being suggested there was an assignment of the deed. *Clarke v. M'Daniel*, 4 Ir. L. Rep. 131, C. P.

The declaration having been entitled of a term different from that in which the defendant had appeared, the court granted liberty to amend on payment of costs, and required the rules to plead to be served *de novo*, the defendant having a claim for untaxed costs against the plaintiff, which, when taxed, he intended to plead as a set-off. *Carroll v. Farrelly*, 4 Ir. L. Rep. 137, C. P.

Where the declaration is entitled of a term different from that in which the writ was returnable, the defendant ought to give the plaintiff notice of the irregularity before he serves him with notice to set it aside, or he should call on him in the alternative either to amend, or that the declaration should be set aside. *Page v. Murphy*, 4 Ir. L. Rep. 417, C. P.

A plaintiff will be allowed to amend a declaration, without prejudice to the rules to plead, when the error sought to be amended was a mere clerical one. *Smith v. Blair*, 4 Ir. L. Rep. 397, Q. B.Ch.

The court will give a defendant leave to amend a plea of the statute of limitations before argument, and will not allow the plaintiff to open affidavits detailing the special circumstances of the case, for the purpose of shewing that the defendant had not a meritorious defence. If a party allow a special demurrer, he need not specify in his notice of mo-

the amendments he seeks. *Brennan v. Monahan*, 4 Ir. L. Rep. 415, C. P.

Where there is a *bond fide* cause of action, and the error has occurred through a mistake of the pleader, the amendment must be allowed. Per Crampton, J. *Baggot v. Malone*, 5 Ir. L. Rep. 460, Q. B.

In an action by the assignees of a bankrupt firm, the court allowed the plaintiffs to amend the declaration, by striking out and adding to the names of the partners of the firm, and to make the writ conformable thereto, though more than two terms had elapsed since the declaration had been filed. The plaintiffs were ordered to pay the costs of the amendments and of the motion, and to serve the rules to plead anew. *Wright v. Gould*, 5 Ir. L. Rep. 98, C. P.

After a demurrer to a plea, and before joinder, the court will permit an amendment to be made without an affidavit of merits, if there be a fair question to be tried. *Johnson v. O'Hagan*, 5 Ir. L. Rep. 133, E.

A declaration cannot be amended by adding a new count, without entering the rule to plead *de novo*. *Anonymous*, 6 Ir. L. Rep. 202, Q. B.

An amendment of a plea of the statute of limitations will be allowed after special demurrer, and before argument, without any affidavit of merits. *Meyler v. Morton*, 7 Ir. L. Rep. 229, C. P.

Semble, an order to amend a declaration by subscribing the name of counsel, is a motion on notice. *Loughnane v. Irwin*, 4 Ir. L. Rep. 19, C. P.

To a declaration in *quare impedit*, a demurrer was, on the last day of Trinity Term, 1846, allowed, at which time an application on behalf of the plaintiffs, to restrain the defendant from entering up judgment until the ensuing Michaelmas Term, was refused. In Michaelmas Term the plaintiffs obtained a conditional order for leave to amend, against which—the case having stood over in the meantime for the convenience of the court—came was not shewn until Trinity, 1847. Held, under these circumstances, that the court had jurisdiction to allow the plaintiffs to amend in Trinity, 1847, though judgment had been pronounced as of a previous term. *The Executors of the Marquis of Winchester v. the Bishop of Killaloe*, 9 Ir. L. Rep. 428, C. P.

The court permitted amendments, but in matters of form alone, and refused to allow additional counts to be filed which varied the statement of title, and alleged a presentation different from that averred in the former counts. *Ib.*

The court, upon special grounds, refused to allow an amendment of two pleas of the statute of limitations, even before argument of the special demurrer taken to these pleas. *Marquis of Ormonde v. The Lord Bishop of Cashel*, 9 Ir. L. Rep. 438, C. P.

Where the defendant appeared as of the preceding Trinity Term, to a writ issued in the vacation, and the plaintiff entitled his declaration as of the term of the appearance, the defendant was allowed to amend the declaration, by entitling it as of Michaelmas Term, and by altering the statement of the appearance accordingly. *Newin v. Hughes*, 9 Ir. L. Rep. 504, Ex.

An application to amend a pleading demurred to must be upon notice. *Cannon v. Nixon*, Bl. D. & O. 95, Ex.

An affidavit of merits is not absolutely necessary on such a motion. *Johnson v. O'Hagan*, ib. 96, Ex.

The court will allow a plea of the statute of limitations to be amended, before argument of the demurrer, though there be no affidavit of merits. *Cowhey v. Cowhey*, Bl. D. & O. 289, Ex.

Upon a motion to set aside a trial, on the ground that the venue in the margin of the declaration was wrong, being county of Cork, instead of county of the city of Cork, the record was amended, the plaintiff paying such costs as if the amendment was made at Nisi Prius. *Potter v. Davis*, Bl. D. & O. 255, Q. B.

A change of venue is not such an amendment as can be made under a general liberty to amend upon the allowance of a demurrer with costs, and will not be permitted without special grounds being assigned. *Evans v. Figgis*, 1 Ir. Jur. 109, C. P.

II. PROCEEDINGS IN EJECTMENT.

The court will permit the demise in a declaration in an ejectment on the title to be amended, though notice of trial be served. *Lessee — v. Smith*, 1 Ir. L. Rep. 380, Q. B. [Per Burton, J. Chamber.]

In an ejectment on the title where it appeared to the court there was a fair question to be tried, the verdict was set aside, and plaintiff allowed to amend by altering the date of the demise. *Hayes v. Cashen*, 2 Ir. L. Rep. 227, Ex.

The declaration in an ejectment on the title may be amended without prejudice to the rules entered on the second declaration, if no defence have been taken. *Carroll v. Ejector*, 1 Ir. L. Rep. 117, C. P.

In an ejectment on the title where no defence has been taken, an amendment of the declaration may be made by substituting A. for B. in the description of the premises. *O'Brien v. Ejector*, 2 Ir. L. Rep. 329.

In ejectments for non-payment of rent the court permitted the declaration, defence, and other proceedings to be amended by striking out the name of one of the lessors of the plaintiff upon terms of giving security for costs to the defendant. *Russell v. Tuthill*, 2 Ir. L. Rep. 360, Q. B.

In an ejectment for non-payment of rent, which went down for trial, but became a remanet by reason of a successful challenge to the array, the court would not allow the declaration to be amended, by adding a demise in the name of the assignee of an insolvent lessor of the plaintiff. *Lewin v. Jennings*, 4 Ir. L. Rep. 418, C. P.

Quere, has the court power to order an amendment of a declaration in ejectment for non-payment of rent, after the service. *Ib.*

No amendment of a declaration in ejectment ought to be made, save for the purpose of making it conformable with the copy served. *Russell v. Ryan*, 2 Jon. 733.

The court will allow a demise on a declaration in ejectment to be amended, without prejudice to the rules to plead. *Bell v. Ejector*, 7 Ir. L. Rep. 195, Q. B.

Where a person who had been served with au

ejectment entitled his defence in the name of John, instead of William Thrustout, and the plaintiff marked judgment, treating the defence as a nullity, the court set aside the judgment, and allowed the defence to be amended. *Doe v. Ejector*, 5 Ir. L. Rep. 591, Q. B.

A declaration in ejectment was allowed to be amended, after the ejectment had been moved on, but before defence was taken, by altering the date of the demise. *Lessee Owen v. Ejector*, 5 Ir. L. Rep. 589, Q. B.

In an ejectment on the title the declaration may be amended, after defence taken, without prejudice to the proceedings already had, by the addition of a demise in the name of the husband of the lessor, who had married subsequently to bringing the ejectment. *Campbell v. Stuart*, 5 Ir. L. Rep. 482, Q. B.

Leave given to amend a declaration in ejectment by altering the date of the demise, upon the terms of the paying the costs of the motion, although a consent for the purpose of amending had been served. *Doe v. Cooper*, Bl. D. & O. 278, Q. B.

Bill of Particulars.—A plaintiff will be allowed upon terms to amend his bill of particulars, by the insertion of an additional item, omitted by mistake, though an abortive trial be had. *Kinnear v. Evans*, 1 Ir. Jur. 128, Ex.

The plaintiff will be directed to amend his bill of particulars, being merely an echo of the declaration, on the application of the defendant, without affidavit or notice of motion. *Hill v. Holt*, 1 Ir. Jur. 37, Q. B.

At Nisi Prius.—Where an application has been made to the judge at Nisi Prius to amend the record under the 48th section of the 3 & 4 Vic. c. 105, and it did not appear that the judge had refused, or that the amendment had been made. Held, that the court had no jurisdiction to make an amendment. *Honan v. Ryan*, 6 Ir. L. Rep. 106, C. P.

In an ejectment for the lands of B. brought on the South Riding of the County of T. They were described in the declaration as situate "in the parish of H. and county of T." It appeared on the trial that the part of the lands of B. within the parish of H. was in the North and not in the South Riding of the County of T. The judge having amended the record, by striking out the words "parish of H." Held, that the amendment was authorized by the statute. *Murphy v. Connolly*, 6 Ir. L. Rep. 116, C. P.

In an action on a guarantee, the declaration averred, that the defendant, "in consideration of the plaintiff's granting a special warrant to A. and B., undertook to indemnify him." At the trial it appeared by the guarantee, that the consideration was to grant "a warrant to A. or B., or either of them, or their assistants. Held, that the omission of the words or either of them might be amended under the 3 & 4 Vic. c. 105, s. 48, or the 9 Geo. 4, c. 15. *Cambie v. Barry*, 6 Ir. L. Rep. 319, Q. B.

Held that the amendment might be made from the copy of the warrant, and that the original need not be produced. *Ib.*

The "merits" of the defence within the words of

the 3 & 4 Vic. c. 105, s. 48, mean those which the defendant has raised on the pleadings. *Ib.*

In an ejectment for non-payment of rent, the demise, by mistake laid prior to the day on which the right of entry accrued, was amended by the judge at Nisi Prius. *Ottivell v. Hamill*, Bl. D. & O. 185—per Blackburne, C. J.

Rule for Judgment.—The court gave a conditional order to amend the rule for judgment entered on a wrong demise; cause to be shewn in ten days. *Clifford v. Ejector*, 1 Ir. Jur. 271, Ex.

Judgment.—The name in a bond and warrant on which judgment had been entered in 1817 was Mary Dowdal, in the judgment she was called Mary Dowd, the court in 1839 allowed the judgment to be amended. *Lyster v. Campbell*, 1 Ir. L. Rep. 294, Q. B.

The court allowed a judgment to be amended on consent of the parties, by increasing the amount, it being entered the term previous to the application, and being for a small sum. *Farrell v. Russell*, 3 Ir. L. Rep. 40, Ex.

The court will not permit a judgment to be amended unless it be shewn that it can be done without prejudice to intervening creditors. *Greene v. Richardson*, 3 Ir. L. Rep. 89, Ex.

Where the judgment was entered in a wrong Christian name of the consor, the plaintiff was permitted to vacate the old judgment and enter a new one. *Ib.*

The court will not allow a judgment to be amended by increasing the amount from the principal to the penalty of the bond, though all parties consent, a new judgment must be entered. *Cromie v. Brown*, 4 Ir. L. Rep. 219, C. P.

Though the court have the power to make an amendment they will not do so except it be clearly for the advancement of justice. So where a judgment was obtained on a *scire facias* issued in Hilary Term, 1841, and in Trinity Term following judgment was given for the plaintiff on a plea of *nil tiel record* to the assignment of the judgment. After writ of error brought on account of the alleged defects in the assignment, the court refused to allow the record to be amended by setting out the assignment of the judgment verbatim. *Fulton v. Creagh*, 4 Ir. L. Rep. 275, Q. B.

Where a judgment was entered by an administrator on a bond and warrant executed to the supposed intestate, which administration was revoked, and probate granted to an executrix, the court refused to allow the judgment to be amended by substituting the executrix for the administrator, but allowed a new judgment to be entered as of the present Term in the name of the executrix, and vacated the former judgment. *Archer v. Coote*, 5 Ir. L. R. 96, C. P.

The court after the term in which the judgment had been signed, after a writ of error had been argued in the Exchequer Chamber, and another sued to the House of Lords, amended the judgment roll by filling, with the amount of taxed costs, a blank left for their insertion. *Irish Society v. the Bishop of Derry*, 5 Ir. L. Rep. 236, C. P.

An amendment of the judgment roll will be allowed by altering the surname of the consuee. *Hanvey v. Rice*, 5 Ir. L. Rep. 593, Q. B.

The court granted a conditional order to amend by altering the surnames of both consor and consuee from Brien to Bryan, they being properly named in the bond and warrant. *Brien v. Brian*, 6 Ir. L. Rep. 203, Q. B.

In 1844 the court gave liberty to amend a judgment of 1815 by changing it from a judgment *de bonis propriis* to a judgment *de bonis testatoris*, and by filling a blank in the remission of damages on the record by inserting the words "last four" before the word "counts," and by inserting the words "first four" in the statement of the counts on which the damages were recovered. *Gower v. Monk*, 6 Ir. L. Rep. 343, C. P.

A special memorandum contained in a warrant of attorney will be allowed to be added to a judgment. *Hilton v. Lord Charleville*, 8 Ir. L. Rep. 2, Q. B.

The court as of course amended a judgment in which the name of the plaintiff was mistaken, there being documents to amend by. *O'Connell v. O'Connor*, Bl. D. & O. 95, Ex.

The court will amend the judgment roll by inserting in the blank left for that purpose the amount of taxed costs, if the judgment be not registered pursuant to the 7 & 8 Vic. c. 90. *Bank of Ireland v. Orpen*, 1 Ir. Jur. 206, Ex.

The memorial of the assignment of a judgment may be amended in the name of the assignee, though there be nothing to amend by, upon affidavit shewing the applicant to be the person to whom it was intended that the judgment should have been assigned. *King v. Yelman*, 2 Jon. 39.

Judgment amended, by altering the name of the consor from Charles Stewart Corry, to Thomas Charles Stewart Corry. *Murland v. Corry*, 2 Jon. 465.

Postea.—Where a defendant paid money into court, and the plaintiff obtained a verdict for a less sum, the court gave liberty to amend the *postea*. *Harly v. Parker*, 6 Ir. L. Rep. 455, Q. B.

This motion need not be made within the first four days of term. *Ib.*

A motion to amend the *postea* should be made within the first four days of the term succeeding the verdict. *Regina v. O'Connell*, 7 Ir. L. Rep. 337, Q. B.

Record—after writ of error.—Where the verdict was given upon the substantial issues, and no finding appeared on the record as to two formal issues, the court, after judgment pronounced, and before the return of the transcript, amended the record by entering a verdict in conformity with the evidence in the bill of exceptions. *Quinn v. National Insurance Company*, 2 Ir. L. Rep. 37, Ex.

The application to amend the record should be made in the first instance to the court below, and subsequently to the Court of Error to amend the transcript. *Ib.*

The court will not allow a plaintiff in error to amend his assignment of errors after special demurrer, where the amendment does not tend to the furtherance of justice. *Roddy v. Clements*, 2 Ir. L. Rep. 229, Ex.

Subsequently to the pronouncing of judgment in the Court of Error, an amendment in the *postea* was

allowed to be made by the court in which the cause originated. *O'Connell v. Mansfield*, 9 Ir. L. Rep. 440, C. P.

The plaintiff having in Trinity Term, 1844, obtained a judgment for £100 damages, and six pence costs, a writ of error was sued out, and a transcript of the record sent to the Court of Exchequer Chamber, blanks being left in the record and transcript, for the costs—not then ascertained—and the consolidated sum of damages, expenses and costs. The judgment having been affirmed in Trinity Term, 1845, and the transcript subsequently remitted to this court, and the costs taxed, the court, in Hilary Term, 1847, ordered the record and transcript to be amended by the insertion therein of the amount of costs, and of the consolidated sum of damages, expenses, and costs in the blanks left for that purpose. *Ryan v. Shee*, 10 Ir. L. Rep. 276, Ex. S. C. 8 Ir. L. Rep. 268.

Sheriff's returns.]—See SHERIFF.

Order of Court.]—The court will not permit a conditional order to be amended. *Bryan v. Campbell*, 7 Ir. L. Rep. 408, Q. B.

An order to set aside a verdict generally, omitted to mention costs, the plaintiff having succeeded on a second trial the officer gave him the costs of both. Held, that on a motion to review the taxation the court would not correct the former order, the course to be adopted was to apply to amend. *Rush v. Purcell*, 8 Ir. L. Rep. 379, Q. B.

ANNUITY—See DEED.

By annuity deeds executed in the years 1829 and 1831 respectively after reciting a devise in 1844 of an annuity of £50 to C. C. charged upon lands in Ireland, and payable half-yearly on the 1st of Nov. and 1st of May, and also the marriage of C. C. to J. L. in 1827, and the settlement thereupon of the said annuities in trustees for the separate use of C. C., and an agreement by the said J. L. and his said wife for the sale of two annuities of the value of £23 1s. 6d. each, to be secured by these covenants, by assignments of the said annuity of £50 by the wife, and by warrants of attorney to confess judgment in the King's Bench in Ireland for £500 respectively—it was witnessed in one of the deeds that in consideration of £200 lawful money of Great Britain—and in the other deed that in consideration of £200 of lawful money of Great Britain current in England, the said J. L. and his wife respectively covenanted to pay to the grantee the said annuities by yearly payments on the 1st of November, and the 1st of May respectively, including the respective proportional parts between the last day of payment, or the day of the date of the deed, and the death of the wife; and also to assign policies of insurance for her life in some English office to the grantee; and by the same deeds the wife appointed the grantee to be her attorney to recover the said annuity. These deeds were prepared in Ireland, and upon Irish stamps, and transmitted to England, where they were executed by the grantors who resided there, and where also the consideration-money was paid; but they were executed by the grantee in Dublin, of which place he was described in both deeds.

Warrants of attorney in the usual English form to enter judgments in the King's Bench in Ireland were also prepared in Ireland, and executed by the respective parties at the same times, and the same places as the deeds respectively. Held, that these contracts were English, and void for want of registry, under the provisions of the English Annuity Act, 53, Geo. 3, c. 141, s. 2. *Ferguson v. Lomas*, 5 Ir. L. Rep. 81, C. P.

APPEAL—See CERTIORARI, CIVIL BILL, QUARTER SESSIONS.

APPORTIONMENT—See LANDLORD AND TENANT (RENT).

APOTHECARY—See MANDAMUS.

In an action of debt for a penalty under the 31 Geo. 3, c. 37, held to be sufficient to aver in the declaration, that the defendant did practise the art and mystery of an apothecary, without stating the particular acts done, and that it need not be averred that the defendant practised the art and mystery of an apothecary for profit or gain. *Apothecaries' Hall v. Calvert*, 6 Ir. L. Rep. 186, Q. B.

A person elected by the trustees or committee of a fever hospital, to be apothecary thereto, and compounding drugs for the patients in such hospital, does not subject himself to the penalties inflicted by the 31 Geo. 3, c. 34, for practising as an apothecary without a certificate. *Governors of Apothecaries' Hall, v. Nichols*, 7 Ir. L. Rep. 390, Q. B.

APLOTMENT—See PARISH CESS, TITHES COMPOSITION.

ARRAY—See JURY.

ARBITRATION.

Submission.]—Where a witness to a deed of submission refused to verify the deed by affidavit, the court held the rule requiring the affidavit not to be inflexible, and the deed was made a rule of court without it. *Shortall v. Moran*, 2 Ir. L. Rep. 87, C. P.

It is good cause against making an award a rule of court, that the submission to refer is not in writing, and it lies upon the party applying to shew it was in writing. *Goulding v. Goulding*, 2 Ir. L. Rep. 164, Q. B.

Either party may revoke his submission before it be made a rule of court. *Ib.*

By submission it was referred to arbitrators "to declare what amount might be the profits to be derived by defendant from the expenditure of plaintiff, with allowance for ditching and draining, as well as all buildings and manure, so as to extend its benefits to any future crop." The arbitrators awarded "that the defendant should give plaintiff £107 7s. on account of profits calculated to accrue to defendant from plaintiff's improvements; that defendant give plaintiff the use of the dwelling house and offices to the 1st of May next; that on

that day plaintiff give up to defendant possession of said premises, leaving them in the same repair as at present. Held, that the portion of the award relating to the possession of the premises was bad, not being warranted by the submission, but that it was separable from the residue, and that the award for the amount of the improvements was good. *Murphy v. Belles*, 4 Ir. L. Rep., 313, Ex.

A subscribing witness to the execution of a deed of submission to arbitration, under the 10 Wm. 3, c. 14, although there is no cause in court, will, upon refusal to verify his attestation by affidavit, be ordered to do so on pain of attachment, and to pay the costs of the motion to compel the execution. *Nugent v. Lowe*, 10 Ir. L. Rep. 3, C. P., S. C. Bl. D. & O. 220.

It is not open to such a witness declining to verify his attestation to justify his refusal, on the ground that the time has elapsed within which the submission should have been entered as a rule of court. *Ib.*

Quere, whether upon such refusal, there being no cause before the court, it has jurisdiction to dispense with the production of the affidavit to verify, and to enter the submission as a rule of court. *Ib.*

Where a matter is referred to arbitration, and complicated matters of law and equity are involved therein, fees to counsel for perusing and settling the deed of submission will be allowed on the taxation of the costs, between party and party. *In re Booth*, 1 Ir. Jur. 68. C. P.

Reference to.—On an application to confirm the Master's report on a reference respecting the amendment on the record of revivor of a judgment, the court has jurisdiction to refer the whole matter to an arbitrator, if that course be more likely to do justice than if left to a jury. *Cruise v. Davies*, 3 Ir. L. Rep. 363, C. P.

Award.—Where arbitrators assessed certain damages, being the amount of several bills of costs due to the attorney by his client, subject to be reduced by taxation, the award was held good. *Gower v. Donovan*, 1 Ir. L. Rep. 40, Q. B.

By an order of *Nisi Prius*, a case was referred to arbitration, it having been consented that a verdict should be taken for the plaintiff for the sum claimed by him, "with costs, subject to be reduced or turned into a verdict for the defendant, with costs, according to the finding or award of the arbitrators." The award reduced the amount so entered for the plaintiff, but was silent on the subject of costs. Held, that the plaintiff was entitled to the costs of the reference, and of the award, in addition to the costs of the action. *Fairbrother v. Earl of Kingston*, 9 Ir. L. Rep. 268, Ex.

If a cause at *Nisi Prius* have been referred to arbitration, and, in consequence of any default, the proceedings on the arbitration are nugatory, the party ultimately successful cannot recover the costs of the arbitration proceedings, unless such have been expressly provided for by the deed of submission. *O'Driscoll v. McCarney*, 9 Ir. L. Rep. 570, Ex.

Entering Judgment upon.—Though a motion to confirm an award, on an order of reference to

arbitration made in a cause, is unnecessary. Yet, when the terms of the deed of submission are, that the decision of the arbitrators should be made the judgment of the court, a motion for an order to enter up judgment is necessary. *Williams v. Bruen*, 1 Ir. L. Rep. 344, Q. B.

Where the parties to an action referred the matter in dispute to arbitration, and agreed that judgment should be entered for the sum awarded, and the defendant after the award would not sign a plea of confession for the amount awarded, the court ordered judgment to be entered up for the sum awarded, and directed that he should pay the costs of the motion. *French v. Farrell*, 6 Ir. L. Rep. 151, Ex.

Enlarging time for making Award.—The court has jurisdiction, under the 3 & 4 Vic. c. 105, s. 63, to enlarge the time for arbitrators, making their award after the term has expired, even though the deed of submission contain a clause empowering the arbitrators to extend the time from time to time. *Macneil v. Macneil*, 1 Ir. Jur. 16, Ex.

Enforcing.—To obtain executions under the 3 & 4 Vic. cap. 105, sec. 27, for a sum of money awarded, the party seeking it must move for an order *Nisi* on the opposite party to pay, which being made absolute, gives the court jurisdiction. *Kelly v. St. George*, 4 Ir. L. Rep. 420, C. P.

Witnesses at.—The application for a rule to compel the attendance of witnesses before an arbitrator, under 3 & 4 Vic. c. 100, who had been appointed by an order of *Nisi Prius*, should be made to a single judge. *O'Connor v. Balf*, 3 Ir. L. Rep. 66, C. P.

Costs.—A cause in the Court of Common Pleas, and cross cause in the Court of Exchequer, in the latter the matter was referred at *Nisi Prius* by a consent which was made a rule of court, the parties delivered blank pleas of confession to the arbitrator, who filled up the blank plea of confession signed by the defendant, on which judgment had been entered up in the Common Pleas; this court ordered the officer to tax the costs of the cause and of the reference, although the consent had never been made a rule of the court. *Morris v. Troy*, 3 Ir. L. Rep. 468, C. P.

By consent between plaintiff and defendant, all matters in dispute were referred to arbitration; the consent was afterwards made a rule of court, and a sum awarded to be paid by the defendant to the plaintiff, together with the costs of the award and of the reference; the award and order to confirm same having been registered, pursuant to the 3 & 4 Vic. c. 105, s. 28; the court ordered the defendant to pay the sum awarded, together with the taxed costs, but doubted whether the plaintiff was entitled to issue execution under the 27th sec. for the sum awarded. *Feeny v. Dillon*, 3 Ir. L. Rep. 503, Ex.

ARREST—See EXECUTION, BAIL, AFFIDAVIT, BANKRUPT.

Privileged Persons.—A salaried clerk, in one of

ices of the courts, is privileged from arrest on his way to court to attend his office.

Ex parte Egan, 3 Ir. L. Rep. 87, Q. B. on an application to be discharged, under the Petty Sessions Act, it must be clearly and explicitly stated that the party applying was a soldier, duly enlisted at the time of the arrest, and that such was contrary to the intent of the Act. The provisions of which are to be strictly construed. *Booth v. Booth*, 2 Ir. L. Rep. 34, Ex.

A defendant arrested under a writ out of one of the superior courts, was discharged on entering a plea on appearance, upon the ground that his name had been seized under an attachment from the Lord Mayor and Sheriff's Court, for the same cause of action, and that the proceedings in that case were for the same cause of action. *Daniel v. Daniel*, 2 Ir. L. Rep. 374, Ex.

Where a person by his proceedings in one court has obtained a security for his demand, he shall not be arrested for the same cause of action. *Ib.*

A party to an Equity suit is not privileged from arrest while attending a commission to examine witnesses in the cause. *McCarthy v. Lowry*, 1 Ir. L. Rep. 776.

A party who attended at the Master's office to take the depositions, on leaving was arrested under a writ. It was held that he was entitled to be discharged upon the ground of privilege, although he remained in custody for a fortnight after his arrest, without making any application. *Wheeler v. Fox*, 3 Ir. L. Rep. 302, note.

A party who resides in the country, but who is summoned in Dublin as a witness in the Prerogative Court, is protected from arrest during the time he remains in town, *bona fide*, for the purpose of being examined. *McDonnell v. Gray*, 1 Ir. L. Rep. 509, Ex.

Where an attorney applied to be discharged from arrest on an affidavit, stating that he had been attending professionally on the 5 and 6th of January at the Quarter Sessions Court, when, in respect of other matters, he was engaged for the prisoner in a crown case; that the trial stood over until the 7th of January, on the morning of which "immediately before the sitting of the court, the deponent was going in the direction thereof," and was arrested on a *ca. sa.* Held that the affidavit was defective in not stating that the defendant was attending court on his professional business, at the time of the arrest. *Scott v. Frayne*, 5 Ir. L. Rep. 11, Ex.

A party summoned before a magistrate, on a criminal charge, is not privileged from arrest on his return home from attendance on the summons. *Don v. McDonnell*, 5 Ir. L. Rep. 594, Q. B.

A coroner, when engaged in the discharge of his official duty, is privileged from arrest; and the defendant, having notice of his being so engaged, and detaining him notwithstanding, was obliged to pay costs of his discharge. *Callaghan v. Twiss*, 9 Ir. L. Rep. 422, C. P.

A barrister, an assistant barrister is privileged from arrest, as well during the exercise of his civil, as of his criminal jurisdiction; and the privilege will not be lost, though he should arrive in the county on

the day preceding that appointed for holding the sessions. *Molloy v. —*, 10 Ir. L. Rep. 14, C. P.

The officers of the Queen's Bench have no general privilege of exemption from arrest on final process; their privilege only extends to the periods during which they are going to, returning from, or engaged in their official duties. *Magrath v. Cooper*, 10 Ir. L. Rep. 332, Q. B., S. C. Bl. D. & O. 141.

A person summoned from a distant part of the country, to attend before a Master in Chancery, is privileged from arrest upon civil process; not merely while attending at the Master's chambers, and going and returning therefrom, but alone during his stay in town, in pursuance of the summons. *Rooney v. Cooke*, 10 Ir. L. Rep. 469, Ex.

Where a party was in custody on a criminal charge which was abandoned, but immediately on being liberated from the dock he was taken in execution by the sheriff, upon a writ issued at the suit of the plaintiff, who had no connection with the prosecutor in the criminal case. Held that he was not privileged from arrest. *Buckmaster v. Cox*, 2 Ir. L. Rep. 101, Ex.

Secus, if there had been collusion between the plaintiff and prosecutor. *Ib.*

Where a person is in custody of the sheriff, upon a criminal charge, it is not necessary to obtain an order of the court for the sheriff to detain him in a civil suit. *Ib.*

Where an officer of the court has been arrested upon a *ca. sa.* and seeks to be discharged upon the ground of privilege, he must satisfy the court that his application is made *bona fide*, and if any circumstances are disclosed to lead the court to think it otherwise, it will refuse his application. *In re —*, 3 Ir. L. Rep. 301, Q. B.

Such an application must be made without delay, therefore where it appeared that the defendant was arrested upon the 11th of January, and did not apply until the 28th, held that the laches was decisive against the motion. *Ib.*

Affidavit.—An affidavit to hold to bail, stating that defendant was indebted to the plaintiff "in the sum of £20, besides interest, being the amount of a bill of exchange, dated and drawn by F. H. on —, accepted by the defendant, payable at 91 days after date, which bill was passed to the plaintiff for valuable consideration, is insufficient. *McCarthy v. Birney*, 1 Ir. L. Rep. 39, Q. B.

An affidavit to hold to bail for goods sold and delivered to the defendant, or for his use, and by his order, is sufficient. "For money paid, laid out, and expended to and for the defendant, and for his use," without adding "at his request," is defective. *Hughes v. Dowd*, 1 Ir. L. Rep. 24, Ex.

An affidavit to hold to bail, by an administrator, for rent "due upon, and by virtue of a lease, bearing date, &c., and made between the deceased of the one part, and J. M. (the defendant) of the other;" without stating that J. M. held and enjoyed under the lease, was held to be sufficient. *Galvin v. Milligan*, 1 Ir. L. Rep. 23, Ex.

An affidavit to hold to bail by one of two plaintiffs, stating that one, W. P., (the defendant,) "was indebted to H. G., deponent's late partner,

in the sum of £158 for goods sold and delivered by the said H. G., and the deponent, during their late partnership, to and for W. P., and, at his request, was held to be sufficient. *Horwood v. Power*, 1 Ir. L. Rep. 203, Ex.

An affidavit to hold to bail, in an action by the indorsee, against the acceptor of a bill of exchange, must state the indorsement to the plaintiff. *Tut-hill v. Bridgeman*, 1 Ir. L. Rep. 62, Ex.

An affidavit to hold to bail, giving only the initials of the defendant's Christian name, is insufficient. *Chaffers v. Bingham*, 1 Ir. L. Rep. 242, Q.B.

An affidavit to hold to bail stating that W. R., the defendant, was indebted to the deponent in £21 11s. as the bearer of a certain check drawn by W. R. on R. R., which said check was given unto this deponent for value received by the said R. R. in diet, washing, &c. provided by deponent for the said R. R. at his request, and made payable to bearer, the payment of which had been refused by the said R. R. Held to be insufficient. *Cleary v. Ramsay*, 2 Ir. L. Rep. 243, Ex.

Affidavits on behalf of the defendant under the 6th section of the 3 & 4 Vic. c. 105, should negative any intention of leaving the country. *Knipe v. McCabe*, 3 Ir. L. Rep. 24, C. P.

A party will not be discharged from custody who has been arrested under a fiat when he qualifies his swearing as to his having no intention of quitting the country, and there are circumstances in the case which sustain the belief that he has an intention of leaving the country. *Hughes v. Ryan*, 3 Ir. L. Rep. 107, Q.B.

Where an affidavit on which a fiat is sought states on belief that the defendant is about to quit the country, the grounds of belief should be accurately stated, and where the fiat was obtained on such an affidavit, and the defendant arrested, the court on an affidavit stating that he did not intend to leave the country, discharged him. *Hughes v. Creswell*, (3 Ir. L. Rep. 108 Q. B.)

Held also that an application to set aside the fiat, and not the order upon which it issued, was sufficiently formal. *Ib.*

An affidavit that the defendant was about to leave Ireland, unless, &c. was held to be sufficient to obtain a judge's fiat to arrest him. *Ryan v. Ryan*, 3 Ir. L. Rep. 200, Q. B.

Repeated declarations by the defendant that he would leave the country to avoid payment of his debt, though made in moments of irritation, were held to be sufficient probable cause to hold the defendant to bail.—Perrin, J. *dissentiente*. *Ib.*

Semble, the plaintiff in shewing cause against a conditional order for the discharge of the defendant must rely on his affidavit to hold to bail, and cannot use additional affidavits. *Ib.*

Where the defendant relies on a counter affidavit, in support of an application to set aside a judge's order under which he has been arrested, the plaintiff may make an affidavit in reply. *Farrell v. McGuire*, 3 Ir. L. Rep. 349, Ex.

The affidavit to ground an application for a discharge must deny positively the averments in the plaintiff's affidavit on which the fiat was granted. *Innes v. Waters*, 4 Ir. L. Rep. 311, C. P.

Where the affidavit upon which a fiat had been

obtained for the arrest of a party was filed without having any stamp upon it, no cause being then pending between the parties, the court set aside the fiat, and ordered that the bail bond, executed by the defendant and his sureties, should be delivered up to be cancelled, upon his entering a common appearance. *Plunket v. Plunket*, 4 Ir. L. Rep. 366, Q. B.

Quære, must an action be commenced before a fiat can be obtained? *Ib.*

The affidavit to hold to bail cannot be amended when the interests of third parties are involved, and between the original parties no amendment will be allowed unless there be something to amend by. *Johnston v. Pothonier*, 5 Ir. L. Rep. 25, Q. B.

Semble, a mistake in the name of the defendant in an affidavit to hold to bail is a substantial defect, and cannot be treated as an irregularity. *Ib.*

A fiat for an arrest was set aside, the affidavit upon which it was grounded stating that the defendant was about to leave the county instead of the country. *Bailey v. Bailey*, 5 Ir. L. Rep. 137, Ex.

The plaintiff's affidavit to obtain a fiat need not state a positive belief as to the truth of the defendant's being about to leave the country, provided the facts be such as would lead the mind of the judge to that conclusion. *Ib.*

As to the practice in obtaining a fiat for the arrest of the defendant. *Ib.*

An affidavit to hold the defendant to bail should be precise as to the sum due. *Ruttle v. Downer*, 5 Ir. L. Rep. 364, Q. B.

When the affidavit stated that the deponent was informed that the defendant was about to leave the country, the person from whom the information was obtained should be stated, and an affidavit made by him, or an excuse for its non-production. *Ib.*

A plaintiff on a motion to set aside a fiat will not be allowed to read an affidavit in explanation of, or to supply the deficiencies in the affidavit upon which the fiat has been granted. *Ib.*

An affidavit for the arrest or detention of a defendant under the 2nd section of the 3 & 4 Vic. c. 105, must state the belief that the defendant is about to quit Ireland, unless he be forthwith apprehended, and must also state the facts upon which such belief is founded. *Hooker v. Duke de Rovigo*, 3 Ir. L. Rep. 51, Ex.

An allegation by the plaintiff that the defendant admitted himself to have been guilty of the crime of forgery, and that he believes if released he will abscond, is sufficient cause against a conditional order to be discharged from custody under the 3 & 4 Vic. c. 105, s. 6, though the defendant swears he had no intention to leave the country. *Knipe v. McCabe*, 3 Ir. L. Rep. 66, C. P.

An affidavit for a judge's fiat to arrest need not be made according to the strict rules of legal evidence, and statements made on hearsay and belief will be sufficient. *Hickey v. Moore*, (4 Ir. L. Rep. 468, Q. B.—Perrin, J. *dissentiente*.)

The affidavit on which a judge's order for the defendant's arrest was obtained, stated, "that there were probable causes for believing that defendant was about to leave the country." Held to be insufficient. *Solomon v. Digby*, Bl. D. & O. 188.

Without probable cause.—An arrest, without

holding a defendant to special bail, though the arrest be without probable cause, does not entitle the defendant to his costs under the 43 Geo. 3, c. 46. *Josel v. Peard*, (10 Ir. L. Rep. 550, Q. B.; S. C. Bl. D. & O. 179).

Quære, if a party be arrested and kept in gaol, not being able to procure bail, or if he lodge the sum claimed, he is in such case entitled to his costs, the arrest being without probable cause. *Ib.*

The defendant and his brother being respectively indebted to the plaintiff for goods sold, the former in £99 14s. 6d., and the latter to the amount of £10, it was agreed that in consideration that plaintiff would take the defendant's bill, payable at twelve months, for the amount of his own and his brother's debts, his brother's debt should be placed to defendant's account; defendant accordingly accepted a bill for the entire, payable at twelve months, but plaintiff not being able to get it discounted returned it cancelled, and defendant then accepted a second bill, payable at six months. The affidavit to hold to bail, which was made by plaintiff's son, stated that the defendant had represented himself as a man of property, but that discovering shortly after the defendant had accepted the second bill that this was untrue, he returned that bill also cancelled, and commenced the present action, the defendant having been arrested for £43. Held that he was entitled to his costs pursuant to the 43 Geo. 3, c. 46. *Cullen v. O'Brien*, 3 Ir. L. Rep. 255, C. P.

To entitle a defendant to costs under the 43 Geo. 3, c. 46, s. 3, there must have been an actual arrest. *Cash v. Trevor*, 3 Ir. L. Rep. 433, Ex.

But it is not necessary for the defendant to show that the plaintiff was actuated by malicious motives in procuring him to be arrested for too large a sum. *Ib.*

In an action for the non-delivery of goods the plaintiff, under the circumstances, was held to be justified in holding the defendant to bail for the value of the goods. *Smith v. Ritchie*, 1 Ir. Jur. 253, Q. B.

Discharge.]—When a defendant was arrested under a *capias quo minus*, in which he was described by the initial of one of his Christian names, he was discharged on entering a common appearance, although he had signed the promissory note on which he was sued, by the same initial, it appearing that due diligence had not been used to obtain a knowledge of the real name. *Symes v. Batt*, 2 Ir. L. Rep. 23, Ex.

Upon a motion to discharge a defendant from custody, upon the ground that she is a married woman, notice of the motion must be served upon the opposite party even to obtain a conditional order. *King v. Keenan*, 2 Ir. L. Rep. 66, Q. B.

Where a party was in custody on a criminal charge, which was abandoned, but immediately on being liberated was taken in execution upon a writ of *ca. sa.* Held, the application for the prisoner's discharge might properly be made to the court from which the process issued, but the criminal court might also take cognizance of it. *Buckmaster v. Cox*, 2 Ir. L. Rep. 101, Ex.

A bail bond given by the defendant on his arrest was cancelled, and proceeding thereon stayed, on

terms of the defendant paying the costs of such proceedings, and entering a common appearance.—3 & 4 Vic. c. 105, s. 6. *Mitchell v. Ferns*, 3 Ir. L. Rep. 49, Ex.

A defendant having been arrested, and having given bail to the sheriff, the court ordered the bail-bond to be cancelled on defendant entering a common appearance.—3 & 4 Vic. c. 105, s. 6. *Hookes v. Duke of Rovigo*, 3 Ir. L. Rep. 51, Ex.

A defendant who had been arrested, and given bail to the coroner, previously to the passing of the 3 & 4 Vic. c. 105, was held to be in custody within the 6th section, and the bail-bond was cancelled on his entering a common appearance. *Arbouin v. Rogers*, 3 Ir. L. Rep. 53, Ex.

The court will not grant a conditional order to discharge a party out of custody on mesne process, where he is also in custody on an execution. *O'Loughlin v. Hughes*, 3 Ir. L. Rep. 63, C. P.

The court will not discharge a defendant from arrest under mesne process where he has presented a petition under the insolvent act to be discharged from the same debt, although that petition was dismissed at his own instance before the application was made. *Cohen v. O'Donovan*, 3 Ir. L. Rep. 88, Q. B.

Upon a motion to make absolute a conditional order for the defendant's discharge, under the 3 & 4 Vic. c. 105, s. 6, the court, under the circumstances of the case, granted the defendant his costs of the application. *Brennan v. Isaac*, 5 Ir. L. Rep. 101, Q. B.

To preclude a party from the benefit of the 3 & 4 Vic. c. 105, s. 6, he must not only have presented a petition in the insolvent court, but the petition must be pending at the time of the application. *Fitzpatrick v. Dunne*, 3 Ir. L. Rep. 158, Ex.

Quære, if his petition had been dismissed by fraud, would that preclude him from the benefit of the statute. *Ib.*

It is not necessary to move, under the 3 & 4 Vic. c. 105, s. 5, for a conditional order that a party who had been arrested on a judge's fiat, should be discharged from custody; such a motion should be made upon notice, and met in the first instance. *Mills v. Magennis*, 3 Ir. L. Rep. 271, C. P.

Where the defendant was arrested under a judge's fiat, the court discharged him from custody on his own affidavit, corroborated by others negating the inference drawn by the plaintiff from his acts and conversations, and denying any intention of leaving the country. *Gabriel v. Lysaght*, 3 Ir. L. Rep. 272, C. P.

The court refused to discharge a defendant out of custody, though the plaintiff omitted to leave with the sheriff, at the time of lodging the execution, a certificate of the sum due, according to the provisions of the 6 Anne, c. 7, but put the plaintiff, who was out of the jurisdiction, under terms to appear to an action for an illegal arrest. *Irwia v. Staunton*, 4 Ir. L. Rep. 270, Q. B.

A party having been arrested on a writ which which was not endorsed, as required by the 43rd general rule, and having, while in custody, filed his petition under the insolvent act, which he afterwards abandoned, but on which one of his creditors was seeking to have an assignee appointed, the

court refused to discharge him. *White v. Kidd*, 4 Ir. L. Rep. 406, C. P.

On a motion to discharge a party out of custody, the court will take the affidavits made on both sides into consideration, and if, upon the whole, there appear to be probable cause for believing the defendant to be about to quit Ireland, the motion will be refused. *Hickey v. Moors*, 4 Ir. L. R. 468.

Where an order had been issued by the Insolvent Court, under the 5 & 6 Vic. c. 95, for the discharge of a pauper prisoner, the marshal must obey that order, though detainers be then lodged with the sheriff against the prisoner. *Ex parte Staunton*, 5 Ir. L. Rep. 581, Q. B.

Where a married woman, who was sued as the drawer of certain bills of exchange, suffered judgment to go by default, and was taken in execution, the court ordered her to be discharged upon motion, she having practised no deception, and the plaintiff being aware of her coverture. *Pepper v. Kelly*, 6 Ir. L. Rep. 580, Ex.

A plaintiff cannot act upon two concurrent writs of *ca. sa.* and *fi. fa.* at the same time. Where a *ca. sa.* and *fi. fa.* having issued together, a small sum only was levied under the former, and before returning the *fi. fa.* the defendant was taken in execution under the *ca. sa.* the court discharged her out of custody. *Fennell v. Dempsey*, 1 Ir. Jur. 64, Q. B.

The court will restrain a defendant who declines to be put under terms not to bring an action, from so doing. *Ib.*

On mens and final Process.—See EXECUTION.

Malicious Arrest.—See CASE (ACTION ON).

—♦—
ASSAULT—See TRESPASS.

ASSETS—See EXECUTORS AND ADMINISTRATORS.

—♦—
ASSIGNMENT.

Of Goods.—See DEED. CHUSES IN ACTION.

Of Leases.—See LANDLORD AND TENANT.

—♦—
ASSIGNEES—See BANKRUPT, INSOLVENT.

—♦—
ASSISTANT BARRISTER—See ARREST, QUARTER SESSIONS.

—♦—
ASSUMPSIT—See GUARANTEE. MASTER AND SERVANT.

Assumpsit generally.—The plaintiff, a trader, being embarrassed in his circumstances, proposed to his creditors to compound their debts for 6s. and 8d. in the pound. The defendant, one of the creditors, refused to accede to the composition, unless, prior to his signing the composition deed, he received, in addition, goods to the value of 3s. and 4d. in the pound. The plaintiff gave the defendant goods to that amount, and, in consideration thereof, the latter signed the composition deed. Held that the plaintiff was entitled to recover from the defendant the amount for which the goods, so

sold and delivered, were sold by the defendant. *Holy v. Hicks*, 3 Ir. L. Rep. 92, Ex.

When trustees of a road entered into an agreement for the toll of a gate upon the road with A. for a certain sum by the year. And A. took possession of the gate and received the tolls. Held that they were entitled to recover in an action of assumpsit, on the agreement, although they could demise only by deed. *Minhear v. O'Leary*, 1 Ir. L. Rep. 78, Q. B.

Consideration to support.—In an action against A. and B., (his wife,) on the joint and several promissory note of B., and a former husband. It appeared at the trial that B. was possessed of separate property at the time she signed the note, and that on application for payment of the note, during her widowhood, she admitted the debt and promised to pay it. The fact of her having separate property did not appear upon the declaration, which after stating the making of the note by B. and her first husband, and the death of the latter, averred that B., whilst a widow, and sole, "in consideration of the premises" promised to pay the note. Held on motion in arrest of judgment, that the declaration was bad, as not disclosing a sufficient consideration for the promise of B. *Ferrar v. Costelloe*, 4 Ir. L. Rep. 425, Ex.

For money paid to the Defendants use.—A. being seized of an estate for life, agreed to convey the same to B. his son, in consideration of a certain annuity, and also that the son should pay his debts, which were enumerated on a schedule annexed to the deed of conveyance. When the parties were about to execute the deed, it was discovered that a debt due by bond from A. to C. was omitted, and A. refused to execute the deed, until B. wrote a letter stating, that A. "having, at the time of the execution of the deed, conveying his estate to me, stated that there was a debt due by him to C. which is not included in the schedule, at foot of said deed of conveyance, I agree to secure, and pay the same, and that A. may be released and discharged from payment thereof;" C. accepted of this letter shortly after it was written; recovered two sums, on account of interest upon the bond debt, from B., and had not after looked to A. for payment; but B. had at one time offered to pay the whole of the principal sum to C. An action of assumpsit was brought for the recovery of this debt, by C. against B. Held that it could not be maintained; first, because if the contract by B. was considered as a collateral agreement, the latter did not shew a sufficient consideration to sustain the action; secondly, to charge the debt of the defendant upon it as an original undertaking; a release to C. or A., or an offer to execute such release, ought to have been relied upon and established. *Cooper v. Foster*, 4 Ir. L. Rep. 259, Q. B.

The defendant, by a written agreement, took a house from the plaintiff, at a certain yearly rent, "above taxes," the succeeding tenant having been obliged for to pay an arrear of taxes, which had accrued due during the period of the defendant's occupancy, was allowed by the plaintiff to take credit in his rent for the sum so paid. Held that the plaintiff might recover the amount, in an action of

indebitatus assumpsit, for money paid to the defendant's use. *Thorp v. Heron*, 4 Ir. L. Rep. 319, Ex.

When a statute, creating a corporation, directs that the council of the corporation shall take an account of the expenses incurred in carrying into effect the provisions of the Act, and then that the council should order the town clerk to pay the same. Semble, such an order to the town clerk does not raise an implied assumpsit, by the corporation, to pay such expenses. *Humphreys v. Lord Mayor, &c., of Dublin*, 6 Ir. L. Rep. 159, Q. B.

Quere, is the town clerk liable for these expenses. *Ib.*

Where, on the death of a lessee for lives, his heir-at-law took possession of premises demised to the lessee, and the rent thereof having become due after the death of the lessee, and during the possession of the heir-at-law, the executor of the lessee was compelled to pay it to the lessor. Held that the heir-at-law was liable in an action for money paid. *Kirkwood v. Burke*, 7 Ir. L. Rep. 387, Q. B.

Held, also, that the executor was not bound to sue in his representative capacity. *Ib.*

By a decree of the Court of Chancery, a demise of six twenty-one parts, of certain lands, for nine hundred years from the year 1811, was executed in 1840 by the plaintiff to the defendant, and two others as tenants in common, pursuant to articles of agreement of 1786, and which lease contained the following recital, "and whereas it is the true intent and meaning of these presents, and of the parties hereto, and the said W. Fitton, (the defendant,) P. B. Fitton, and R. Fitton, do hereby admit and acknowledge, that they the said W. F., P. B. F., and R. F., their executors, administrators, and assigns, and their estate and interest, under these presents, in the premises hereinafter demised are, and shall be liable to the payment of rent charge, in lieu of tithes or tithe composition, which now is, or hereafter shall be, chargeable upon, or payable out of the premises hereinafter demised, in addition to the yearly rent hereinafter reserved; and that the lessors in these presents, their heirs, executors, administrators and assigns, shall be wholly exempted therefrom." And in the *reddendum* the rent was expressed to be payable "over and above all taxes, charges, rates, assessments, rent-charge, in lieu of tithes, and other impositions whatever, imposed, or to be imposed by Act of Parliament, or otherwise, quit and crown rent only excepted." The plaintiff having in five twenty-one undivided parts of the same parcel of land, also demised by him to the same lessees, an estate liable to the tithe rent-charge, under threat of legal proceedings, paid the tithe rent-charge, due out of the eleven twenty-one parts, and sued the defendant in assumpsit for contribution, in respect of the six-twenty-one undivided parts, held under the lease of 1840. Held, first, that under the above state of facts, the defendant was entitled to pay the rent-charge in question, and sue the defendant for contribution; secondly, that covenant for the amount was not maintainable upon the lease of 1840; and that the action was well brought in assumpsit, for money paid to

the defendant's use. *Davis v. Fitton*, 10 Ir. L. Rep. 81, Ex.

Where a party gives one promissory note in substitution for another, which is accepted by the holder of the first in discharge of it, an action for money paid, for the use of the defendant, is maintainable. *McKenna v. Hartnett*, 1 Ir. Jur. 232, Ex.

A special verdict stated, that "the defendant did receive, as salary and fees, for executing the duties of the office, the sum of £3,011 9s. 4d." Held, that the salary and fees, so found to have been received, were legal fees, as such, and recoverable in an action for money had and received. *Darley v. Smyth*, 10 Ir. L. Rep. 376, Ex. Ch.

Moral Obligations.—A father is not under any legal obligation to provide for the support of his child; and to make him liable for necessaries supplied for the maintenance of the child, there must be a contract expressed or implied; nor will the fact, that the father has permitted the child to live with the mother, while she lived apart from him, be any evidence that she is an agent of the father, or that she has any authority from him to contract debts for the maintenance of the child, when he disputes the legitimacy of such child. *Day v. Spread*, 4 Ir. L. Rep. 247, Q. B.

For Deposits paid upon Undertakings abandoned or abortive.—The defendant being the proprietor of certain shares in a projected joint stock company, for which he paid a deposit of £50, sold the same to the plaintiff for £250, through a third person who negotiated the entire sale. In about a fortnight after the project was set on foot it was entirely abandoned; and, before any deed or written agreement was executed by the parties, the plaintiff received back the £50, the amount of the original deposit on the shares he purchased, and then brought the present action for money had and received for his use, by the defendant, in order to recover the residue of the £250. Held, that he was entitled to recover that sum. *Maguire v. Goddard*, 8 Ir. L. Rep. 306, Q. B.

Use and Occupation.—Where A. was tenant from year to year to B. and C., the holding being in each case from November to November. B. served notice to quit upon A. and C., requiring them to deliver up possession on the 1st of November, 1840; and brought his ejectment in January following. In February following C. gave up possession of the premises; and in 1842, B. having obtained judgment in the ejectment against A. he executed his *habere*, and turned A. out of possession. It also appeared that C. had paid all rent due by him to November, 1840. Held, that, under these circumstances, A. could not maintain an action for use and occupation against C. for any rent to accrue after November, 1840. *Harman v. Henderson*, 5 Ir. L. Rep. 477, Q. B.

In assumpsit for use and occupation, if it appear on the cross-examination of the plaintiff's witnesses that the agreement on which the action is brought, though originally made and entered into by parol, was afterwards reduced into writing, and signed by the plaintiff, that agreement must be produced, or proper ground laid to admit of secondary evi-

dence. *Thunder v. Warren*, 8 Ir. L. Rep. 181, Ex.

In an action for use and occupation, the plaintiff proved by a witness the fact of the occupation by the defendant, and on his cross-examination admitted there was a written agreement in existence which the plaintiff did not produce. Held, that such instrument ought to have been given in evidence; and a declaration, by the defendant, of his holding at a particular rent, was not admissible. *Lawless v. Queale*, 8 Ir. L. Rep. 382, Q. B.

A. being in possession of certain premises, at a yearly rent, proposed by letter to B. to become lessee of the same, and additional premises, for the same term that B. held, at a specified rent payable half yearly, to commence on the 1st of May then next—reserving power to pay the ground rent to the landlord, and deduct the same from the stipulated rent; and, also, reserving liberty to purchase the right of B., in said premises, at any time after the date thereof; A. having remained in possession for two years subsequent to this proposal, and no lease having been executed—Held, that an action for use and occupation was properly maintainable for the rent in arrear. *Henry v. Vance*, 8 Ir. L. Rep. 205, Q. B.

When a corporation purchased houses, pursuant to power given them by certain town improvement Acts of Parliament, which did not directly authorise a letting by will from year to year, and which houses, at the time of the purchase, were in possession of yearly tenants, whose interests had not been purchased, nor had they been remunerated for damages done by the works of the corporation—Held, that the corporation might sue them in use and occupation, for rent accruing after the purchase. *The Corporation of Belfast v. Tisdall*, 1 Ir. Jur. 206, Cir. C. [Per Pigot, C. B.]

The defendant was declared tenant under the court in a mortgage matter. In the month of December, 1846, on the receiver being discharged, the plaintiff, (the mortgagor,) distrained the defendant for the rent, which the latter paid under pressure of the distress. In the month of March following the plaintiff put the defendant out of possession by an injunction, and brought an action for use and occupation, for the period intervening, between the preceding November, and the time of executing the injunction. Held, that such an action was maintainable. *Mitchell v. Bulfin*, 1 Ir. Jur. 143, Ex.

At the period of the setting, the following memorandum was entered—"Declare Edward Bulfin tenant to the lands, at £66 per annum, he paying the inheritor for his seed and labour, and getting in return compensation for the grass which has been consumed." Held, to be conclusive of the nature of the agreement, and that plaintiff could not sustain a count for the price and value of crops bargained and sold. *Id.*

Semble, that an action for use and occupation of an incorporeal hereditament does not lie, except it be incident to the reality. *Minhear v. O'Leary*, 1 Ir. L. Rep. 73, Q. B.

A tenant sued in an action for use and occupation, and who obtains a verdict which is bad, by reason of the misdirection of the judge who tried the case—cannot, as cause against a motion for a new trial, rely upon the wrongful eviction by his landlord,

during the term, as suspending the rent altogether unless the fact of eviction has been found by the jury. *Smyth v. Kellett*, 1 Ir. L. Rep. 43, Q. B.

Action for Money had and received.—A. being seized of government stock, standing in his name died intestate; and B. obtained administration of him; B. died intestate, and C. obtained administration, *de bonis non*, to A.; C. executed power of attorney, authorising E. to sell out the stock, and receive the amount for her, which E. did; C. afterwards died without having received the proceeds of the sale, and appointed D. his executor; D. may recover the amount of the proceeds, in an action for money had and received by G., to the use of C. *Curbois v. Bereton*, 2 Ir. Rep.

Pleadings in indebitatus Assumpsit.—The declaration stated, that the defendant was indebted to the plaintiff, in a certain sum, for the use and occupation of certain premises, without stating promise to pay it. It also contained the money counts, which were introduced under a "whereas also," and concluded with an averment, that the defendant, in consideration of the premises respectively, promised to pay the said last mentioned several monies respectively on request. Held, on demurrer, that there were two counts in the declaration, and that the first was bad, for want of promise; the word "last mentioned;" in the second count not extending to the first. *Wilson v. Wilson*, 3 Ir. L. Rep. 538, Ex.

A count for use and occupation, reciting "that the defendant held, and occupied the premises," and by the permission of the plaintiff. Held, on special demurrer, to be bad. *Osborne v. Fox*, 4 Ir. L. Rep. 369, Q. B.

The declaration stated, that the defendant was indebted to J. C. deceased, in a certain sum for work and labour; and in another sum for goods sold by the said J. C.; and in another sum for agist divers cattle, without averring any promise to pay. It also contained the money counts, which commenced thus—"And, also, the said defendant, on the same day and year, and at the place above said, was indebted," &c.; and concluded—"And therefore, the defendant afterwards, to wit on the day and year last aforesaid, and at the place above said, in consideration of the premises, then there promised to pay the said last mentioned several monies respectively, to the said J. C. in his life time, on request; yet he hath disregarded the promises, and hath not paid any of the said monies or any part thereof." Held, on special demurrer, the first set of counts were bad for want of a promise. *Condon v. Ryces*, 7 Ir. L. Rep. 399, Q. B.

Pleadings in special Assumpsit.—The declaration in the first count averred, that certain accounts had been commenced by one B., as trustee of the plaintiff, against C. and S., for certain sums by them to B.; that judgment was recovered against them, and C. and S. taken in execution thereat in consideration thereof, and that the plaintiff, at the request of the defendant, would consent to the discharge of the said C. and S. out of costs on their paying the sums respectively due by them, and half the costs, the defendant

the plaintiff the other half of the costs; it averred the consent of the plaintiff to their urge, on paying the amount of said sums, and the costs; that the other half of the said costs to be paid by the defendant on request, and stated the breach. The third count was averring, that the defendant promised to be answerable to the plaintiff for half the costs, in consideration that the plaintiff would consent to let the sheriff to discharge them. Held, on demurrer, that these counts were bad, there being no averment that the costs remained due and unpaid by the defendant not being previously liable.

Held, also, that the consent stated in the first count should be a consent from the plaintiff in the declaration, and that it should be averred that such consent continued to the bringing of the action. The second count stated, that the defendant promised to pay half the costs, without stating to whom. Held to be bad for want of that averment. *May v. Ware*, 1 Ir. L. Rep. 246, Q. B.

The statement that one person is trustee for another is not sufficient; the nature of the trust must be shewn. *Ib.* [Per Burton, J.]

In a declaration in assumpsit there were three counts on bills of exchange. The first stated the defendant as acceptor; the second and third as drawer of two other bills; and the common-law counts. The first count contained the promise to pay, according to the tenor, &c.; the second and third counts, that the general promise was stated in either the second or third; the fourth count contained the words "promised to pay, according to the tenor, &c.; the promise was stated in either the second or third; the fifth count contained the words "promised to pay, according to the tenor, &c.; the sixth count, that the general promise in the conclusion, extended to these counts, notwithstanding the words last mentioned. *Mills v. Field*, 1 Ir. L. Rep. 323, Q. B. [See *Lomas v. M.*, 3 C. B. 763.]

In an action by the holder, against the indorser, it is not necessary to aver a promise, in each count; the promise in the conclusion, given by the rules of 1834, extending to all. *Roches v. Jones*, 3 Ir. L. Rep. 178, C. P.

Held, also, that the averment, "promised to pay said several monies to the plaintiff," was tantamount to a "promise to the plaintiff to pay him," *Ib.*

The declaration stated, that one H. A. was indebted to the plaintiff in £100 as his salary, for services done by the plaintiff for the said H. A., in the trade of corn-factor; and that H. A. assigned the defendant his business, and the good will of the said business, and that defendant, in consideration of plaintiff agreeing to assist him in carrying on said business, and collecting said debts, promised to hold himself accountable for the payment of plaintiff's salary, due by H. A. to plaintiff; and in consideration of the promises, the defendant undertook, and promised to pay, the last-mentioned sum of money, to the plaintiff, on request. The common money counts were added, averring a general breach, but without averring a specific request. Held upon writ of Error, that the verdict and judgment for the plaintiff, that the declaration was bad; it appearing that the defendant's promise was a promise to pay the debt to another person, H. A., upon request; yet that

no default was alleged on the part of H. A., and no request averred on the part of the plaintiff.

Held, also, that the defect was not cured by the verdict, a previous request being necessary to give title to the plaintiff, such request being laid in the declaration as part of the defendant's promise. *Maher v. O'Shea*, 3 Ir. L. Rep. 516, Ex. Ch.

In an action of assumpsit the plaintiff declared that he was seized under an indenture of release, of certain premises by which he covenanted to pay the rent thereby reserved, and also to keep the premises in repair; and being so seized, and having in his possession such indenture, the defendant, in consideration that the plaintiff would deliver him the indenture, and put him in possession of the premises, promised to pay the rent, and keep the premises in repair. Plea, that this promise was parcel of a contract, respecting an interest in land, was within the Statute of Frauds, and required a note in writing. Held, upon general demurrer to this plea, that it appeared sufficiently on the pleading, that the agreement concerned an interest in land, to bring it within the Statute of Frauds. *Bentham v. Hardy*, 6 Ir. L. Rep. 179, Q. B.

A declaration stated, that in consideration that the plaintiff, and one E. B., now deceased, at the special instance and request of the defendant, had given and made to the defendant a proposal of £15 a year, with a fine for certain lands, undertook, and promised the plaintiff, and the said E. B. to complete a purchase of the estate, and to execute a lease of the premises; and averred, as a breach, that the defendant did not effect and complete the purchase of the estate, nor execute a lease of the premises. Special demurrer, that there was no averment of a performance of precedent matter by the plaintiff, or of a special request by the plaintiff to the defendant to execute the lease; and that there was no averment of a reasonable time having elapsed, or that a conveyance had been tendered by the plaintiff to be executed. Held that the declaration was bad. *Dolan v. M'Ternan*, 9 Ir. L. Rep. 175, Q. B.

A declaration stated, that in consideration that the plaintiff, at the request of the defendant, had then and there bought a horse of him, he then and there promised that the horse was sound. Held, on special demurrer, to be good; for that the sale and warranty were contemporaneous, and that the statement in the declaration was not an averment of a sale being had before the promise was made. *Smyth v. Morrison*, 10 Ir. L. Rep. 213, Q. B.

The declaration contained a count in assumpsit by payee against the defendant, as one of three joint and several makers of a promissory note for £24, and the money counts. Pleas, the general issue to the whole declaration, and to the second count, *actio non*; because before the making of the note in the first count mentioned, the defendant was indebted to the plaintiff in £20, and thereupon, in consideration that the defendant, at the special instance and request of the plaintiff, could procure one P. R. and J. M., to join the defendant in making the said note, the plaintiff promised and undertook not to take any proceedings by city attachment, or otherwise, for the recovery of said sum of £20, until default should be made in the payment

of the said note; and that the defendant did procure the said P. R. and J. M. to join in making the said note; and the same was made upon the terms and the consideration aforesaid, and upon no other; and that afterwards, and before the note became due, the plaintiff, in violation of said agreement, and of the terms and consideration upon which the note was made, sued out of the Court of Record, of the borough of Dublin, a certain writ, called a city attachment, and procured the defendant's goods and chattels to be seized and attached; and afterwards prosecuted an action in said court, against the defendant, for the said sum of £20, in violation of the agreement and the terms, and consideration upon which said note was made. On the first plea the plaintiff joined issue, and to the special plea replied—that the promissory note, in the said plea mentioned, was not made upon the terms and consideration in said plea alleged. The jury found for the defendant upon the special plea, and, by the direction of the court, for the plaintiff upon the general issue, on the first count, and for the defendant on the issue on the *indebitatus* counts, which were not sustained by the evidence. Held that the special plea was a valid one, and that the finding of the jury thereupon having shewn a total failure of consideration, the defendant was entitled to a general verdict upon the record. *Pepper v. Maguire*, 10 Ir. L. Rep. 461, Ex.

A declaration in assumpsit by the indorsee against the acceptor, which contained a special count, with the usual promise to pay in it; and the common money counts concluded with an averment, that the defendant afterwards, &c., in consideration of the promises respectively, then and there promised the plaintiff to pay the last mentioned monies respectively, on request; yet he hath disregarded his promise, and hath not paid any of the said monies, or any part thereof, to the plaintiff's damage, &c. Held, to be a sufficient averment of a breach of the promise contained in the special count. *Bourke v. Cooney*, 6 Ir. L. Rep., C. P.

Evidence.—On a sale by auction of certain property of a bankrupt, the conditions of sale referred to public advertisements, which professed to contain a description of the property to be sold. Held, in an action of assumpsit, by the vendee against the assignee of the bankrupt, to recover back the deposit on the purchase money, that these advertisements were admissible to show that the conditions of sale misdescribed the premises. *Thompson v. Guy*, 7 Ir. L. Rep. 6, Q. B. [Pennefather, C. J., *dissentiente*.]

ASSURANCE, (POLICY OF.)

Policies on Life.—A policy of assurance effected on the life of E. F., commenced with a recital that E. F. had proposed to effect an assurance on his own life with the C. J. company, and had deposited in the office of the said company a declaration signed by him, dated &c., which being set forth as the strict statement of the facts, was received as the basis and condition of the contract of assurance between the

said E. F. and the company, setting forth, &c. (setting forth and qualifying certain of the items contained in the declaration, with respect to his age, health, habits, and his accession to the articles of agreement, and constitution of the company, and omitting the others,) and the policy concluded with a proviso "that in case any untrue or fraudulent allegation be contained in said declaration deposited in the office as aforesaid, or that any information respecting the past health or habits of the person assured, or any other circumstance important to the directors to know shall have been withheld from them, or in case payment of the said premium shall not be regularly made as aforesaid, or if the income on the part of the assured in the life shall not determine, or in case any of the nullities specified in the conditions hereunto annexed, as well as the original proposal, then and in every such case the policy shall be null and void, and all monies therefor shall be forfeited to the company." The plaintiffs averred in their pleadings that the declaration of the said E. F. so referred to in the policy, and so made by him, was in all respects true. Held that all the matters contained in the proposal of declaration referred to in the policy, besides those specially set forth, were to be taken as matters of warranty and not of mere representation, and that therefore the suppression by E. F. of the fact of having been attended by another medical man besides the one named in the declaration, although one of those matters specially set forth in the policy, had vitiated the policy, though the jury found that the fact suppressed was neither fraudulently withheld, nor a circumstance important for the directors of the company to know. *Scates v. Seaming & Co.* 10 Ir. L. Rep. 367, Ex. Ch.

Overruling the judgment of the court below (10 Ir. L. Rep. 139, Ex.) *Brady, C. B., Richards, & Perrin, J. dissentientibus.*

Assumpsit on three several policies of assurance, each contained a provision that it should be void "if anything stated by the assured, either in the declaration thereinbefore mentioned to have been made by him should not be true." The proposal for assurance contained the following particulars: "Has the party's life been accepted or refused at any other office, and, if accepted, was it at the usual premium, or with what addition?" The answer returned by the assured was, "Asylum and National Office, at the usual premium." The following agreement appeared at the foot of the proposal, and was signed by the assured: "I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void." The defendant proved at the trial that the assured had proposed the same party's life for insurance at two other offices, previous to effecting the assurance with the defendants, and his proposal was rejected. The judge, in summing up, stated to the jury that it was for them to say whether there had been a concealment by the assured of any circumstance which it was material for the company to know. Held, that this was a misdirection, for the

the assured have contracted with the company that the several matters contained in the proposal should be answered truly, and, consequently, that the question, whether an answer given was more or less material, was not open to him. *Bennett v. Anderson*, 1 Ir. Jur. 245, Q. B.

Policies on Vessels.—A policy of assurance effected on a vessel contained the words "lost or not lost at Cardiff to Ballyshannon, beginning the adventure from loading thereof at Cardiff," and in a subsequent part of the policy were the words, "that the said vessel was warranted safe in port." Held that the words "safe in port" meant the port of departure, and that the vessel being at the time of effecting the policy safe in another port, did not satisfy the terms of the policy, *Kernahan v. The National Assurance Company*, 10 Ir. L. Rep. 319, Q. B.

Substitution of service upon Insurance Companies.—See PRACTICE AT LAW, (SUBSTITUTION OF SERVICE.)

ATTACHMENT.

Against Sheriff.—See SHERIFF.

For contempt of process of Court.—To obtain an attachment for not obeying a writ of *habeas corpus* if the writ be not personally served, the affidavit must state that a servant or agent of the party to whom the writ is directed was served at the house where the person was detained. *In re Wildridge*, 1 Ir. L. Rep. 1, Q. B.

Where an attorney had been subpoenaed to give evidence and excused his absence, on the ground that he was attending a motion in the Rolls Court, and denied the contempt, the Court refused an attachment at the instance of the plaintiff against whom there had been a verdict. *Collins v Green*, 3 Ir. L. Rep. 17, Q. B.

Where a witness came from the country to Dublin, pursuant to a subpoena *ad testificandum*, and attended court during the first day of the sittings, but did not attend on the next day until after the case had been called on, and the plaintiff nonsuited, the court refused to grant an attachment against the witness, it appearing that he had been induced to suppose from the state of the *Nisi Prius* list at the close of the first day, that the case could not come on at an early hour on the second; and the witness deposing that he had been unable to leave his bed until a later hour than usual on the latter day, in consequence of indisposition. *M Cormack v. Magrath*, 6 Ir. L. Rep. 519, Ex.

The court refused to attach a witness for not attending a trial in obedience to a subpoena, where his non-attendance originated in a misconception of the meaning of an arrangement entered into between him and the plaintiff's attorney, whereby he was to be sent for. *Ib.*

A material witness who was served with a subpoena *ad testificandum* on a certain day, and attended accordingly, but on finding that the trial was adjourned until the following day, expressed an intention of absenting, and did absent himself, was attached until he paid the costs of the non-suit occa-

sioned thereby, though the subpoena did not require him to attend "from day to day" until the cause was disposed of, and though he was not served with a further notice to attend. *Swanne v. Taafe*, 8 Ir. L. Rep. 101, C. P.

It is not necessary that a subpoena should be entitled in the name of more than one of the lessors of the plaintiff. *Ib.*

Where a question was left to the jury whether a particular witness was not collusively kept out of the way, Held, that the subpoena being to attend on a particular day only, was no defence, though it might be cause against an attachment. *Keating v. Smith*, Bl. D. & O. 159, N. P. [Per Pigot, C. B.]

For non-payment of Costs.—Where a motion to take a frivolous demurrer off the file was granted, and the parties filing it ordered to pay costs, Held, that an attachment might issue for them, as they could not be included in the execution, not being costs in the cause. *Anonymous*, 2 Ir. L. Rep. 66, Q. B.

Practice.—A conditional order for an attachment for the use of insulting expressions having been made; on cause being shown, the court, under the circumstances, ordered the cause shown to be disallowed, and the conditional order to be made absolute, but the attachment not to issue. *Sturgeon v. Douglass*, 10 Ir. L. Rep. 128, Q. B.

For non-performance of award.—See ARBITRATOR.

ATTESTATION—See WARRANT OF ATTORNEY.

ATTORNEY AND SOLICITOR—See WARRANT OF ATTORNEY. COSTS.

Admission.—The court, before permitting an attorney to be re-admitted who had, at his own desire, been struck off the roll, required him to serve notice on the Law Society of his intention to apply to be re-instated. *Anonymous*, 10 Ir. L. Rep. 111, Ex.

An attorney admitted as an apprentice under the circumstances of the case, though he had not served five years. *Ex parte Merville*, 2 Jon. 282.

A minor will not be admitted an attorney of the court. *Ex parte Robinson*, 2 Jon. 622.

The 1 & 2 Geo. 4, c. 48, applies only where the party has been bound apprentice after he has taken his degree. *Ex parte Colville*, 2 Jon. 624.

Privilege.—In transitory actions, an attorney has the privilege of suing in his own court, and laying and retaining the venue in the county in which it is situated. *Montgomery v. Cheyne*, 2 Ir. L. Rep. 163, Q. B.

In an action, by an attorney, for the recovery of a bill of costs, the venue was changed before plea pleaded to the adjoining county, upon an affidavit, that from the peculiar influence of the plaintiff in the county, where the venue was laid, a fair and impartial trial could not be had. *Boyse v. Smyth*, 2 Ir. L. Rep. 366, Ex.

If an attorney be sued in *autre droit* by bill, no

writ having been issued against him, his proper course is, to move to set aside those proceedings; if he appear and plead, or demur, he waives the objection. *Kehoe v. Wright*, 9 Ir. L. Rep. 261, Ex.

Where an attorney is sued in *autre droit* by bill, without process, the proceedings are irregular, and will be set aside with costs. *Keely v. Lynch*, 9 Ir. L. Rep. 563, Ex.

Where an attorney is sued as such jointly, with an unprivileged person, the declaration will be set aside for irregularity. *Johnson v. Sparkes*, 9 Ir. L. Rep. 139, C. P., S. C., Bl. D. & O., 49.

The circumstance of the defendant having compelled the plaintiff to give security for costs, is not a waiver of the irregularity *Id.*

An attorney of the superior courts, on appeal, can assert his privilege, as an objection to the jurisdiction of the Manor Court, though he appeared below by counsel and attorney. *Molloy, appell. v. Caldbeck, resp.* Bl. D. & O. 217. [Per Pigot, C.B.]

License-Certificate.—The defendant, who was an attorney, but had not taken out his license for several years, having been served with process, appeared by attorney, and pleaded in abatement his privilege to be sued by bill without process. The court refused a motion to set aside the plea. *Fury v. Ryan*, 6 Ir. L. Rep. 518, Ex.

Semble, that the 68 section of the 56 Geo. 3, c. 56, which imposes a penalty on an attorney practising without having obtained his annual certificate, does not apply to the case of an attorney practising in the Crown Court at Quarter Sessions. *Scott v. Frayne*, 5 Ir. L. Rep. 41, Ex.

Bill of Costs.—In an action for attorney's bill of costs, if it appear from the bill itself that the defendant is the person intended to be charged, the bill need not be drawn in the technical form of a debtor and creditor account. *Holmes v. Magrath*, 5 Ir. L. Rep. 376, Q. B.

An English solicitor suing, in this country a defendant resident here, for costs incurred in England, is not bound to serve his bill of costs, pursuant to the 6 & 7 Vict. c. 73,* (Eng.) prior to bringing his action. *Whyte v. Chichester*, 9 Ir. L. Rep. 409, Q. B.

An Irish solicitor suing in England for business done in Ireland, is not bound to serve his bill of costs one month before bringing the action. *Guinness, v. Allen*, 9 Ir. L. Rep. 412, Q. B.

Taxable items.—When a bill of costs was for conveyancing, with the exception of one item, for drawing a bond and warrant of attorney. Held, that the warrant being a taxable item subjected the whole bill to taxation, and no action could be brought on such a bill if not served pursuant to the statute. *Dunne v. Tierney*, 1 Ir. L. Rep. 321, Ex.

Taxation of.—Where an attorney delivered his bill a month before action brought, and after action brought, the client obtained an order to have the bill taxed, and more than one-sixth was struck off. The court refused to give the client the costs of taxation, no settled practice to the

contrary being shewn. *Hamilton v. Gould*, 2 Ir. L. Rep. 285, Q. B.

Copies of an attorney's bill of costs are not allowed in the taxation of the costs of an action brought to recover the amount of that bill. *Gower v. Donovan*, 2 Ir. L. Rep. 333, Q. B.

The court will not entertain a motion to review taxation before the costs have been signed by the officer. *Burke v. Ormsby*, 3 Ir. L. Rep. 64, C. P.

Where an executrix of an attorney sued for a bill of costs due to her testator, the court stayed the proceedings until the bill had been taxed, but without the costs of the motion, though the defendant had served a consent to pay when the amount should be ascertained. *Rowland v. Bole*, 3 Ir. L. Rep. 183, C. P.

When the practice of the taxing officer is the question to be decided, the court will not enter into it without the officer's report. *Irwin v. Jordan*, 3 Ir. L. Rep. 468, C. P.

A petition, praying that the respondent, an attorney, be ordered to tax his costs, and furnish a list of credits, without alleging misconduct on the part of the respondent, in having refused the credits required, or an undertaking on the part of the petitioner to pay the amount of the costs when ascertained. Held to be irregular, and that the respondent was entitled to the costs of the application. *Roddy v. Conroy*, 4 Ir. L. Rep. 135, C. P.

Where an action is brought by an attorney for the recovery of his bill of costs, and it appears that there is but one taxable item; though it be for business done in some other court of law, the court will stay the proceedings, and refer the bill for taxation—upon an undertaking by the defendant's attorney, to pay same when taxed and ascertained—independently of the 7 Geo. 2, c. 14, from the inherent jurisdiction which the court exercises over its own officers. *Bastable v. Reardon*, 4 Ir. L. Rep. 167, Q. B.

Where an action was brought upon two bills of costs, as to one of which the defendant admitted his liability. The court, upon his application, referred the undisputed bill for taxation, upon terms of his lodging with the officer a blank plea of confession, to be filled for the amount to which the said bill should tax, if the plaintiff should fail as to the disputed bill, but if he recovered the amount of it, that also, should be included in the plea of confession. *Kelly v. Antisell*, 4 Ir. L. Rep. 492, Ex.

When a bill of costs is pleaded as a set off, the court have discretion to order those costs to be taxed, without the plaintiff giving an undertaking to pay the amount. *Alter v. Dunne*, 9 Ir. L. Rep. 105, Q. B.

The court has jurisdiction, independently of the 7 Geo. 2, c. 14, to give to a defendant the costs of taxation, though the reference to tax be not made until after action brought. — *v. Massey*, Bl. D. & O., 150, Ex.

The court will not, on a motion by the defendant for the costs of taxation, enquire whether the taxation be correct, their being no motion to review *Id.*

Lien—and Motions for liberty to proceed for costs.—In an action of assault, the plaintiff having obtained a verdict with 40s. damages, and being indebted in

* This act has been extended to Ireland, 12 & 13 Vict. —Editor.

per sum than the amount of the costs of this, was afterwards discharged as an insolvent, on a motion by the plaintiff's attorney for y to issue execution for the costs of the action, that an admission by the attorney of his g being paid the costs, though explained was lent to let in the equities between the parties, deprive the attorney of his lien on the judgment for his costs. *Ronayne v. Doherty*, 4 Ir. L. 332, C. P.

e parties having entered into a consent, which made a rule of court, that the proceedings in a win suit should be stayed, on the terms of the diff investing one moiety of the arrears and agreeing for certain specified purposes, and paying the other moiety to the defendant, Held that attorney for the defendant had no lien on the judgment for his costs. The court ordered attorney to pay the costs of the motion, it appearing that the bill of costs was large and unnecessary, and only a small balance due. *Regan v. O'Connell*, 4 Ir. L. Rep. 402, C. P.

here an interlocutory judgment in an action unliquidated damages had been set aside upon in terms, and before those terms had all been complied with; the plaintiff and defendant compromised the action without the knowledge of the plaintiff's attorney. The attorney will not be allowed to treat this as a subsisting judgment, for purpose of recovering his costs against the defendant. *Wulsh v. Delany*, 5 Ir. L. Rep. 203, Q. B.

an action of trespass, the defendant before trial effected a compromise with the plaintiff, without the knowledge of his attorney. Upon an application on behalf of the attorney to compel the defendant to pay him his costs. Held that this was an action of tort for unliquidated damages, and the solicitor had no lien for the costs against the defendant. *Ex parte Mitchell*, 3 Ir. L. Rep. 83, Ex. Ch. The rule is, that the parties may compromise, and be served with notice not to do so, without the knowledge of the attorney, and releases may be made, if it be done without collusion. *Mulligan v. Regan*, 3 Ir. L. Rep. 323, Q. B.

After arrangement filed, an arrangement was entered into between the parties, with the privity of the plaintiff's attorney, that securities should be given for the debt, and that the defendant should pay a sum of £6 to the plaintiff's attorney for his costs, it being understood, that the proceedings in the suit were not to terminate until the costs were paid. The securities were duly paid, and repeated applications made, for the costs. Held that the plaintiff's attorney was irregular in proceeding in the suit, without the leave of the court. *Farrell v. Elly*, 6 Ir. L. Rep. 147, [Doherty, C. J. dissentiente.] The defendant's acceptance being dishonoured, the plaintiff's attorney paid the amount to the holder of the bill (banking company), who promised to send him a bill which they had sent to their attorney. By the same post application for payment was made by the attorney both of the plaintiff and of the bank, the latter of whom stated that the bill was in his hands. The defendant, after declaration at the plaintiff's suit, paid the attorney of the bank, got the bill, and pleaded the general issue. The court refused to allow the attorney of the plaintiff to proceed

with the action for his costs, and directed a *stet processus*. *Murphy v. Kelly*, 10 Ir. L. Rep. 472, Ex.

Where a party collusively, and without the privity of his attorney, consented to a compromise of the cause of action, the consent was set aside, and the attorney held to be entitled to his lien for costs, though he had served no cautionary notice. *Nugent v. O'Brien*, Bl. D. & O. 208, Q. B.

If after action brought the demand is settled without the knowledge of the attorney, it is not sufficient that he should serve notice of his intention to proceed for his costs; he should apply to the court for such leave. *Kirwan v. Hampton*, Bl. D. & O. 227, Q. B.

Reference to Tax.—After plea pleaded, the defendant will be allowed to have a bill of costs referred for taxation, without an undertaking to pay the amount when ascertained and without prejudice to his right to dispute the retainer. *Dolphin v. Bird*, 7 Ir. L. Rep. 216, C. P.

Recovery after Taxation.—Where the plaintiff, on changing his attorney, signed a consent, which was made a rule of court, that it should be referred to the taxing officer to tax and ascertain the amount of the costs of the former attorney, the usual undertaking to pay was omitted. The costs having been taxed, certified, and demanded, the court refused to grant an attachment against the plaintiff for non-payment; and the cause having been referred to arbitration, by a rule of *Nisi Prius*, the court further declined to stay the proceedings in the cause, or to make an order for payment within a specified time. *Blake v. Blake*, 7 Ir. L. Rep. 211, C. P.

Jurisdiction of Court over.—See OFFICER (OF SUPERIOR COURTS.)

ATTORNEY GENERAL.

The privilege of the attorney general to open a demurrer is personal and cannot be deputed. *Regina v. Duffy*, 9 Ir. L. Rep. 329, Q. B.

AUCTION—See SALE. VENDOR. PURCHASER. AUCTIONEER.

AUCTIONEER—See SALE.

The defendant having been previously in treaty with two persons for the sale of a farm, gave notice to them to come to his house at a particular time, when the property should be set up and sold. They attended at the appointed time, a few of the defendant's friends and neighbours being also present, one of whom put down in writing the names of the bidders, and the conditions of the sale; after several biddings by both the persons who had been negotiating for the purchase of the farm, one of them having outbid the other, was declared by the defendant to be the purchaser. Held that this was not such a sale by auction as subjected the seller to the penalty imposed by the 54 Geo. 3, c. 82, on a person acting as an auctioneer without being licensed, or as rendered the sale liable to the auction duty. *Attorney-General v. Cathew*, 3 Ir. L. Rep. 149, Ex.

Quære.—If a person selling his own goods by auction, subjects himself to the penalty imposed by the 54 Geo. 3, c. 82, on an unlicensed auctioneer. *Ibid.*

In construing the terms of a penal act, the court is bound to see that the transaction sought to be effected by it is within the plain and ordinary meaning of those terms. *Ib.*

It is not necessary for the special bailiff of a sheriff to take out a license as an auctioneer, or to employ a licensed auctioneer to entitle him to sell, by public auction in the usual way, goods taken by him in execution under a civil bill decree, he not being thereby a person carrying on the trade and business of an auctioneer within the meaning of the 6 Geo. 4, c. 81, s. 26. *Reg. v. Martin*, 4 Ir. L. Rep. 153, Q. B.

Quære, is the 46th sec. of the 6 & 7 W. 4, c. 75, repealed by the 1 Vic. c. 43, s. 3.

A special bailiff, nominated by the plaintiff, and appointed by the sheriff, is not enabled to sell by way of auction, goods taken in execution under a civil bill decree, without being licensed, or procuring the assistance of a licensed auctioneer. *Attorney-General v. Malone*, 9 Ir. L. Rep. 245, Ex.

—◆—
AVOWRY—*See* DISTRESS. REFLEVIN.

—◆—
AWARD—*See* ARBITRATION.

—◆—
BAIL—*See* AFFIDAVIT. ARREST. COMMISSIONERS.

Notice of.—A notice of, describing the bail as of "S. A. Street, Druggist," where it appeared that he resided in S. A. Street, but carried on business in a different place, held to be sufficient. *Williams v. Ansell*, 1 Ir. L. Rep. 277, Ex.

There is no distinction, in a notice of bail, between the word "householder" and "housekeeper." *Coughlan v. Devine*, 1 Ir. L. Rep. 375, Ex. [Per Richards, B.]

A notice of bail, in which the bail are described as householders, is sufficient. *Anonymous*, 1 Ir. L. Rep. 229, Ex. [Per Pennefather, B.]

A notice of bail, which describes the bail as householders instead of housekeepers, is bad. *Foudrinier v. Pike*, 1 Ir. L. Rep. 2, Q. B.

Commissioners for taking bail.—Commissioners for taking bail in the country have no authority to take a recognizance of security for costs. *Loveland v. Daly*, 3 Ir. L. Rep. 537, Ex.

Surrender.—When a *ca. sa.* had issued against a trader, who had entered into a bond with sureties under the 3 & 4 Vic. c. 105, s. 8, and a return of *non est inventus* was filed on the 9th of February, and a writ issued against the sureties returnable the 15th of April, and an appearance was had on the 23rd. Held, that the sureties were too late in offering to surrender their principal on the 25th of April. *Leamings v. Marshall*, 6 Ir. L. Rep. 454, Q. B.

Sureties with a trader on a bond under the 3 & 4 Vic. c. 105, s. 8, conditioned to pay the amount of debt and costs which might be recovered against the principal, or to render himself, were after judg-

ment allowed to render their principal in discharge of the condition of the bond. *Baile v. Coyne*, 6 Ir. L. Rep. 214, Ex.

Bail bond.—Where the names in the bail bond were different from those in the defendant's order, and notice of bail, and it was not stated where it was taken, though it appeared to have been acknowledged before a commissioner, it was held to be informal, and was ordered to be taken off the file of the court. *Anonymous*, 2 Ir. L. Rep. 169, Q. B.

The 8th new General Rule does not apply to an attorney giving security for costs for a plaintiff who resides out of the jurisdiction. *Anonymous*, 1 Ir. L. Rep. 294, Q. B. [Per Burton, J.]

Lodging money in lieu of bail bond.—A party arrested on an affidavit to hold to bail, and the money for which the flat issued was lodged by his attorney out of his own money, Held, that a party making such lodgment is to be regarded with the same favour as bail, and is entitled to all the advantages which he would have had in showing error or irregularity in the plaintiff's proceeding, in case he had actually joined in a bail bond. *Johnston v. De Pothonier*, 5 Ir. L. Rep. 25, Q. B.

The practice as to lodging money in lieu of bail is not altered by the 3 & 4 Vic. c. 105, s. 3. *Rusell v. Clifford*, 8 Ir. L. Rep. 3, Q. B.

Sufficiency of.—A person, tendered in bail swore he was worth double what he owed, but admitted his having bills of his protested without being able to account satisfactorily for his having done so, was refused. *Williams v. Ansell*, 1 Ir. L. Rep. 277.

Action on.—In an action on a bail-piece, the judgment against the principal is but collateral, and an indorsement to the action and not the foundation of it. The declaration alleged that the plaintiff recovered a judgment against the principal on the 17th of June, 1840; on the production of the record it appeared from the entry on the roll, to have been recovered on the 27th of May, 1840—the 17th being marked in the margin of the roll as the day on which it was actually entered. *Pls. nul tiel record.* Held, that there was no variance, the allegation of the recovery of the judgment being an allegation of substance and not of description. *O'Loughlin v. Fogarty*, 5 Ir. L. Rep. 54, Ex.

Semble, that if the judgment against the principal were matter of description, there would be no variance, as the day marked, pursuant to the statute, on the margin of the roll, is the true date of the judgment. *Ib.*

Staying proceedings.—Where in an action against bail, the bail bond was executed the 18th Nov. 1837, the bail offered to render the principal on the 21st, but subsequently requested the plaintiff to stay proceedings on the bond, the principal in the meanwhile became insolvent, and the action on the bond was not commenced till the 21st Sep. 1839. A motion by the defendant to stay proceedings was refused with costs. *Norris v. Callan*, 2 Ir. L. Rep. 180, Q. B.

Affidavit on which to ground a motion to stay proceedings, must deny collusion with the principal. *Ib.*

Where the defendant had been arrested, and had given bail to the sheriff under the 3 and 4 Vic. c. 105, the court stayed proceedings on the bail bond without an affidavit of merits. *Ferrier v. Purcell*, 3 Ir. L. Rep. 262, Ex.

Bail in error.—A defendant who has brought writ of error *coram vobis*, will be ordered to give bail in error within four days, or plaintiff to be at liberty to issue execution. *White v. Mulhall*, 1 Ir. L. Rep. 355, Ex.

An order for the payment of costs incurred by reason of a notice to give bail in error, will not be granted though the notice fail in consequence of the non-attendance of the plaintiff to perfect his recognizance. *Middleton v. Sadler*, 4 Ir. L. Rep. 134, Ex.

Bail in criminal cases.—See CRIMINAL LAW.

Bail on removing cause from inferior courts.—See CERTIORARI.]

BAILIFF—See SHERIFF, AUCTIONEER

BANK—(JOINT STOCK.)

Pleading.—The defendant was sued as the public officer of a banking company established under the provisions of the 6 Geo. 4, c. 42, and was described in the commencement of the declaration as “the nominal defendant for and on behalf of a certain society or co-partnership, called the Southern Bank of Ireland,” and was stated to be sued as one of the public officers “pursuant to the statute in that case made and provided;” but in the body of the declaration the contract was stated as made with the defendant without saying as public officer. The proof at the trial was of a contract with the society or co-partnership. Held, that it sufficiently appeared in the pleadings that the defendant was sued in his official, and not in his individual capacity. *Keily v. Whittaker*, 1 Ir. L. Rep. 28, Ex.

The privilege given by the 6 Geo. 4, cap. 42, to banking companies established under the provisions of that act of suing in the name of any one of their public officers, does not authorize the institution of a suit in the name of more than one. A declaration so framed is bad on demurrer. *Thompson v. Birnie*, 2 Ir. L. Rep. 234, Ex.

The 7 Geo. 4, c. 46, Eng. (analogous to the 6 Geo. 4, c. 42, Ir.) is a public act, and the 10th section applies to actions brought in Ireland as well as in England. The public officer of an English company established under that statute may bring actions in Ireland for debts due to the company without specially setting out the statute in the declaration. *Wright v. Murphy*, 4 Ir. L. Rep. 258, Q. B.

The declaration described the defendant as “one of the public officers of certain persons united in copartnership for the purpose of carrying on the business of bankers in Ireland, according to the statutable enactments in that case, made and provided.” Held, on special demurrer, to be bad, for not stating that the copartnership was then carrying on, or had carried on the trade and business of bankers. *May v. Hodges*, 5 Ir. L. Rep. 584, Q. B.

The declaration stated, that, “I. F., one of the public officers of the society, or copartnership,

called the Belfast Banking Company, who sues on behalf of the said society, according to the statute, in such case made and provided;” and the causes of action were averred to have accrued, and the promises to have been made “to the plaintiff;” and the breach to the plaintiff’s damage, as such public officer. Held to be bad, upon special demurrer, for not shewing that the company were so constituted as to enable the plaintiff to sue on their behalf, pursuant to the 6 Geo. 4, c. 42. *Thompson v. Kelly*, 6 Ir. L. Rep. 32, Ex.

Held, also, that the words, “as such public officer,” could not be rejected as surplusage, so as to admit of the plaintiff’s recovering in his own right. *Id.*

Held that it was not necessary expressly to name the statute under which the plaintiff sued, it being a public general statute of which the court would take judicial notice. *Id.*

A declaration stated, that J. H., “the plaintiff in this suit, one of the public officers of certain persons carrying on the business of bankers in England, in copartnership, under the name, &c., of the Yorkshire Banking Company, according to the form of the statute, in such case, made and provided, and who has been, and is registered at the Stamp Office London, pursuant to the said statute, to sue, and be sued, on behalf of the said copartnership, and, also, as such public officer, duly registered as aforesaid, sues as nominal plaintiff, on behalf of said copartnership,” &c.; and concluded, “and thereupon the said plaintiff, as such public officer, for, and on behalf of the said copartnership, the said Y. B. C., by virtue of the said statute, brings his suit,” &c. Held, that there was no necessity to aver that the public officer had been nominated by the company; registration, under the statute, is proof both of nomination and of appointment. *Howard v. Love*, 10 Ir. L. Rep. 505.

Held, also, that the mode of pleading is not altered by the provisions of the 7 & 8 Vict. c. 113, that statute not subjecting to any disability or condition companies that existed at the time of its passing. *Id.*

An allottee of shares in a railway company provisionally registered, paid a deposit of £2 2s. per share, and signed the subscribers agreement, which gave the provisional directors power to carry on the undertaking, or any part of it, or to abandon the whole, or any part of it; and out of the money which should come to their hands, by way of deposit or otherwise, to make such deposits or investments as might be required by the standing orders of Parliament, and, also, to pay salaries, &c., and generally to apply such monies in paying and satisfying all other costs, expenses, or liabilities, which they might incur in relation to the undertaking. The project proved abortive, and in an action of assumpsit to recover back the deposit, Held, that the plaintiff could not, in such action, impeach the validity of the subscribers’ agreement, and that by executing that deed, he had authorized the directors to dispose of the money, and, therefore, could not recover back any part of the deposit. *Daly v. Rooney*, 1 Ir. Jur. 196, Q. B.

Proceedings by Scire Facias against Members.—When a judgment has been obtained against the public officer of a joint stock banking company, established under the provisions of the 6 Geo. 4, c. 42, s. 18, and it is sought to recover the amount of the judgment from any of the members of the company, the proper mode is by *scire facias*. *May v. Hodges*, 4 Ir. L. Rep. 245, Q. B.

When the persons proceeded against were members of such company, when judgment was obtained, and were still so, the order for leave to issue the *scire facias* is absolute. *Ib.*

BANKER.

A., being a stockbroker and notary public, received money on deposit, and paid it out on cheques, like a banker; and in some other respects acted as a banker; he did not, however, hold himself out to the public as a banker, nor did it appear he was generally believed to be one, and in his books the alleged banking accounts were mixed with others as a stockbroker and trader. Held he was not a banker, within the provisions of the 33 Geo. 2, c. 14, requiring the enrolling and registry of bankers deeds. *Stafford v. Henry*, 1 Ir. Jur. 133, Ex. [See *Fitzsimons v. Guinness*, 1 Ir. Jur. 357.]

Quære, does the 33 Geo. 2, c. 14, apply to banks not issuing notes? *Ib.*

BANKRUPT—See BOND, DEBTOR AND CREDITOR.

I. THE ASSIGNEES AND THEIR RIGHTS.

Actions by.

Operation of Executions.

Practice.

II. THE BANKRUPT.

Protected transactions.

Examination of.

Actions by.

Actions by.—The 104th section of the 6 Wm. 4, c. 14, enacts, "That in actions by, or against any person acting by, or under a commission of bankruptcy, no proof of the petitioning creditor's debt, trading, or act of bankruptcy, shall be required at the trial, unless notice be given that the party intends to dispute some of such matters." Held, that this enactment applied to ejectments. *O'Brien v. Bernard*, 6 Ir. L. Rep. 6, Q. B.

Held, that where there are several lessors of the plaintiff, they are not bound to give evidence of those distinct matters, without notice, although but one be assignee. *Ib.*

Held, also, that such lessor need not appear on the record to be assignee, if, at the time of taking defence, the defendant knew of the proceedings in bankruptcy. *Ib.*

Held, also, that depositions by the defendant, in the bankruptcy cause, were admissible evidence of that fact.

The policy of the bankrupt code is to prevent the relation of a secret act of bankruptcy, so as to avoid all intermediate *bond fide* dealings. When,

prior to an act of bankruptcy, a trader had executed a mortgage of a house and furniture to A., with liberty to enter and take possession, in case B. should make default in payment of the interest, at a certain time after it became due; B. made default in the payment, at the time specified, and, subsequently thereto, committed an act of bankruptcy, of which A. had no notice. Held, that this was a conveyance, contract, dealing, and transaction by, and with the bankrupt; and having been entered into more than two months before the issuing of the commission was protected by the 95th section of the Bankrupt Act, 6 Wm. 4, c. 14. *O'Connor v. Harris*, 9 Ir. L. Rep. 217, Q. B.

In an action of replevin, the declaration stated the taking to have been on the 27th of September, 1841. *Pleas non caput*, and two others, one laying the property in C. W. and G. B., and the other in their assignees. The plaintiffs joined issue on the first plea, and replied to the second and third, that the goods were the property of the plaintiffs and not the property of the persons named in those pleas. On these replications issue was joined. At the trial a deed of the 16th of June, 1840, was given in evidence, which was a mortgage for £10,000, with a proviso, that as long as the interest should be regularly paid within thirty days from the 16th of December, and 16th of June, half-yearly, plaintiffs would not require payment, without giving six months' notice; but if default should be made as aforesaid, that the plaintiffs might enter and sell the hotel and furniture; and it was proved that on the 27th of September, 1841, an arrear of interest being then due more than forty days, the plaintiffs under the said powers took possession of the mortgaged premises, and all the property therein; that on the same day the defendant in replevin issued a city attachment, and seized under it a portion of the said property, and it was for these the replevin was brought. It was further in evidence, that prior to the 27th of September, 1841, C. W. and G. B. had committed an act of bankruptcy, of which it did not appear the plaintiffs had notice. On the 29th September, 1841, a commission of bankruptcy issued against C. W. and G. B. which was not prosecuted, but on the 1st of April, 1842, a second commission issued, under which they were declared bankrupts. Held, that on the foregoing state of facts, the jury were properly directed to find for the defendants. *Harris in replevin v. Anderson*, 9 Ir. L. Rep. 232 note, Q. B.

Operation of Executions.—Where the goods of a trader were seized under an execution issued upon a judgment obtained by confession on a warrant of attorney, and after the seizure, but before the sale, the trader committed an act of bankruptcy, held that an action of trover lay at the suit of the assignee against the execution creditor for the recovery of the value of the goods to whom the sheriff had paid over the proceeds of the sale, without notice of the bankruptcy. *Hudson v. Allen*, 4 Ir. L. Rep. 438, Ex.

Seamble, the 126th section of the 6 W. 4, c. 16, which provides, "that no creditor who shall sue out execution upon any judgment by default, &c. shall avail himself of such execution to the preju-

dice of other fair creditors," applies only to creditors who shall sue out execution within two months before the issuing of a commission of bankruptcy. *Lessee O'Brien v. Bernard*, 6 Ir. L. Rep. 6, Q. B.

Where an *elegit* issued on a judgment, and an inquisition and return had been made thereon, two months prior to the issuing of a commission of bankruptcy, but the return had not been filed till after the bankruptcy, held, that the return on the inquisition having been made more than two months prior to the bankruptcy, there was at that time an execution executed within the provisions of the 95th section of the 6 W. 4, c. 14, though no actual possession was thereby given. *Ib.*

A party had been declared a bankrupt, and the assignee appointed on the 2nd September, 1842. In April, 1843, the usual consent to enable him to obtain his certificate, had been signed by the assignee and the majority of the creditors in number and value. But the other necessary steps to obtain the certificate had not been taken, and the bankrupt had continued to trade in his own name, without any attempt on the part of the assignee to take possession of his goods, until August, 1844, when they were seized and sold by the sheriff, under a writ of *fi. fa.* at the suit of a judgment creditor, the sum levied having been lodged in court by the sheriff. The court refused to pay it over to the assignee. *Coleman v. Lynch*, 7 Ir. L. Rep. 208, C. P.

An act of bankruptcy concerted by the bankrupt and a creditor, or one acting for him, is void against all not privy to it. *Bourke v. Crosthwaite*, Bl. D. & O. 74, N. P. [Per Brady. C. B.]

If two writs of execution issue, the first of which is invalid, the seizure under the second is good, as against a commission issued before the first was satisfied. *Ib.*

In an action by a creditor of the bankrupt, against the sheriff, for the value of the goods seized, and given up by the sheriff to the assignee, it is competent to examine the attorney of the bankrupt, concerning a conversation relative to concerting the act of bankruptcy. *Ib.*

Statements of the bankrupt to his attorney; of matter under which the sheriff does not justify, is not evidence. *Ib.*

Practice.—In an action by the assignees of a bankrupt against a sheriff, for selling the goods of a bankrupt, the defendant was allowed to withdraw his plea, for the purpose of serving a notice, to dispute the Act of Bankruptcy. *Thompson v. Waller*, 10 Ir. L. Rep. 135, Q. B., S. C., Bl. D. & O. 27.

Protected transactions.—Assumpsit by the assignee of a bankrupt, to recover a sum of money levied on a sale of the bankrupt's goods, under a *fi. fa.* in a judgment entered at the suit of the defendant on a bond and warrant of attorney, the bond and warrant which were collateral with a settlement executed on the marriage of the bankrupt, had been executed to the defendant as a trustee in the settlement for the purpose of securing a provision for the wife of the bankrupt. By the terms of the settlement, judgment could not be entered on the bond without the consent of the bankrupt. The question raised was, whether the bankrupt had procured his goods to be taken in execution, "with intent to defeat or delay his creditors." The

only evidence of this intent, was his having on the eve of his bankruptcy given his consent to entering judgment on the bond. It did not appear whether he consented spontaneously, or yielded to the importunities of the wife and trustee. Held, the bankrupt being under a moral obligation to provide for his wife, was not bound to withhold his consent, in case he had been pressed by his wife and her trustee for permission to enter judgment on the bond, and the court refused to disturb the verdict, though the conclusion which the jury arrived at, was not that which the members of the court individually would have come to. *Rooney v. White*, 3 Ir. L. Rep. 153, Ex.

Examination.—If upon his examination before the Commissioners of bankrupt, the bankrupt swear to a disposition of his property, which no reasonable man can believe, the Commissioner is authorized in committing him under the 52nd section of the 6 W. 4, c. 14. *In re Caulfield*, 5 Ir. L. Rep. 358, Q. B.

On an application to the Queen's Bench to discharge the bankrupt from custody, an affidavit containing additional statements of the bankrupt is not admissible, the party must be bound by the warrant. *Ib.*

Questions put to a bankrupt in reference to the preparation of his schedule, are legal questions within the meaning of the 6 W. 4, c. 14, s. 49, and evasive answers thereto, justify the commissioners in issuing a warrant for his committal. *In re Downing*, 8 Ir. L. Rep. 494, Q. B.

A warrant authorising the committal of a bankrupt, for not giving satisfactory answers on his examination, ought to shew on the face of it, that he had been declared and adjudged a bankrupt. *Ib.*

Semble, where the warrant states that the bankrupt surrendered himself, and in some of his answers his assignees were spoken of, the defect is cured, such being a formal matter and within the terms of the 52nd section. *Ib.*

The warrant need not specify the precise answers with which the commissioner was dissatisfied. *Ib.*

Actions by.—Nothing can be more distinct than the difference between the law of bankruptcy and insolvency, in respect of the right of an insolvent to sue on his contract; and for this reason that the bankrupt acts do not contain any provision about the dismissal of the petition. *Mowlds v. Power*, 4 Ir. L. Rep. 165, Q. B. [Per Pennefather, C. J.]

There is one exception to the general rule, which is, that where the bankrupt becomes entitled to anything for his own services, there, he may recover; and that rule is founded upon this principle, that in such a case the assignee is not entitled to hire out the bankrupt, for the benefit of his creditors, but the bankrupt himself is entitled to what he earns. *Ib.* [Per Pennefather, C. J.]

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BARON AND FEME—See HUSBAND AND WIFE.

—◆—
BARRISTER—See ASSISTANT BARRISTER. COUNSEL.

—◆—
BIGAMY—See CRIMINAL LAW.

BENEFICE—See ECCLESIASTICAL PROPERTY.

BILL OF EXCEPTIONS—See EVIDENCE.
CHARGE. PRACTICE.

BILLS OF EXCHANGE & PROMISSORY NOTES—See DEBTOR AND CREDITOR.

Form of.—The following memorandum—"My dear sir—You have given me this day £280, which I undertake to return to you next week. This money you have given me on behalf of Sir G. G., out of the trust money of Miss G., which you hold for her. (Signed) H. J. H." "To Sir G. G." Held, not to be a promissory note. *Hamilton v. Gould*, 1 Ir. L. Rep. 171, Q. B.

Consideration for.—In an action to recover the amount of a bill of exchange, for the price of a horse, and drawn by the defendant in favour of the plaintiff. Held, that the warranty and unsoundness were no defence to the action, and that the jury were properly directed to find for the plaintiff, except they were of opinion he acted fraudulently. *Cripps v. Smith*, 3 Ir. L. Rep. 277, C. P.

Action against A. and B., his wife, on the joint and several promissory note of B., and a former husband. It appeared, that B. was possessed of separate property at the time she signed the note, and that on application for payment of the note, during her widowhood, she admitted the debt to be a fair one, and promised to pay it. The fact of her having separate property did not appear upon the declaration; which, after stating the making of the note by B., and her first husband, and the death of the latter, averred that B., whilst a widow, and sole, "in consideration of the premises," promised to pay the note. Held, on motion in arrest of judgment, that the declaration was bad, as not disclosing a sufficient consideration for the promise of B. *Ferrar v. Costello*, 4 Ir. L. Rep. 425, Ex.

In assumpsit, by the indorsee, against one of the makers of two joint and several promissory notes, which notes were given to the payee in settlement of a demand, consisting of the purchase money agreed to be paid for certain mining property, for which the payee was suing at law certain trustees of a joint stock company, of which the defendant was one of the directors; the payee, (the vendor,) having waived his lien upon the property, and accepted as his security the personal covenant of the trustees. Held, that in such action the defendant could not deny or impeach the validity of the partnership deed, which he had executed. *Howard v. Shaw*, 9 Ir. L. Rep. 335, Q. B.

Held, that in an action by the payee of those notes, general evidence of fraud and imposition having been practised on the public, in the formation of the company, and the sale of the mining property, to which the payee was privy, having been used to induce the defendant to become a partner, and execute the partnership deed, or to become a party to the notes, was inadmissible, such fraud being only examinable by a Court of Equity. *Id.*

Held, that if the defendant had all the plans of

information requisite to enable him to become acquainted with the state of the company's affairs, and the relative rights of the company and the trustees, it was no defence in such action, that he acted in ignorance, or that deceit had been practised on him in obtaining these securities by a representation. That the company were liable to the payee for the amount of the purchase money claimed, there being no evidence to connect the latter with such representations, and the representation being itself substantially true, the company being bound by the partnership deed to pay the trustees for the mining property. *Id.*

Held, that proof of the liability, in a court of law, of the company, for the purchase money, so matter what the value of the mines, and proof of the notes being given as a compromise of the actions pending against the trustees, was, under such circumstances, sufficient evidence of consideration given by the payee of the notes. *Id.*

Held, that even supposing evidence of fraud had been given in inducing the defendant to make and deliver these securities, or that he had given them without consideration, yet, that the onus of proving consideration, was not thereby thrown upon the plaintiff; unless, that evidence, affected him with notice of a participation in the fraud; or, that it was shewn he took the note after it became due; or, without any consideration. *Id.*

Marriage is a good consideration for a bill of exchange. *McKee v. McKain*, 1 Bl. D. & O. 80, N. P. [Per Brady, C. B.]

In an action by an indorsee, against the acceptor of a bill, the defendant gave evidence that the bill was fraudulently drawn for a larger sum than had been agreed upon between the drawer, and a person who was no party to the bill, but to whom the drawer had sent the stamp, signed in blank. Held, that such evidence was sufficient to throw upon the plaintiff the burthen of proving consideration. *Delany v. Newland*, 1 Ir. Jur. 238, Q. B.

Howard v. Shaw, 9 Ir. L. Rep. 335, commented and disapproved of, upon the question of fraud throwing the onus on the indorsee of proving consideration. *Id.*

In an action by the payee, against the maker of a promissory note, payable twelve months after date, a witness was examined, who stated, that the plaintiff had given £50 as a portion to the defendant's wife at her marriage, and on that occasion the note was given, by defendant, on the understanding, that if the defendant's wife survived the marriage for twelve months, the gift of the £50 should be absolute, and the note should not be put in suit. Held, on a motion for a new trial, that such evidence was admissible, as not varying the written contract, but shewing a failure of consideration. *Murray v. Skinners*, 1 Ir. Jur. 39, Q. B.

A *fi. fu.* having been executed against the property of B., at the instance of A., while the money arising from the sale remained with the sheriff, it was agreed by deed that A. should relinquish the fruits of his execution, and should receive a certain composition on the amount of his claim, along with the other creditors of B. It was, also, agreed that A. might have the use of the money arising from the levy, on passing his note at four months for the

nt to C., as a trustee for the creditors. A., giving the deed, deposited the note with the tor of C., receiving from him, at the same a written undertaking not to part therewith, the creditors had executed, or assented to the

No creditor, except A. signed the deed, was not further acted upon. Held, there no consideration for the note. *Smith v. vy*, 1 Ir. Jur. 236, Q. B.

ld, that independently of this, the action was maintainable, the note having been deposited in the hands of a third party, to be handed only in a certain event which never hap-

Ib. able, that in point of law there was no delict of the note. *Ib.*

is in consideration of signing Composition.]—See DEBTOR AND CREDITOR.

entment.]—In assumpsit by the payee, t the maker of a promissory note, payable in dy at a particular place. Held, that a pro- of the defendant, after the note became due, the amount of it, was evidence of the debt the money counts, and dispensed with the on in the declaration of a special count, ng, presentment at the particular place, and proof of such presentment. *Carnegie v.*, 4 Ir. L. Rep. 392, Q. B.

s passed contemporaneously with the signing sed of composition, to make up the difference an the amount secured by the deed and al debt, are void. *Merrick v. Sincos*, 7 Bl. O., N. P. [Per Blackburne, C. J.]

ies of Dishonour.]—Assumpsit on a bill of age by indorsee against drawer. The only evi- of notice of dishonour was the notice of the t at a house to which the plaintiff was in the of sending paper parcels from his warehouse defendant, and which the witness swore e lodging of the defendant, but admitted the eason he had for calling them was that the lant had directed the parcels to be sent there. that this was not sufficient evidence of serf the notice of dishonour to warrant the judge ecting the jury, if they believed the evidence, d for the plaintiff. *Cumming v. Haughton*, L. Rep. 430, Q. B.—Perrin, *J. dissentiente*.

an action by the indorsee against the indorser promissory note protested for non-payment, s of the protest is sufficient notice of dis- ir. *Hamilton v. Smith*, 3 Ir. L. Rep. 409, Ex. an action by indorsee against indorser, upon of exchange drawn by one B., and due April 345, the plaintiff gave in evidence a letter from e defendant to the plaintiff in the handwriting of rmer, in the following terms—"Dear Sir, need not give me any notice of the non-pay- of Mr. O'C.'s or Mr. B.'s bill, which I end- to you, and which I am sure were not paid ay demanded. Yours, &c. Due this day, O'C. 20, B. £130." The date of the letter was so d, as to render it uncertain whether it was the or 22nd of April, 1845. Held, that this was ncom from which the jury might infer a due nd of payment, and notice to the defendant of

the dishonour of the bill. *Pepper v. Queely*, 10 Ir. L. Rep. 274, Q. B.

Notice of dishonour may be proved partly by written and partly by parol evidence. — *v. Hearne*, Bl. D. & O. 64, N. P. [Brady, C. B.]

On the trial of an action against the drawer of a bill of exchange, a witness proved that he had served the defendant with an account of the plain- tiff's demand, amongst the items of which was the amount of the bill in question, and that the defend- ant had objected to several of the charges made, but had passed over in silence the item relating to the bill. No direct evidence of presentment and notice of dishonour was adduced. Held that there was a *prima facie* case to go to the jury, that the defend- ant had due notice of the dishonour. *MacEvers v. Berkeley*, 1 Ir. Jur. 299, Ex.

The son of the testator, whose executors the plaintiffs were, was examined as a witness and ob- jected to on the ground that he was directly inter- ested in the result of the trial. Held that his evidence was admissible. *Ib.*

Waiver of Notice of Dishonour.—Where the defendant (the drawer) after the bill was dishon- oured by the acceptor, spoke of the bill and the sum secured thereby, as among the losses likely to accrue by the insolvency and default of the accep- tor, this was held to be evidence to go the jury that the defendant had received due notice of the dishonour of the bill. *Ledlie v. Lockhart*, 1 Ir. L. Rep. 89, Ex.

In an action against the indorser of a bill, the plaintiff gave in evidence this notice of dishonour—"Take notice, that J. B.'s draft on M. O'B., due yesterday, amount £138 1s. 2d. on which you are an indorser, has not been paid." It was proved that the defendant, after he had been arrested at the plaintiff's suit, voluntarily wrote a letter to the plaintiff's attorney, in which this passage occurred, "I propose out of my industry to pay your client £20 a-year, until the principal be fully discharged. I have no money to pay any costs." He subse- quently offered securities for the debt, stating that if acceded to, they would give him his liberty. These offers were entertained by the plaintiff, but the negotiation was subsequently broken off, in conse- quence of the defendant's non-performance of some of the conditions agreed upon. Held, that this evidence was admissible, though a compromise was pending, and the defendant in custody. Secondly, that the acts of the defendant, subsequent to his arrest, amounted to evidence of a waiver of the want of notice of dishonour.

Semble, that the notice was insufficient, it not containing any statement from which it necessarily appeared that the bill had been dishonoured. *Brush v. Hayes*, 1 Ir. L. Rep. 327, Q. B.

Pleading.—In a declaration by indorsee, against indorser of a bill of exchange, accepted, payable at a particular place, it is not necessary to notice the special acceptance, or to aver presentment at such place. It is sufficient to state a general pre- sentment to the drawee, without stating any accep- tance, and to prove the presentment at the parti- cular place pointed out by the acceptance. *Ledlie v. Lockhart*, 1 Ir. L. Rep. 89, Ex.

Where a bill of exchange is by the drawer made payable in the body of it, at a particular place, and accepted generally. Held, in an action against the acceptor, that a presentment at that place need not be averred or proved. *Davis v. O'Hara*, 5 Ir. L. Rep. 337, Q. B.

Where the pleading contains an averment of some act which it was not necessary to aver, in order to sustain the action, proof of such averment is unnecessary. *Ib.*

In an action on a bill of exchange by the indorsee against the acceptor, the declaration described the drawers and indorsees as "certain persons using the name, style, and title of Charters, Holland, and Newsome." Held, on special demurrer, to be sufficient. *Southey v. Magan*, 10 Ir. L. Rep. 250, C. P.

A signature to a bill of exchange will be implied from the word "made." *Ib.*

In an action against the acceptor of a bill of exchange, made payable in the body at a particular place, and accepted generally, it is not necessary to aver, or prove presentment at the place where it is so made payable. *Elliott v. Fieley*, 10 Ir. L. Rep. 485, Ex. [Overruling, *Roache v. Johnson*, 1 Law Rec., N. S. 100, S. C. Hayes & Jones, 246.]

Assumpsit, by the indorsee of a bill of exchange against the acceptor. The first count averred, "for that whereas Hugh F., carrying on business under the name, style, and firm of F. and Co., made his bill of exchange writing, and directed the same to the defendant, and thereby required the defendant to pay to the drawers, or their order, £—, two months after the date thereof;" and then averred, that H. F. indorsed to the plaintiff. Held, on special demurrer, to be sufficient. *Reilly v. Jessop*, 1 Ir. Jur. 7, Ex.

Assumpsit, on a bill of exchange. The averment of indorsement stated, that "the said defendant indorsed to the plaintiff," omitting "then and there." Held, on special demurrer, that time, being a material traversable fact, the omission of it vitiated the declaration. *Jones v. Pope*, 1 Ir. Jur. 7, Ex.

The declaration alleged, that A. B. directed his bill of exchange to certain persons trading under the name, style, and firm of F. and Co., &c., and that the said certain persons, trading under the name, style, and firm of F. and Co., accepted the same. Held, on special demurrer, to be a sufficient description of F. and Co., as acceptors. *Barcker v. Figgis*, 1 Ir. Jur. 22, Ex.

To a declaration upon two bills of exchange, the defendant pleaded, "That before, and at the time when he first became, and was the indorser and holder, and interested in the bills of exchange, the plaintiff knew they were given for an illegal consideration." The plaintiff replied, "That he did not before, or at the time when he first became, and was the indorsee, and interested in the said bills, know they were given for an illegal consideration." Held, on demurrer to the replication, that, as the statement in the plea meant a single allegation, that the plaintiff became indorsee, and interested at the same moment, or in other words, had notice of the illegality, that the traverse

was good. *Cole v. Batcock*, 1 Ir. Jur. 331, Ex. Ch., S. C. 11, Ir. L. Rep. 306, Q. B.

The plea, also, alleged, that the money was lost at a certain game called "Hazard," and that the plaintiff well knew that was the consideration for the bills. The replication alleged, that the plaintiff did not know that the bills were given for the consideration, in the plea mentioned. Held, that the traverse was good; the replication being in the words of the plea, must be taken to be co-extensive with it.

Held, that the traverse did not throw the onus upon the defendant, of proving a knowledge in the plaintiff, of the illegality before, and at the time of his becoming holder, as if he proved a notice of it before he became so, it would follow he had it at the time.

In assumpsit, by the indorser against the maker of a bill of exchange, the second count stated, that the defendant thereby required the acceptor to pay "at three months date, which period had then elapsed." Held, that averment was sufficiently certain, and was not ground of special demurrer. *Maxwell v. Chambers*, 8 Ir. L. Rep. 267, Ex.

Evidence.—In an action by indorsee against indorser, of a promissory note protested for non-payment, service of the protest is sufficient evidence of notice of dishonour. *Hamilton v. Smith*, 3 Ir. L. Rep. 409, Ex.

Quære, can parol evidence of a payment, by means of a bill of exchange, be given, without producing the bill, or proving the loss of it, or notice on the opposite party to produce it. *Daly v. Kelly*, 3 Ir. L. Rep. 174, C. P.

In an action on a bill of exchange, by the indorsee against the acceptor, it was proved, that the bill had been due for three years, without any demand having been made for the payment, and the plaintiff's witness and attorney stated, that he had forborne to sue on it at the request of the indorser, who, it appeared, had lately become bankrupt, and left the country, and that the plaintiff had been appointed his provisional assignee. It was, also, proved by the defendant, that, about the time of the bill in question becoming due, the defendant had accepted another, for nearly the same sum, drawn by the same person, and indorsed by him to the plaintiff, and which was duly paid. The jury were directed to find for the defendant, if they believed that the second bill had been given in discharge of the first; and that there was a community of interest and privity between the indorser and indorsee, and the jury having found for the defendant, Held, that the declarations of the indorser were properly admissible in evidence against the plaintiff, and the court refused to set aside the verdict, on the ground of the admission of illegal evidence. *Hunter v. Simpson*, 3 Ir. L. Rep. 275.

Assumpsit, by the payee against the maker of a promissory note. Plea, the Statute of Limitations. The production of a note, corresponding with that stated in the declaration, in parties names, sum, and the time it had to run, will not support the plaintiff's case, he must connect the note pro-

used with that stated in the declaration. *O'Brien v. Roche*, 6 Ir. L. Rep. 338, Ex.

A promise, after a note is due, to pay the amount of it, is evidence of the debt, under the money counts, and dispenses with the omission of a special count, averring presentment in the particular place at which the note was made payable in the body, and in the proof of presentment there. *Carnegie v. Gibby*, 4 Ir. L. Rep. 392, Q. B.

Declarations by the drawer of a bill of exchange, who has indorsed after maturity, are admissible in evidence against the holder, to prove illegality of consideration. *Lyons v. Bolingbroke*, Bl. D. & N. P. 19, N. P. [per Ball, J.]

Urury, 2 & 3 Vict. c. 37; 8 & 9 Vict. c. 102.]—A. applied to B., the proprietor of a loan office, for a loan of £5, which B. agreed to advance upon A.'s giving his joint and several promissory note, with two sureties, payable to the order of B. twenty-one days after date; B. to deduct from loan 1s. per £1, as discount, and 1s. for expenses of inquiring after the solvency of the sureties. The £5 to be repaid by weekly instalments of 5s. each; the first payment to be made in seven days from the giving of the note; but in the event of A. allowing three weeks to be in arrear, the twenty-one days specified having expired, the note was to be put in suit. Held, that was within the protection of the 2 & 3 Vict. c. 37. *Fitzgerald, app., Lacy, resp.*, 1 Ir. Jur. 110. [Per Pigot, C. B.]

BILL OF LADING.

A. being the holder of a bill of lading of a certain cargo of coals, therein expressed to be deliverable to him as well as his assigns, brought assumpsit against B., the captain of the vessel, for the non-delivery of the same. The goods were stated in the instrument to have been shipped by C. Held, that A. was entitled to sue in his own name in the present form of action. *Smith v. Ritchie*, 1 Ir. Jur. 258, Q. B.

It appeared at the trial, on the cross-examination of one of the plaintiff's witnesses, that there was a charter party in existence, relating to the cargo in question, which the plaintiff omitted to produce. Held, that the bill of lading constituted in itself a complete contract; and that it lay with the defendant, if he sought to vary the terms of the same, to produce the charter party. *Ib.*

BILL OF PARTICULARS—See PARTICULARS OF DEMAND.

BOG—See DEEDS AND CONVEYANCES.

BOND—See DEBT. REPLEVIN. WARRANT.

Replevin Bond.]—The assignee of a Civil Bill Replevin Bond cannot sue upon it in the superior court. *Bentley v. Hastings*, 6 Ir. L. Rep. 170, Q. B.

Collector's (County Cess,) Bond.]—The court will not, without a suggestion of breaches, allow execution to issue on a judgment entered on a collector's bond, conditioned to pay over to the

treasurer of a county, the county cess to be levied by the high constable off a barony, before the next assizes. *Montgomery v. Blackwood*, 7 Ir. L. Rep. 428, Q. B.

A judgment entered on a bond, with warrant of attorney, containing a release of errors, which bond was conditioned to levy and collect all such sums as should be presented by the grand jury of a county, comes within the provisions of the 9 Wm. 3, c. 10, s. 8; and it is necessary that a suggestion of breaches be entered before execution issues. *Stratton v. Codd*, 9 Ir. L. Rep. 1, Q. B., [Perrin, J., dissentiente.]

A warrant of attorney contained the following clause—"It shall be lawful to, and for the said R. D., his heirs, executors, administrators, and assigns, to issue one, or more execution, or executions, upon the judgment, or judgments, to be entered upon these presents, for so much money as shall remain uncollected, or unpaid, to the said R. D., by the said defendant, without filing a suggestion of breaches, or taking any other or further legal proceedings, to obtain such execution, or executions, further than the judgment, or the judgments, to be entered aforesaid." The court refused to give effect to this stipulation, and set aside an execution, issued on this judgment, without a suggestion of breaches, as required by the 3 Wm. 3, c. 9, s. 8. *De Lacour v. Murphy*, 1 Ir. Jur. 46, Ex.

A verdict obtained upon a bond, conditioned for the discharge of the duties of poor-law clerk, will not be set aside upon the ground, that no breaches were assigned before the trial. *Guardian of the poor of Castlereagh Union v. Dillon*, 1 Ir. Jur. 229, C. P.

Deceazance.]—P. and J. M. executed a bond to the plaintiff, in the penal sum of £600, with warrant of attorney to confess judgment, the plaintiff writing them the following letter—"Gentlemen, you have this day executed to me your bond, with warrant of attorney, for confessing judgment in the penal sum of £600; now, I hereby declare, that such bond, and any judgment to be entered thereupon, has been passed to me as a collateral security for any overdue bills which I may hereafter discount for you, and for no other object—" separate judgments were entered upon this bond, within twenty-one days of its execution; but the warrant was not filed, nor was the letter to the defendants written upon the same paper as the warrant; the defendant having become bankrupt. Held, that such judgment was good against their assignees, and came within the saving clause of the 13th section of the statute 3 & 4 Vict. c. 105. *Conlan v. McAnaspie*, 10 Ir. L. Rep. 295.

Semble, that the above letter amounted to a deceazance, within the 14th section. *Ib.*

Semble, that the provisions of the 14th section apply to warrants of attorney collateral with bonds. *Ib.*

Pleadings.]—Debt on bond against the heir of the obligor. Plea, that the plaintiff recovered a judgment on the same bond, against the administratrix of the obligor, and sued out execution, under which the administratrix was arrested, and was in custody. Replication, that she was dis-

charged under the Insolvent Act, and that the judgment, debt, and damages, remained unpaid. Rejoinder, that at the time of the commencement of this action, the administratrix was still in custody, under the execution. Held, on demurrer, that the rejoinder and plea were bad; the judgment and execution against the personal representative not being a satisfaction of the debt, as against the heir, who was liable in respect of the real assets descended on him. *Hewitt v. McGeown*, 11r. L. Rep. 84, Ex.

A declaration in debt on a bond, stating, that the bond had been lost. Held bad, on special demurrer, for not stating that the loss was occasioned by time or accident, or some other casualty. *Barry v. McDowell*, 5 Ir. L. Rep. 348, Q. B.

New Trial.—A verdict obtained upon a bond, conditioned for the discharge of the duties of poor-law clerk, will not be set aside upon the ground, that no breaches were assigned before the trial. *The Guardians of the poor of the Castlereagh Union v. Dillon*, 1 Ir. Jur. 229, C. P.

Stamp.—A ten shilling stamp, on a bond for £140 9s. 8d., conditioned for the payment of one-half year's rent of certain premises, before the other became due, the half year's rent being £70 4s. 10d., is insufficient; and the bond with the condition having been produced by the plaintiff, on a writ of inquiry to assess damages, the verdict for the plaintiff was set aside with costs, and a new inquiry granted. *Kearney v. Power*, 7 Ir. L. Rep. 465, C. P.

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BOROUGH—*See* CORPORATION.

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BOROUGH COURT—*See* CERTIORARI.

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BOUNDARIES—*See* CORPORATION.

—◆—
BREACHES—(SUGGESTION OF)—*See* BOND.

—◆—
BURGESS—*See* CORPORATION—MINISTER'S MONEY.

—◆—
BURNING ACT—*See* CONVICTION.

—◆—
CALLS—*See* PUBLIC COMPANY.

—◆—
CAPIAS AD RESPONDENDUM—*See* PRACTICE. (SERVICE.)

—◆—
CAPIAS AD SATISFACIENDUM—*See* EXECUTION. ARREST.

—◆—
CASE—(ACTION ON THE)—*See* ACTION.

For Breach of Duty. H., a lessee of certain premises, assigned her interest to D., who assigned to M. In neither of these deeds was there a covenant to pay the rent. M., while in possession, suffered a year's rent to be in arrear; B., the lessor,

recovered this rent from H., in an action of covenant; H. subsequently brought an action on the case against M., founded on a breach of duty. Held, that H. was entitled to recover from M., in this form of action, the rent which she had paid to B. *Hopkins v. Murray* 1 Ir. Jur. 43, Q. B.

Maliciously issuing a Search Warrant.—In an action for maliciously, and without probable cause, issuing a search warrant, to search the plaintiff's house for goods alleged to have been stolen from the defendant. The judge told the jury that there would be sufficient to constitute probable cause, if they believed the facts in evidence; and left it to them, on the whole case, to find whether there had been probable cause or not; and, also, directed them to find for the plaintiff, if they believed there was any malice on the part of the defendant. Held, that this direction was right, and that the jury having found for the defendant, the court could not interfere in granting a new trial. *Power v. Harrison*, 4 Ir. L. Rep. 122, C. P.

Libel.—In an action for libel, it is not necessary to set out in the declaration a document referred to in the libel, which does not contain matter material to the sense, or does not alter the meaning of the libellous paragraph. *Walsh v. Henderson*, 4 Ir. L. Rep. 34, Q. B.

A libel, which by the innuendo at the heading was alleged to be conversant about a false charge of felony, made through feelings of religious bigotry by the plaintiff, against one D. S., went on to allege, that the plaintiff was aided in making the said charge by one C. R., who was stated to "have been for some time back, employing every means to win the confidence of this young gentleman, their intended victim, (meaning thereby that the said plaintiff, and the said C. R., had been contriving some plan to assail the character, and destroy the reputation of the said D. S.) as taking him on country visits, and inviting him to the Continent, with the hope, it is alleged, of getting him altogether to themselves, and destroying his prospects the more easily, by some foul charge, which he could not find means of contradicting, there being no one else of the company. They had met with a direct refusal, it seems, to their invitation to the Continent, and, therefore, rather prematurely opened their present plot, (meaning the said charge of felony.) Affidavits are, we understand, shortly to be laid before the law officers of the crown, charging the above facts, together with certain conversations between the pair of Romanists, who have trained this ingenious manœuvre, (meaning the charge of felony aforesaid.) Held, that this libel did not amount to a charge of conspiracy, though in the introductory part of the allegation, the plaintiff alleged, that the object of the defendant was to injure him, &c., by causing it "to be suspected, and believed, that he, the said plaintiff, was guilty of conspiracy, calumny, and fabrication of false charges;" and, therefore, it was not necessary that the defendant should have justified such a charge. *O'Connell v. Mansfield*, 9 Ir. L. Rep. 179, Ex. Ch. [Jackson, J., Richards, B., and Crampton, J., *dissentientibus*.]

In an action for a libel, the defendant having pleaded the general issue, and the special plea of an apology, under the 6 & 7 Vict. c. 96, s. 2, the court refused to allow him to withdraw the latter plea, the plaintiff having sworn that he would be prejudiced thereby at the trial. *Sullivan v. Lenihan*, 7 Ir. L. Rep. 418, C. P.

In an action of libel, against the editor of a newspaper, the defendant pleaded the general issue, and the special plea, given by the 6 & 7 Vict. c. 96, s. 2. Held, that libels published in the same newspaper, and during the same editorship, more than six years before the publication of the libel complained of, were properly received in evidence on the part of the plaintiff. The judge having directed the jury not to take the said prior publications into consideration, in estimating the damages, but only for the purpose of ascertaining the animus of the defendant. *Long v. Barrett*, 7 Ir. L. Rep. 439, C. P.; S. C. 8 Ir. L. Rep. 331, Ex. Ch.

Several persons joined as plaintiffs in an action on the case for a libel, which contained imputations against the said persons, affecting them not only separately and individually, but as owners of a certain manufactory, by imputing malpractices in the conduct and management of it; and at the commencement of the declaration described themselves as trading under the name, style, and firm, of M. brothers, and then in the inducement, contrivances, and colloquia, made some averments which contained no allusion to any joint interest, and such as would have been adopted, if the plaintiff had been suing separately; and, also, other averments, which described them as having a joint interest, and charging an intention to injure them both personally, and in their trade and calling, and claimed damages for injuries of a personal and individual character, as well as for injuries in respect of their trade. Held, that the declaration was sufficient to sustain the judgment after verdict, and that the court would presume, that the jury had, under the direction of the judge, found joint damages for the joint injury, and for that only. *Lefanu v. Malcolmson*, 8 Ir. L. Rep. 481, Ex. Ch.

When one of the counts of the declaration contained matters defamatory of the plaintiffs, as co-partners in trade, even though it contained other matter defamatory of them as individuals, and though part of the innuendo ascribed the latter meaning to the libel, yet, after verdict, the court will presume, that the damages were awarded for the injury jointly sustained, and none other. *Ib.*

Where a libel contains various matters actionable in themselves, and to which the innuendo does not apply, it may be regarded as surplusage. *Ib.*

The Libel Act, 6 & 7 Vict. c. 96, does not apply to seditious libels. A justification under that Act, cannot, therefore, be pleaded to such indictment. *Reg. v. Duffy*, 9 Ir. L. Rep. 329, Q. B.

Evidence.—In an action of libel against the editor of a newspaper, the defendant pleaded the general issue, and the special plea given by the 6th & 7th Vict. c. 96, s. 2. Held, that libels published in the same newspaper, and during the same editorship, more than six years before the publication

of the libel complained of, were properly received in evidence, on the part of the plaintiff; the judge having directed the jury not to take the said prior publications into consideration in estimating damages, but for the purpose alone of ascertaining the animus of the defendant. *Long v. Barrett*, 7 Ir. L. Rep. 439, Ex. Ch.

Slander.—A count in a declaration alleging, that the defendant falsely, wickedly, and deceitfully, represented, and affirmed, to one P., that the plaintiff was a person of bad character, and had been guilty of immoral conduct, and was not fit to be associated with; and so depraved, and of such a character, that the said P. ought not to permit, or suffer, him to reside, or dwell, in the house with the said P's. wife, and that the plaintiff was in other respects disreputable, and disgraceful, in his conduct. Held, to be a count for slander, and bad, on general demurrer, for not setting out the words verbatim. *Sullivan v. White*, 6 Ir. L. Rep. 40, Ex.

In an action in the case against a Roman Catholic clergyman, for publicly pronouncing the plaintiff, who was owner of a mill, to be an excommunicated person; the plaintiff examined witnesses to prove that, after his excommunication, he was avoided by his neighbours, and that his mill was deserted. The declaration did not specify the names of the persons who so avoided him, or deserted his mill. Held, that the general evidence of these two facts were properly received, on the ground that such evidence was not to be considered as evidence of special damage, but as evidence to shew that the consequence, which the defendant intended to arise from his act, actually happened. *M'Loughlin v. Welsh*, 10 Ir. L. Rep. 19, Q. B.

A declaration for slander, stated, in one count, that the plaintiff was guilty of most abominable conversation, and public exposure of his naked person; and in another, that he was guilty of publicly, and indecently, exposing and uncovering those parts of his person which ought to be kept concealed. Held, to be an imputation of an offence punishable as a misdemeanour. *Torbitt v. Clare*, 9 Ir. L. Rep. 86, Q. B.

Maliciously abusing the Process of the Court.

—Form of a declaration, for maliciously abusing the process of the court, for the purpose of affecting the arrest of the plaintiff. *Weaver v. Byrne*, 3 Ir. L. Rep. 439, Q. B.

Malicious Arrest.—See ACTION.

In an action for a malicious arrest, the absence of probable cause must be shewn by the plaintiff, and where such a question is a mixed one of law and facts, and the inference of the fact doubtful, the judge is right in submitting it to a jury. *Clarke v. Sawyer*, 10 Ir. L. Rep. 530, Q. B.

In an action in the nature of an action for malicious arrest, but which in form was an action for maliciously abusing the process of the court, for the purpose of effecting the plaintiff's arrest, the judge left two questions to the jury. First, whether the plaintiff, in point of fact, had been arrested; and, secondly, if so, whether such arrest had been malicious; and told them that as the writ issued regularly, and for a debt admitted to be due, no exe-

cution of that writ, however oppressive in point of fact, could in point of law be malicious. Held, that supposing there was evidence to go to the jury, that this direction was erroneous. *Weaver v. Byrne*, 3 Ir. L. Rep. 439, Q. B.

In case for maliciously and injuriously over-marking a writ of *ca. sa.*, and causing the plaintiff to be arrested thereon, the judge having stated that, in his opinion, proof of actual malice in fact was not necessary, but that malice might be inferred from gross neglect, told the jury that, if in their opinion, the injury done to the plaintiff was occasioned by the gross neglect of the defendants, they were at liberty to infer malice. Held, a misdirection. *Carmichael v. Waterford, and Limerick, R. C.*, 1 Ir. Jur. 186, Q. B.

In an action, on the case for maliciously and injuriously over-marking a writ of *ca. sa.*, and causing the plaintiff to be arrested thereon, it is not sufficient, in order to prove malice in the defendant, to show that his attorney or agent was actuated by malicious motives. *Carmichael v. Waterford, and Limerick, R. C.*, 1 Ir. Jur. 285, Q. B.

Held, that a mere mistake, on the part of the attorney, was no proof of malice in him, and that the facts relied on by the plaintiff, in the present case, amounted to nothing more. *Ib.*

Semble, that the same rule would apply equally to the cases of an individual, and a corporate body. *Ib.*

An action against a public company, in the name of their public officer, for having falsely, maliciously, and, without probable cause, procured the arrest and imprisonment of the plaintiff, cannot be sustained by proof that one of the directors, who was also general manager of the bank, had acted wilfully and maliciously in the proceedings which formed the subject matter of the arrest, without establishing the concurrence in, or adoption of, his acts by the company. *Reid v. Mitchell*, 4 Ir. L. Rep. 322, C. P.

The 6 Geo. 4, c. 42, has made no change in the general law, as affecting such an action, beyond allowing the company to be sued in the name of their public officer. *Ib.*

CERTIORARI.—See CONVICTION.

Where it lies.—The court will issue a writ of *certiorari*, to bring up the record of the Assistant Barristers' Court. *Fitzsimons v. Lyons*, 4 Ir. L. Rep. 222, C. P.

Return.—The Court of Quarter Sessions, on appeal, under the 7 & 8 Geo. 4, c. 53, having reversed the judgment of conviction by the magistrates at Petty Sessions, in an information exhibited before them, for an alleged breach of the Excise Laws, the proceedings were removed into this court by *certiorari*. The return by the clerk of the peace, which purported to be a full return of all the proceedings and documents in the case, did not mention any of the preliminaries required by the 83rd section of the 7 & 8 Geo. 4, c. 53, to be performed by the appellant, except a notice of appeal, directed to the Chairman of the Petty Sessions, which was set out, but which did not state

that the parties appeared, nor that the court of appeal decided upon the same evidence as that given below, nor upon any evidence, the court, though this return, was held to be imperfect, refused to quash the judgment of the quarter session, so as to set up the original conviction, or to send back the case to the quarter sessions, it being admitted by the Crown that the parties appeared, and that evidence was given. *Reg. v. Lundy*, 9 Ir. L. Rep. 29, Ex.

In a return to a *certiorari*, removing a conviction, under the Excise Laws, the evidence upon which that conviction was founded need not be stated; but if set forth on the face of the return, and the court consider it insufficient to sustain the conviction, the conviction will be quashed. *Reg. v. M'Naghten*, 9 Ir. L. Rep. 93, Ex.

Where, upon the return of a conviction under the Excise Laws to the quarter session, the magistrate before whom the information was exhibited, was described the Honourable H. W., and in the conviction, as H. W., Esq. Held, not to be a fatal variance. *Reg. v. Harts*, 1 Ir. L. Rep. 112.

Practice.—Where a party prosecuting for a misdemeanour, applies for a *certiorari* to remove the indictment into court, an absolute order will be granted in the first instance. *Regina v. Byrne*, 5 Ir. L. Rep. 473, Q. B.

Where a *certiorari* issued after joinder in demurrer in the inferior court, it will be set aside in a cause within the jurisdiction of that court, with costs, and a writ of *procedendo* will be awarded. *Worte v. Dowling*, 5 Ir. L. Rep. 482, Q. B.

A party removing a cause by *certiorari*, will be compelled to put in special bail, if by such a proceeding, the bail in the superior court were discharged. *Tiger v. M'Anaspie*, 9 Ir. L. Rep. 70, Q. B.

On an application for a *certiorari*, to remove a presentment, the court will not go behind the presentment to see if it be properly obtained. *In re Quin*, 9 Ir. L. Rep. 160, Q. B.

An action commenced in a Borough Court, by writ of attachment, is not removeable by *certiorari*. *Sullivan v. Burke*, 10 Ir. L. Rep. 204, Q. B.

Where a writ of *certiorari* has been sued out, after issue joined in an inferior court, it will be set aside with costs, though the judge of the inferior court may not have refused obedience to the writ. *Elliott v. Swift*, Bl. D. & O. 254.

CESS.—See RATES.

CHALLENGE.—See CRIMINAL LAW. JURY, (GRAND AND PETTY.)

CHARGING ORDER.—See COSTS.

Money lodged in a savings bank will not be charged under the 3 & 4 Vict. c. 105, s. 23. *Macalister v. Murray*, 5 Ir. L. Rep. 92, C. P.

If stock be standing to the credit of a cause to which a judgment debtor is a party, the court will not under the 3 & 4 Vict. c. 105, s. 23, make an order, charging by anticipation so much of the

stock as the debtor may thereafter be declared entitled to. The precise sum to which he is entitled must first be ascertained. *White v. Heron*, 5 Ir. L. Rep. 167, n.

A testator bequeathed money in the funds to trustees, in trust to pay the dividends to the wife of the defendant, and at her decease, to and among her children, as she should appoint, or, in default of appointment, share and share alike, with remainder over to the trustees, in default of issue. A conditional order was obtained by the plaintiff to charge this stock, under the 3 & 4 Vict. c. 105, s. 23; before this order was made absolute, the defendant became insolvent, and filed a petition in the Insolvent Court. Held, that the conditional order could not be made absolute, the assignee of the insolvent not being before the court. *Mills v. Horner*, 6 Ir. L. Rep. 210, C. P.

Semble, that on the construction of this will the court had no jurisdiction to charge the stock. *Ib.*

Where an order had been obtained, under the 3 & 4 Vict. c. 105, s. 23, to make a judgment a charge upon government stock, personal service of that order on the consor of the judgment, who was resident out of the jurisdiction, and entitled to the stock, was held to be sufficient. *Wheelhouse v. Sharpe*, 9 Ir. L. Rep. 154, Q. B.

A testator directed his executors to set apart so much of his old £3½ per cent stock as would produce £8,000, and pay the interest thereof to his wife during her life-time, and then divide it among his four children, of whom the defendant was one. Upon an affidavit, that the executors had sold out all testator's said stock, except a sum of £8,000, and had left that sum still standing in testator's name for the above purposes, and had applied the interest thereof as by his will directed, the court granted an order under the 23rd section of the statute, 3 & 4 Vict. c. 105, charging one fourth of stock in execution. *Errington v. Prior*, 10 Ir. L. Rep. 79, Ex.; *S. C. nomine Cavanagh v. Prior*, Bl. D. & O. 148.

CHARTER PARTY—See CONTRACT.

CHOSE IN ACTION.

Grand Canal debentures, certifying, that A. B. having paid £100, is entitled to interest on the same, at the rate of 6 per cent per annum, to be paid to him, his executors, administrators, and assigns, in yearly payments, until the said principal sum shall be repaid at one entire payment, the company reserving a liberty, at any time after seven years, from the date thereof, giving six months notice to repay the same. Held, that proof of a custom that the debentures had been dealt with, and taken as assignable securities, would not give the assignee a right to recover. *Norman v. Reid*, 10 Ir. L. Rep. 207, Q. B.

Held, that an instrument, evidencing a chose in action, payable to bearer, or holder, or assigns, will not make it assignable. *Ib.*

CIVIL BILL COURT—See ACTION. AUCTIONEER. BAILIFF. BOND. CERTIORARI. REPLEVIN.

Appeal.—In an appeal from the civil bill juris-

diction of the Recorder's Court, it is sufficient to lodge the costs of the dismiss only. *Costello v. Bartlett*, Bl. D. & O. 12. [Per Brady, C. B.]

Jurisdiction of.—Quære, whether a civil bill decree can be maintained, which includes several demands, separately within the jurisdiction of the Assistant-Barrister's Court, but in the aggregate beyond it. *Ryan v. Shee*, 7 Ir. L. Rep. 536, Ex.

Semble, that any objection arising from the excess of demand apparent on the face of the civil bill, in such cases may be obviated, by varying the grounds of the demand, and including all in one sum, not exceeding the limit of the jurisdiction of the Assistant-Barrister's Court. *Ib.*

Upon a motion in arrest of judgment, it having been objected that the above declaration was defective—first, because it contained no averment of a warrant having been granted by the sheriff, and under which the arrest took place; and, secondly, because the decree was not alleged to have been obtained against the plaintiff in the present action. Held, first, that the sheriff was not bound to grant a warrant, and *non constat*, but that he may have executed the decree in person; secondly, that after verdict the court was bound to intend that the decree proved at the trial was the one obtained against the plaintiff in this action. *Ib.*

A civil bill cannot include two demands which together exceed the jurisdiction, though the second is stated to be the "said sum." *Costello v. Bartlett*, Bl. D. & O., 12. [Per Brady, C. B.]

The assignee of a civil bill replevin bond assigned to him by virtue of the 6 & 7 Wm. 4, c. 75, s. 13, cannot sue on it in the Sessions Courts. *Bentley v. Hastings*, 6 Ir. L. Rep. 170; *S. C.* 8 Ir. L. Rep. 166, Ex. Ch. [Brady, C.B., *dissentiente*.]

Replevin.—The extent of the jurisdiction given in replevin cases to these courts by the 6 & 7 Wm. 4, c. 75, is to be governed by the amount of the reserved rent, and not by the amount of the rent distrained for; and therefore a plea of the non-delivery of the particulars of distress required by the 6 & 7 Wm. 4, c. 75, s. 6, to an avowry of distress for £120, due for one and a half years' rent, was held to be a bad plea. *Daniel v. Bingham*, 7 Ir. L. Rep. 29, Ex. Ch.

CHURCH WARDENS—See MANDAMUS.

CLERK OF THE CROWN—See CROWN.

COLLECTORS—See BOND RATES.

COLLEGE (TRINITY)—See MANDAMUS.

Roman Catholics are not admissible to Scholarships in Trinity College, Dublin. *Reg. at the prosecution of Heron v. Visitors of Trinity College, Dublin*, 9 Ir. L. Rep. 56, (n.)

COMMISSIONERS—See MANDAMUS.

Of Towns.—See BOROUGH.

For taking Affidavits.—See AFFIDAVITS.

For Paving and Lighting.—See DEEDS. MANDAMUS.

Tithe Composition.—See TITHE COMPOSITION.

For Taking Special Bail.—See BAIL.

For Examining Witnesses.—See EVIDENCE.

Of Poor Laws.—See POOR LAW.

COMBINATION (ILLEGAL)—See CRIMINAL LAW.

COMMITTAL—See CRIMINAL LAW.

COMPANY—See BANK (JOINT-STOCK), PUBLIC COMPANY.

COMPENSATION—See MANDAMUS. PUBLIC COMPANY.

COMPOSITIONS—See DEBTOR AND CREDITOR. BANKRUPT.

COMPROMISE—See ATTORNEY.

CON-ACRE—See DEED. LANDLORD AND TENANT.

CONDITION PRECEDENT—See CONTRACT.

CONDITION BROKEN—See ENTRY. EJECTMENT.

CONSIDERATION—See ASSUMPSIT. BILL OF EXCHANGE. GUARANTEE.

CONSPIRACY—See CRIMINAL LAW. LIBEL.

If two persons do acts of the same tendency, the doing of the acts is evidence of the acting in concert, but not conclusive evidence, for each may have had a separate and distinct plot; and in this case the plaintiff has not alleged that there was a joint concert between the plaintiff and Rooney. *O'Connell v. Mansfield*, 9 Ir. L. Rep. 212, Ex. Ch. [Per Pennefather, B.]

The objection, however, assumes another, and a more technical shape, which is, that the declaration and libel import the specific charge of conspiracy, which the plea does not justify. I admit they state facts which would be evidence to support such a charge; but when the plaintiff does not, as he might, ascribe to them this meaning, I think that the court cannot be required to do so—the more especially because if he had done so, that meaning would have been reasonable, and might possibly have been negatived. In this point of view, it is material to remark the plain distinction between the case of libel, which is only defamatory because it imputes the crime of conspiracy, and that before us, in which the libel, whether it imputes conspiracy or not, is *per se* highly defamatory. In

the one case the calumny would consist solely in the charge of conspiracy; but in the other—the libel being defamatory, whether it imputed conspiracy or not—the fair way to treat the declaration is, that it complains of the libel as generally defamatory of the plaintiff, and that the guilt of the action is not the specific crime of conspiracy, though it complains of joint acts and joint designs, which are but evidence of a conspiracy, *Id.* 215, 216. [Per Blackburne, C. J.]

CONTINUANCES—See PLEADING (DISCONTINUANCE.)

CONTINUANCE (PUIS DARREIGN)—See PLEADING.

CONTRACT—See ANNUITY. ASSUMPSIT. LANDLORD AND TENANT.

Construction.—In an action of special assumpsit upon the following contract, "I propose to superintend the execution and building of the B. Workhouse, and to devote my entire attention to it, for the sum of £2 per week. Signed, A.B." Held, that this not appearing to be a contract exceeding £20 in value, did not require a stamp. Secondly, that it was a continuing contract, and could not be put an end to without notice. *Hickey v. Browne*, 4 Ir. L. Rep. 277, Q.B.

"Where a document is so obscurely worded as to leave a doubt as to the intention of the parties, it may be open to the court to inquire into and speculate upon that intention; but when the language of the instrument is clear, and the intention manifest, I am not aware of any case which decides that the court can hold anything immaterial that either party, and more especially a party under no original liability, thinks fit to stipulate for in his contract: such a party is not bound to involve himself in the transaction at all, except upon his own terms, and on the exact fulfilment of which he has a full right to insist." *Barry v. Cambie*, 6 Ir. L. Rep. 68, Ex. (Per Richards, B.)

Where certain Commissioners proposed to the Corporation of Dublin, "That they and their successors should pay to the said corporation the sum of £150 per annum, the better to enable the said corporation to extend their mains and works for the supply of water to the fountains or conduits which were to be erected by the said Commissioners, or their successors, in such places as they shall think fit, provided they should be empowered by Act of Parliament so to do," which proposal the said corporation agreed to accept, and said agreement was in every part ratified and confirmed by statute. Held, that the corporation were only bound to extend their mains into the streets in which such fountains were erected, and were not bound to supply pipes for the purpose of connecting these mains with the fountains. *The Commissioners of Paving v. The Lord Mayor, &c., of Dublin*, 3 Ir. L. Rep. 193, Q. B.

The plaintiff, in an action for breach of contract, declared that M. H. was indebted to the defendant in £5000, and that in consideration, that the plaintiff would, for the securing thereof, execute to the

defendant a bond conditioned for payment of £500, and a warrant of attorney for entering judgment on it; the defendant undertook and promised the plaintiff to give him six months' notice in writing of her intention of calling in the principal of said sum so to be secured; the declaration then averred the execution of the said bond and warrant, and alleged in the breach, the issuing of a *fi. fa.* by the defendant on a judgment entered on said bond and warrant, and a seizure and sale of the plaintiff's goods without the said notice, the defendant having pleaded the general issue, the plaintiff at the trial called a witness, who produced and proved the following agreement: "Gentlemen, I hereby promise to give you six months' previous notice in writing, on the occasion of my calling in the sum of £500, lent by me to you, and am, gentlemen, your obedient servant, M. R. (defendant.) To Messrs. M. H., J. K., M. D., and T. H." (plaintiffs). The witness also stated that the £500 mentioned in the agreement was the amount of a bond passed by the parties to it to the defendant; and that M. H. was the principal debtor, and the agreement was drawn up in consequence of an apprehension of the money being called suddenly in. The attested copy of the judgment was also given in evidence, which appeared to be on confession, and recited the bond as the bond of the defendant alone; but neither the bond itself nor the warrant of attorney were produced, the jury having found a verdict for the plaintiff. Held by the court, on a motion for liberty to set aside the verdict, and to enter up a non-suit, that the action was properly brought by the plaintiff alone, without joining the parties to the agreement as co-plaintiffs. *Honan v. Ryan*, 6 Ir. L. Rep. 112, C. P.

But then comes the important question, whether this action was rightly brought, or could be maintained, by the plaintiff individually; or whether it ought not to have been brought in the names of the four persons, or the survivors of them, to whom the undertaking of the defendant was addressed. The rule on that subject has been clearly and distinctly laid down by the Court of Exchequer Chamber, where all the authorities were recently under review, in the case of *Barry v. Cambie*, and the rule is this—that whatever may be the language used by the parties to the contract, the nature of the contract is to decide whether it is joint or several; and, therefore, though the language may be joint, yet, if the transaction be in its nature several, each of the parties can maintain a separate action for the breach, and *vice versa*; and whether the action be in covenant or assumpsit, the rule is the same. *Ib.* [Per Doherty, C. J.]

Conditions Precedent.—A charter party stated an agreement, that the vessel was to proceed to H., take in a cargo, and proceed therewith to D., and there discharge part of her cargo, and should take on board a full complement of passengers—say three to every five registered tons, and being so loaded, should proceed to Q., and deliver the same, on being paid freight, at the gross sum of £300, and that this freight should be paid by the defendant to the plaintiff, in cash, previous to clearing at D. The declaration after the usual averments

of mutual promises, and that the vessel was tight and staunch, &c., alleged that she did proceed to H., and did arrive at D., and that the plaintiff was willing to receive, and did afterwards receive, on board the ship, such passengers as the defendant tendered to be taken on board. Held, the taking the passengers on board was an independent condition, and not a condition precedent. *Garrick v. Bradshaw*, 10 Ir. L. Rep. 129, Q. B.

A declaration on a charter party, set forth a stipulation that the ship should proceed to Dublin, or as near thereto as she should safely get, and deliver the cargo, on being paid the freight as therein mentioned, and that one-third of the freight should be paid, in cash, on the unloading and right delivery of the cargo, and the rest by approved bills, payable in London at four months following, &c. The declaration contained an averment that the said ship did therewith proceed to Dublin, and did then and there deliver her cargo, &c. Special demurrer, on the ground that the unloading and right delivery was a condition precedent, and that there was no averment of the unloading. Held, that the declaration was bad, in not averring an unloading, as well as a delivery of the cargo. 1 Ir. Jur. 288, Ex.

Statute of Frauds.—Plaintiff furnished G. with a sample of oatmeal for sale, and G. sold the oatmeal to the defendant. G. did not enter any memorandum of the sale at the time, or deliver a bought and sold note, but in a day or two after, he made the following memorandum: "Sold Mr. J. R. (the defendant), for Mr. R. G. (the plaintiff), one hundred loads of oatmeal, to be delivered here immediately, and to be full weight, and to be fully equal to sample, at 28s. per load, cash." Held, that in the absence of a bought and sold note, this memorandum was evidence of the contract, and that as it stated all the terms of the contract, and was made while the authority of the agent continued, it was a sufficient memorandum to satisfy the statute of frauds. *Richey v. Garvey*, 10 Ir. L. Rep. 544, Q. B.

Usurious.—*Quære*, whether the following clause of the 2 & 3 Vic. c. 37: "Any contract for the loan or forbearance of money, above the sum of £10 sterling," is to be construed as a general clause extending to any contract for the loan or forbearance of money above the sum of £10, or whether it is to be restricted to contracts for the loan or forbearance of money upon the faith or security of bills or notes. *Swoyer v. Maguire*, 7 Ir. L. Rep. 373, Ex.

[As to whether bills or notes under £10 are within the 2 & 3 Vic. c. 37, &c. *Fitzgerald v. Lacy*, 1 Ir. Jur. 110.]

Stamps.—In an action for the plaintiff's salary as clerk to the defendants, the plaintiff produced and gave in evidence a letter to A., signed by him, at foot of which was the following memorandum: "J. D. (the plaintiff) commenced this day at £70, to be paid £80 if he remains twelve months, to be increased £10 per annum, and give a three months' notice of leaving. (Signed.) T. M. (the defen-

dant). Held, that it required a stamp. *Dunn v. Mahon*, 8 Ir. L. Rep. 83, Ex.

A memorandum. "My dear sir,—You have given me this day £280, which I undertake to return you next week. This money, given me on behalf of Sir G. G., out of the trust-money of Miss G., which you hold for her. H. J. H. (plaintiff). To Sir G. G. (the defendant). Held, that this memorandum should not be interpreted as a promissory note, and was, therefore, admissible in evidence, without being stamped as such. *Hamilton v. Gould*, 1 Ir. L. Rep. 171, Q. B.

At the trial of an ejectment, the following document, signed by several tenants: "Sir,—Allow us back into the possession of the land lately held by us under Mr. Cooper, and we will consider ourselves monthly tenants, and will yield up possession of the aforesaid land on getting one month's notice, and that without litigation or trouble. March 20, 1835." Held, that no evidence having been offered to prove that this was not a joint agreement, the foregoing document, signed by the several defendants, did not require more than a single stamp. *Cooper v. Flynn*, 3 Ir. L. Rep. 472, Ex.

In an action of replevin for a piano-forte, the plaintiff claimed the special property as a bailee, and one of his witnesses produced the following letter, which he stated contained the terms of the bailment to the plaintiff: "Sir,—You have handed me cash for my two separate acceptances for the sum of £65 each, bearing date, respectively, three months after date, on an understanding that the same are to be renewed for three months longer, from the 24th of August next; and as I have deposited with you a grand piano-forte, and a debenture for £125 on the Theatre Royal, Hawkins-street, I hereby authorize and desire you will sell or dispose of, to the best advantage, such piano-forte and debenture, if I do not, on or before the first day of November next, place in your hands sufficient funds to meet said acceptances, and apply the produce of said sale to the payment of the said acceptances. Dated this June 12, 1839. Henry Baker." "And, Sir,—A certain acceptance of mine, bearing date the 23rd of May, 1839, payable in six months, for the sum of £125, now in your possession, as a collateral security for the performance of the within, as understood by and between us both, to be cancelled or returned on the due fulfilment of the said within, my undertaking, 12th June, 1839. Henry Baker." Held, to require an agreement stamp. *Butler v. Bridges*, 3 Ir. L. Rep. 464, C.P.

"I agree to superintend the execution and building of the B. Workhouse, and to devote my entire attention to it, for the sum of £2 per week. Signed, A. B." Held, that as it did not appear that this was a contract exceeding £20 in value, it did not require a stamp. *Hickey v. Brown*, 4 Ir. L. Rep. 277, Q. B.

An agreement containing matters, one of which would not want a stamp in any case, and the other only requiring it, if exceeding £20, need not be stamped, although both matters would jointly exceed that sum. *Haig v. Byrne*, Bl. D. & O. 57, N. P. [Per Brady, C. B.]

A document, having but one stamp, and con-

taining several proposals, each requiring a stamp, is admissible in evidence to prove the agreement to which the stamp, by juxta position, is affixed, and no other. *Headly v. Walsh*, 1 Leg. Rep. 288.

A., the agent of B., to charter a vessel, entered into a contract with C. for that purpose, and executed a charter party for B., and directed the vessel to sail to the port at which B. desired to load her. Upon her arrival, B. refused to load her, and C. brought an action for the breach of the charter party. At the trial, the plaintiff produced a copy of the charter party properly stamped, but which, it appeared, was executed after the defendants refused to perform the contract, and the original charter party being produced, the defendants being called upon by notice to do so, was not stamped. Held, that neither copies could be received, the original charter party not being stamped, and the latter being executed after the authority of the agent had expired. *Nichol v. Hickson*, 3 Ir. L. Rep. 73, Q. B.

In an action of trespass for mesne profits, an instrument amounting to an agreement was offered in evidence, not for the purpose of enforcing its provisions, but for the collateral one of proving the defendant in possession of the premises. Semble, that for this purpose it was admissible without a stamp. *Earl of Listowel v. Greene*, 3 Ir. L. Rep. 205, Ex.

A. had been allotted shares in a railway, which he had sold as scrip, but which had, nevertheless, been registered in his name in the books of the company. The real holder subsequently sold them to B., who sold them to C., by deed according to the provisions of the Act. A. executed a deed of transfer, which he delivered to B., receiving the following written undertaking: "I have received the deed, on condition of having it executed by C., and registered." At this time calls amounting to more than £20 had been made on the shares, which, by the provisions of the 8 Vic., c. 16. s. 16, should be paid before registering the deed. An action having been brought for a breach of the undertaking. Held, that it did not require a stamp. *Jeffereys v. Evans*, 1 Ir. Jur. 151, Ex.

CONVERSION—See TROVER.

CONVICTION—See JUSTICE OF THE PEACE. CERTIORARI.

Form of.—Where the act under which the defendant was convicted required that a notice in writing should be served upon him, within a week after the information was exhibited, and the conviction stated that due notice in writing was served upon him, and also that the notice was produced and proved before the magistrates, held, that this statement was sufficient. *Reg. v. Harris*, 1 Ir. L. Rep. 112, Q. B.

Where an information charged that a party did knowingly harbour and conceal, and did also knowingly permit and suffer to be harboured and concealed, certain contraband articles, and the conviction thereon adjudged him to be guilty of the

offence so charged, held, that this information did not charge two offences, and that there was no duplicity in the conviction. *Reg. v. McNaghten*, 9 Ir. L. Rep. 93, Q. B.

A conviction under the Burning Act, 40, Geo. 3, c. 24, Ir., described the offender as convicted in a penalty of £10 an acre, for having burned seven acres and two roods of land. Held bad for uncertainty, there being no evidence to shew whether the acres specified were English statute or Irish plantation measure. *Reg. v. Kirwan*, 10 Ir. L. Rep. 203, Q. B.; S. C. Bl. D. & O. 89.

CORONER—*See* ARREST. ELIZORS.

Under the 9 & 10 Vic. c. 37, a coroner is bound to reside, and the provisions of this Act apply to coroners who have been continued in their situation, as well as those newly appointed since the passing of the Act. *In re Magee*, Bl. D. & O. 250, Q. B.

CORPORATION—*See* MINISTER'S MONEY.

Generally.—Rating under the Act for the Relief of the Poor in Ireland, must have been in existence for twelve months, prior to the 31st of August, in the year in which the Municipal Corporation Act, (3 & 4 Vict. c. 108,) comes into operation in any borough in Ireland. Therefore, as the poor rate was first struck in Limerick, in September, 1840, Held, that the Corporation Act could not come into operation in that borough until the year 1842, as a twelve months rating to the poor, prior to the 31st of August, would not be completed until August in that year. The matters required to be done by the 38th section of that statute are essential, and the act is in regard to them imperative, and not merely directory. *Regina v. Versker*, 4 Ir. L. Rep. 382. [Perrin, J., dissentients.]

Where a statute, creating a corporation, directs that the council of the corporation shall take an account of the expenses incurred in carrying into effect the provisions of the act, and then that the council should order the town clerk to pay the same.

Semble, such an order to the town clerk does not raise an implied assumpsit by the corporation to pay such expenses. *Humphreys v. Lord Mayor, &c., of Dublin*, 6 Ir. L. Rep. 159, Q. B.; S. C. 7 Ir. L. Rep. 44.

Quære, is the town clerk liable for suit expenses. *Ib.*

In an action brought against N. and others, being the Town Commissioners of Cashel, appointed pursuant to the 9 Geo. 4, c. 82, Held, that they were properly sued as individuals, and are not a corporate body. *Colquhoun v. Nolan*, 1 Ir. Jur. 263, Ex.

Burgesses.—The appeal given under the 50th section of the 3 & 4 Vict. c. 108, against the right of a burgess to remain upon the burgess roll, being a proceeding analogous to an application for an information in the nature of a *quo warranta*, cau-

not be moved within the last four days of term. *Anonymous*, 4 Ir. L. Rep. 103, Q. B.

On motion to strike a burgess off the roll. Held, that the conditional order need not state the grounds upon which the party is sought to be removed. *Conway v. Baster*, 7 Ir. L. Rep. 16, Q. B.

Semble, one party cannot delegate to another a general power to sign notices of objection. *Ib.*

Quære, has the court jurisdiction to strike a burgess off the roll, when an objection to the burgess has not been made in the court below. *Ib.*

The person objecting, under the 45th section of the 3 & 4 Vict. c. 108, must be a *bonâ fide* objector; but it is not necessary, in order to give him a right to make the objection, that he should have had positive knowledge of the facts, upon which he made the objection, at the time he signed the notice. *Regina v. Hannon*, 7 Ir. L. Rep. 21, Q. B.

Liability for acts of Servants.—A corporation acting as a public body, in the execution of a public duty which they are bound to perform, are not answerable for the negligence or unskilfulness of the agents, or contractors, whom they employ. *Glover v. Corporation of Limerick*, 3 Ir. L. Rep. 246, Ex.

Quære, whether a corporation receiving tolls and customs, upon the condition of keeping a bridge, or other public work, in repair, are liable, as private individuals would be, for the acts of the agents, or workmen, employed under their authority. *Ib.*

Actions by.—A corporation need not declare by attorney. *Governor, &c., of the Apothecaries Hall v. Calvert*, 6 Ir. L. Rep. 186, Q. B.

COSTS—*See* ATTORNEY. ARREST. AWARD. AMENDMENT. CROWN. PRACTICE.

Amendment.—A consent to be allowed to amend contained no offer of costs. A notice of motion, for the same purpose, did so. The motion was refused without costs to either party. *Haword v. Mason*, 4 Ir. L. Rep. 411, C. P.

Motions and proceedings generally.—The court will not allow the costs of a motion to set aside proceedings, where the notice of the motion does not sufficiently specify the defect upon which the motion is granted. *Lynch v. Ejector*, 2 Ir. L. Rep. 240, Ex.

By a former order the costs of proceedings had upon process, with which the defendant swore he had never been served, were to abide the event of a prosecution for perjury. The court gave the costs to the defendant, after a trial in which the jury disagreed, but there was strong evidence of the guilt of the process server. *Comerford v. Burke*, 2 Ir. L. Rep. 197, C. P.

If a party served with a notice tenders a consent to do that which the court on motion will order, he will be entitled to the costs. *Reynolds v. Kelly*, 3 Ir. L. Rep. 186, C. P.

A defendant who has strictly followed the rules

of the court will not be liable to the costs of a motion, though a consent had been previously tendered, offering the same terms imposed by the court. *Waldron v. Hussey*, 4 Ir. L. Rep. 134, C. P.

If a party comes into court seeking any benefit to himself by his motion, he will not be entitled to costs. *Finn v. Walsh*, 3 Ir. L. Rep. 368, C. P.; *Loveland v. Daly*, 3 Ir. L. Rep. 537, Ex.

The defendant, though required by several notices, the last of which bore date the 27th of October, had not signed a consent to make a rule of Nisi Prius, of the 18th of June, a rule of court, until the 29th of October, and after expenses incurred by the plaintiff, in preparing for a motion to have the rule entered with costs, of which notice had been served on the same 29th, and an offer made on the part of the plaintiff to withdraw it on payment of the expenses actually incurred. The court made a conditional order, obtained on the first day of term for the purpose, absolute, with costs. *Regan v. Francis*, 4 Ir. L. Rep. 6, C. P.

The court has no jurisdiction to order a party to pay costs to another, incurred in proceedings in equity. *Lynch v. Lynch*, 4 Ir. L. Rep. 298, C. P.

Where a motion is not properly moveable, the party appearing to oppose it will not be allowed his costs, except the notice of motion state that leave to move had been given. *Mara v. Murphy*, 4 Ir. L. Rep. 138, C. P.

The process server was prosecuted by the defendant, and convicted of perjury. The court set aside the civil proceedings with costs, but refused to make the plaintiff pay the costs of the prosecution. *Lewis v. Hymas*, 4 Ir. L. Rep. 177, Ex.

The defendant having prosecuted, and convicted the process server of perjury, the court set aside the civil proceedings with costs, and the costs of taking the affidavit of the process server off the file, for the purpose of the prosecution, but refused the costs of the motion, as the notice asked the costs of the proceeding in the Criminal Court. *Fahie v. Nash*, 4 Ir. L. Rep. 304, C. P.

Quære, has the court jurisdiction to order the plaintiff to pay to the defendant the costs incurred by the latter in the prosecution. *Id.*

A plaintiff is not entitled to the costs of a motion, calling on the defendant to furnish the particulars of a set off, where no previous demand has been made. *Betham v. Franklin*, 5 Ir. L. Rep. 40, Q. B.

No costs of a motion will be given except asked for by the notice.

If, on argument of a demurrer, the objections have not been noted in the judge's books, in pursuance of the 134th rule of the court, the party obtaining judgment, on such objections, will not be allowed his costs. *Cochrane v. Fitzpatrick*, 8 Ir. L. Rep. 187, Q. B.

The costs of a commission to examine witnesses are always costs in the cause. *Harris v. Good*, 1 Ir. Jur. 216, Ex.

A defendant is entitled to the costs of a commission to examine witnesses, though the witness examined was not produced, nor his depositions read at the trial, the plaintiff not having provided, by the form of his order, for that contingency. *Kem-*

mis v. Machlin, Bl. D. & O. 222, C. P.; S. C. 10 Ir. L. Rep. 7.

Security for Costs.—A tenant will be required to give security for costs, under the 1 Geo. 4, c. 87, though there has been laches, on the part of the landlord in the service of the notice required by the statute, if there be no affidavit on the part of the tenant, shewing that there is something to be tried. *Flynn v. Ejector*, 1 Ir. L. Rep. 72, Q. B.

A defendant in ejectment will not be required to give security for costs, when he holds under a lease for 21 years, though determinable, at the end of each year, by a previous six months notice, either from the lessor, or lessee, if the ejectment be brought upon a notice, pursuant to the proviso in the lease, for determining the interest. *Duke of Devonshire v. Ejector*, 1 Ir. L. Rep. 6, Q. B.

A defendant who is a seafaring man, will not be required to give security in an action for costs of replevin. *Corscaden v. Stewart*, 1 Ir. L. Rep. 110, Q. B.

In an ejectment for non-payment of rent, the defendant was compelled to give security for costs, it appearing he was a mere cottier tenant, and that for the mere purpose of depriving the landlord of costs; defence had been taken in his name, by the principal tenant, who had been delapidating the premises since the ejectment was brought. *Henderson v. Hagan*, 1 Ir. L. Rep. 231, Ex.

Where an insolvent took defence to an ejectment brought by his assignee, the court refused to interfere, either by setting aside the defence, or by compelling the defendant to give security for costs, it appearing, that, in consequence of his refusal to give up possession of the premises, he still continued a prisoner, and had not obtained the benefit of the Act for the Relief of Insolvent Debtors. A defendant in ejectment will not be compelled to give security for costs, unless under very special circumstances. *Evans v. Reilly*, 1 Ir. L. Rep. 230, Ex.

The 8th new G. R. does not apply to an attorney giving security for costs for a defendant living out of the jurisdiction. *Anonymous*, 1 Ir. L. Rep. 294, Q. B.

Where the plaintiff stated, that he then resided, and intended to reside, within the jurisdiction, and that an order requiring him to give security for costs, was obtained for the purpose of delay, Held, that this was not sufficient ground to rescind the order. *Woodley v. Woodley*, 3 Ir. L. Rep. 86, Q. B.

Where a Court of Equity directs that an action should be tried at law, and the plaintiff, in the action, resides out of the jurisdiction, the law court, in which the action is brought, may order the proceedings to be stayed until the security for costs be given. *Lilly v. Stafford*, 3 Ir. L. Rep. 300, Q. B.

[This application may be also made in the Court of Chancery. *Desprez v. Mitchell*, 5 Mad. 87.]

When there has been judgment for the defendant in the court below, and the plaintiff sues out a writ of error, he is bound to enter into security, as if the defendant below was plaintiff in error. *Dunson v. McIntyre*, 3 Ir. L. Rep. 443, Q. B. [*Williamson v. Haygarth*, 12 Jur. 727, Ex. Ch.]

In a writ of error, from an inferior court, the Common Pleas will not compel the defendant to

give security for costs, being the plaintiff below, and residing out of the jurisdiction, but who had not been required to give security for costs in the court below. *Harkin v. Montgomery*, 3 Ir. L. Rep. 471, C. P.

A party being resident, out of the jurisdiction, at whose suit a *scire facias* to revive a judgment is issued, will not be compelled to give security for costs. *Walker v. Fitzgerald*, 3 Ir. L. Rep. 509, Ex.; S. P. contra. *Archdall v. Supple*, 3 Ir. L. Rep. 287, C. P.

Where the action of trespass, for mesne rates, is brought in the name of the feigned lessee, the court, upon the defendant's application, will stay the proceedings till security be given for costs. *Loveland v. Daly*, 3 Ir. L. Rep. 537, Ex.

Where the plaintiff was not a person in solvent circumstances, and the action was brought at the suggestion and cost of the landlord, the proceedings were stayed till the plaintiff gave security for costs. *Egan v. Kirkaldy*, 3 Ir. L. Rep. 542, Ex.

In an ejectment on the title, a defendant will not be compelled to give security for costs, unless fraud or collusion be clearly shewn. *O'Brien v. Dwyer*, 4 Ir. L. Rep. 380, Q. B.

A plaintiff residing abroad, but who has property in Ireland, and has been resident since the commencement of the suit, and purposes to do so till its settlement, will not be required to give security for costs. *Sisson v. Cooper*, 4 Ir. L. Rep. 401, C. P.

A personal representative residing out of the jurisdiction will be ordered to give the defendants, in a *scire facias*, security for costs. *O'Brien v. Upton*, 4 Ir. L. Rep. 419, C. P.

The court will not order an attorney to disclose to the defendant the name and place of abode of his client, or to give security for costs, when he states that he resides in Ireland, and that he will produce him at the trial; but if he fail, he must pay the defendant's costs. *Riley v. Beatty*, 6 Ir. L. Rep. 100, C. P.

The court will not compel a defendant in ejectment to give security for costs, except some fraud or collusion be shewn. *Colclough v. Magill*, 6 Ir. L. Rep. 220, Ex.

Plaintiffs will be compelled to give security for costs, though many of the members reside in this country, the company being essentially a foreign one. *North American Colonial Association v. Archer*, 6 Ir. L. Rep. 509, Ex.

The defendant is not entitled to the costs of a motion to compel a plaintiff to give security for costs. *Ib.*

A plaintiff who serves notice of speeding a writ of inquiry, upon a suggestion of breaches under the 9 Wm. 3, c. 10, cannot be compelled to give security for costs. *Thompson v. Donnelly*, 6 Ir. L. Rep. 30, Ex.

A pauper tenant bringing an action of trespass, for injury to his holding, his attorney being the attorney of the landlord, who a short time previously discontinued an action in his own name for the same cause of action, was ordered to give security for costs. *Larkin v. Lauder*, 7 Ir. L. Rep. 227, C. P.

It is not necessary, under such circumstances, to

make a previous application or demand for such security. *Ib.*

If the officer, on a reference to measure security for costs, fix the amount above the ordinary sum, the court will not direct him to review his taxation, unless that order be clearly wrong. *Lewis v. Earl of Charleville*, 9 Ir. L. Rep. 301, Ex.

Semble. The court will direct him to review his order, if the plaintiff state that he is unable to procure the required amount of security. *Ib.*

An officer serving in the East India Company's service is liable to give security for costs, when resident out of the jurisdiction. *Thorpe v. Murphy*, 10 Ir. L. Rep. 332, Q. B.

A plaintiff out of the jurisdiction gave security for costs, and at the trial a verdict was given against him, on which he took a bill of exceptions. The court, after the bill of exceptions had been made up, made an order, on the application of the defendant, that the proceedings should be stayed until the plaintiff gave further security for costs, the costs out of pocket having exceeded the original security. *Lemson v. Hodges*, 8 Ir. L. Rep. 112, C. P.

The defendant having ascertained, when the time for pleading was about to expire, that the plaintiff was resident out of the jurisdiction, gave notice of a motion for security for costs, and on the following day filed his plea. Held, that he had thereby waived his notice. *Watson v. Chadwick*, 8 Ir. L. Rep. 291, Ex.

Semble. The proper course is to serve a cautionary notice on the plaintiff, requiring him not to mark judgment for want of a plea pending the notice for security. *Ib.*

The affidavit to found a motion for security for costs need not be made by the defendant, and when pending the motion, having been served with the rule for judgment, he pleaded. Held, that he was not disqualified from making the motion. *Clarke v. Dickson*, 8 Ir. L. Rep. 410, C. P.

A plaintiff in error, who has been plaintiff below, cannot be compelled to give security for costs, under the 1 Geo. 4, c. 68. *Stephenson v. Higginson*, Bl. D. & O. 37, Ex.

A plea, though filed under protest, is a waiver of the right to move for security for costs. *Henry v. Hackett*, Bl. D. & O. 248, Q. B.

A plaintiff residing as a judge in one of the colonies will not be compelled to give security for costs. *Perry v. Moloney*, Bl. D. & O. 207, Q. B.

A defence taken to an ejectment on the title, in the name of a person served who had subsequently left the jurisdiction, will be set aside, unless security for costs be given, it appearing that his name had been used by other persons, to avoid the payment of them. *Stewart v. Bartholomew*, 1 Ir. L. Rep. 377, Ex.

To induce the court to compel a defendant in ejectment to give security for costs, some fraud or collusion must be shewn, as where a pauper is put forward, by a solvent person, to embarrass the lessor of the plaintiff. *Colclough v. Magill*, 6 Ir. L. Rep. 220, Ex.

If the defendant give the preliminary notice that the plaintiff, residing out of the jurisdiction, shall give security for costs, if the plaintiff assent

thereto, such assent must be unconditional, and no further proceedings can be taken until the security be given. *Cochrane v. Holden*, 1 Ir. Jur. 80, C. P.

Particulars of Demand.—A plaintiff having omitted to file a bill of particulars with his declaration, on being served with a notice of motion on the same day, to compel him to furnish it with costs, forwarded it before six o'clock the same evening, offering to pay the costs incurred to that time, Held, that he was justified in refusing to sign a consent to pay a taxed bill of costs of the motion, and on the defendant's moving the original motion, it was refused, with costs. *Hughes v. Fitzgerald*, 6 Ir. L. Rep. 114, C. P.

A general heading to a bill of particulars omitted the date of each item. To entitle the defendant to the costs of a motion for further particulars, he should have given the plaintiff notice of the irregularity, and demanded further particulars. *Anonymous*. Bl. D. & O. 99, Ex.

Costs of Executors.—Where there had been a verdict against an executor-plaintiff in action of *sci. fa.*, the court struck out the part of the judgment which awarded costs against him, it having ever been the understood construction of the 9 Wm. 3, c. 10, that executors, whether plaintiffs or defendants, in a *scire facias*, were exempted from payment of costs in cases of non-suit or verdict, and by the operation of the new statute (3 & 4 Vic., c. 105), the question was not likely to occur again. *Glover v. Nagle*, 3 Ir. L. Rep. 21, C. P.

To exempt an executor or administrator from costs, under the 3 & 4 Vic., c. 105, s. 56, after a verdict for the defendant, there must be some misconduct on the part of the defendant, tending to mislead the plaintiff into bringing the action. *Martin v. Johnson*, 5 Ir. L. Rep. 245, Ex.

Executors, plaintiffs in *scire facias*, prior to the passing of the 3 & 4 Vic., c. 105, cannot be held liable for costs, when judgment is given against them. *Farran v. Otiwell*, 7 Ir. L. Rep. 54, Q. B.

The 3 & 4 Vic., c. 105, s. 56, puts executors and administrators on the same footing as ordinary plaintiffs, and makes them liable for costs, unless the court, in the exercise of its discretion, shall otherwise order. *Ackland v. Grant*, 1 Ir. Jur. 80, Q. B.

Staying Proceedings and Discontinuance.—The court will permit the defendant to enter a rule to stay proceedings, until the costs of not going to trial, pursuant to notice, be paid, where a trial has been lost by the default of the plaintiff, in not delivering the *distringas* to the sheriff in sufficient time to enable him to summon the jurors six days before the assizes. *Gillespie v. Cuming*, 2 Ir. L. Rep. 28, Ex.

When the defendant obtains an order upon the plaintiff, to stay proceedings until the latter give security for costs, the court will not give him the costs of the application, though before making the application he called upon the plaintiff to give the security. *Loveland v. Daly*, 3 Ir. L. Rep. 537, Ex.

The defendant having entered a rule to stay proceedings, until the costs of plaintiff not pro-

ceeding to trial were paid, may afterwards apply for a conditional order on the plaintiff, to pay the costs without discharging that rule. *Horsfall v. Jennings*, 4 Ir. L. Rep. 218, C. P.

A defendant may apply for the costs occasioned by the plaintiff not going to trial, pursuant to notice, notwithstanding the usual side bar rule to stay proceedings, and the court will make the conditional order for costs absolute, and for the costs of the motion, and, at the same time, give the defendant liberty to quash the rule to stay proceedings. *Broadbent v. McNicholl*, 5 Ir. L. Rep. 417, C. P.

If two actions be commenced for the same cause of action, and a rule to discontinue be entered in one, proceedings will be stayed in the other until the costs of the rule to discontinue are paid. *Considine v. Moroney*, 5 Ir. L. Rep. 486, Q. B.

Action of trespass for the diversion of a water-course. The plaintiff was non-suited, proceedings were stayed in a second action for the same cause, until the costs of the non-suit were paid. *Horgan v. Quinlan*, 5 Ir. L. Rep. 590, Q. B.

Where a notice of trial of an ejectment had been withdrawn, and the defendant had entered a rule to stay proceedings, until the costs of not proceeding to trial were paid, and (a new ejectment having been brought) had also entered a rule to discontinue, until the costs of the former ejectment were paid, the plaintiff will be ordered to pay the costs so incurred, though the defendant have not discharged the rule to discontinue. *Healy v. Kennedy*, 6 Ir. L. Rep. 457, Q. B.

Judgment as in Case of Non-suit.—Where on motion for judgment, as in case of non-suit, after default on a peremptory undertaking to go to trial given on a former motion, the plaintiff gives a peremptory undertaking to go to trial at the ensuing sittings, he will be put under terms to pay the defendant the costs already incurred, the costs of this motion, and also leave will be given the defendant to enter up judgment without further motion, if the plaintiff fail in going to trial pursuant to this undertaking. *O'Donohoe v. O'Donohoe*, 1 Ir. L. Rep. 9, Q. B.

If a defendant have obtained judgment, as in case of a non-suit, on the terms of paying to the plaintiff the costs of the motion, and have not taken out this order, the plaintiff, on motion on notice, will be allowed to take out the order for the purpose of recovering those costs. *Lucina v. Flattery*, 5 Ir. L. Rep. 453, Q. B.

Where an action was brought against a barony constable and collector of county cess, for an alleged illegality in the seizure of a horse and car, as a distress for the recovery of grand jury cess, the defendant entered up judgment, as in case of a non-suit, and issued execution thereunder for double costs. Held, that the 10 Car. 1, sess. 2, c. 16, applied to judgments, as in case of non-suit, and that under that statute the defendant was entitled to double costs. *Dobbin v. Morrow*, 5 Ir. L. Rep. 353, Q. B.

The plaintiff's attorney was directed to pay the costs of a judgment, as in case of non-suit, he having failed to comply with an undertaking to

produce his client, which he gave on a motion for security for costs. *Riley v. Beatty*, 6 Ir. L. Rep. 100, C. P.

Of New Trial.—Where inadmissible evidence is allowed by the judge to go to the jury, the court will not give costs against a party seeking a new trial upon that ground, though in the opinion of the judge the evidence could not have influenced the jury. *Sinclair v. Barnett*, 1 Ir. L. Rep. 46, Q. B.

Where the judge at Nisi Prius entertains a strong doubt upon any of the questions raised, and wishes to have them reserved for the opinion of the court above, the costs of the argument will not in general be given against the unsuccessful party. But where the objections are reserved, not from any doubt in the mind of the judge, but to afford that advantage to the party making them, if he fail in these objections, he must pay costs. *Barrett v. Hyndman*, 3 Ir. L. Rep. 109, Q. B.

The court will not give costs to a plaintiff against whom there is a verdict, though he succeeds upon a motion to change the verdict on liberty reserved, as the plaintiff derives a benefit from that course, by not being obliged to take exceptions to the charge, and go to trial again, and the question being left to the determination of the court, the costs are in their discretion. *Daly v. Colbert*, 3 Ir. L. Rep. 355, C. P.

Several Trials.—Where there had been three abortive trials, a juror being withdrawn by consent on the first occasion, on the two subsequent occasions, the jury not being able to agree, were discharged by the judge, and on the fourth a verdict was had for the plaintiff. It appeared from affidavits made on the part of the defendant, that additional witnesses were examined, on the part of the plaintiff, at each successive trial since the first. The plaintiff's attorney said that the evidence on each occasion was substantially the same. Held, that the plaintiff was entitled to the costs of the three abortive trials. *Atkinson v. Carty*, 2 Ir. L. Rep. 170.

The costs of a former abortive trial, when the default has arisen from the act of either party, cannot be recovered by the party ultimately successful. *O'Driscoll v. Macartney*, 9 Ir. L. Rep. 570, Ex.

Neither the court on motion, nor the officer on taxation, can enquire who has been the defaulting party. *Ib.*

Secus, in the case of a *remanet pro defectu juratorum*, or withdrawing of a juror. *Burchall v. Ballamy*, 5 Burr. 2693, overruled. *Crean v. Crean*, 2 Fox & Smith, 10, not followed. *Ib.*

Where an order Nisi had been made, setting aside a verdict generally, and no mention be made therein of the costs of the trial, the party succeeding on the second trial is entitled to the costs of the former. *Rush v. Purcell*, 8 Ir. L. Rep. 379, Q. B.

Special Jury.—The party who applies for a special jury, unless the judge certifies, must pay the costs of it, even though there be no more costs than damages. *Coghlan v. Carney*, 1 Ir. L. Rep. 201.

Where a cause has been tried by one special jury who disagreed, and it was again tried by another, and a verdict had for the plaintiff, and the judge who tried the case on the last occasion certified that the case was a proper one for a special jury, it was held that the party ultimately succeeding was entitled to the costs of the special jury who tried the case on the previous occasion. *Atkinson v. Carty*, 2 Ir. L. Rep. 170.

Where the plaintiff succeeds on some issues, and the defendant upon the others, the former will not be allowed the costs of the special jury, though had upon his own application. *Blair v. Wilson*, 3 Ir. L. Rep. 134, C. P.

The party who applies for a special jury must pay the costs of the same, unless the judge certifies, under the 3 & 4 Wm. 4, c. 91, s. 27, even when there are no more costs than damages. *Martin v. Cochrane*, 5 Ir. L. Rep. 374, Q. B.

The defendant applied for a special jury, and there was a verdict for the plaintiff. On a bill of exceptions a *venire de novo* was awarded, and on a trial before a common jury a verdict had for the plaintiff. The plaintiff paid the jury on the first trial. Held, that he was entitled, on taxation, to be allowed all the costs of striking and paying the special jury. *Harrison v. Bradley*, 3 Ir. L. Rep. 264, C. P.

Notice of Taxation.—To give notice to the taxing officer of a motion to review his taxation is irregular, and will be dismissed as against him, with costs. *O'Connor v. Burke*, 5 Ir. L. Rep. 189, C. P.

Taxation.—In the taxation of costs between party and party, held, first, that an attorney who appears for several defendants will only be allowed one appearance fee. Secondly, that the adversary is not chargeable with more than one consultation, or for the revival of the direction of proofs by leading counsel, or for one fair copy of the pleadings laid before counsel for the direction of proofs, to assist the defendant in his inquiry after the necessary witnesses. Thirdly, that the adversary is not chargeable for the costs of procuring from the journals of the House of Commons a compared copy of evidence given before a committee of the house. Fourthly, that he is not chargeable with the expenses attending the examination of several persons, in order to select, from amongst them, those only whom it would be useful and necessary to produce upon the trial. *Jones v. Conyngham*, 1 Ir. L. Rep. 10, Q. B.

A party will not be allowed lump sums for the expenses of witnesses; he must specify the items of expenditure. *Atkinson v. Carty*, 2 Ir. L. Rep. 170, Q. B.

An attorney is entitled to a fee for attendance, not only on the day on which a law argument is heard, but on each of the law days in the week while it is on the list. *Thompson v. Birnie*, 3 Ir. L. Rep. 38, Ex.

In taxing the costs of an ejectment for non-payment of rent, the lessor of the plaintiff will be allowed the costs of registry searches made, against both names and lands, for the purposes of the action. *Jack v. Lawler*, 3 Ir. L. Rep. 531, Ex.

Where the jury omit or refuse to find any costs at the trial, and there is no finding in that respect in the postea. The taxing officer is, notwithstanding, bound to tax the costs, *de incremento*, when the verdict will carry them. *Pigott v. Morris*, 6 Ir. L. Rep. 340, C. P.

In an ejectment on the title separate appearances were entered by the same attorney for several defendants, and these defences were subsequently consolidated, they having but one common title; the defendants are not each entitled to costs of briefs for counsel at the trial. *Egan v. Arkins*, 10 Ir. L. Rep. 512, Q. B.

In the taxation of costs, the officer should allow a brief to the junior counsel, though there be three counsel of the inner bar. *Fay v. Morphy*, 1 Ir. Jur. 22, Q. B.

There is an inherent jurisdiction in the court over its own officers, to direct the reference to tax which the defendant seeks; with this single qualification, that the bill of costs contains one taxable item. *Bastable v. Reardon*, 4 Ir. L. Rep. 169, Q. B.

The court has jurisdiction to give to a defendant the costs of taxation, though the reference to tax was not till after action brought. — *v. Massey*, Bl. D. & O. 150, Ex.

Several Issues.]—Where issues on one cause of action had been found for the plaintiff, and the issues on the other two causes for the defendant, the defendant was not allowed any portion of the costs paid by him to his counsel, though they were larger than usual, on account of the length of pleadings caused by the plaintiff, having joined the three causes of action in the one declaration. *Blain v. Wilson*, 3 Ir. L. Rep. 134, C. P.

The defendant, in replevin, will be allowed only the costs of the avowry, on which he succeeds, though the arbitrator, to whom the case had been referred from *Nisi Prius*, had found forty-six issues for the defendant, with costs, and thirteen for the plaintiff, without mentioning costs. *Burke v. Ormsby*, 8 Ir. L. Rep. 288, C. P.

In an action of libel, where the defendant pleaded the general issue, and special pleas of justification, and the jury found for the defendant on the general issue, and for the plaintiff on the special pleas, Held, that the plaintiff was entitled to the costs of the witnesses subpoenaed, to disprove the truth of the alleged libel; and, also, a portion of the fees of counsel at the trial, and all costs incurred by him, by reason of the pleas of justification, though the witnesses produced would probably have been examined under the general issue. *Hurst v. Whaley*, 5 Ir. L. Rep. 429, C. P.

An attorney is entitled but to one fee for attendance on a motion, and refreshers to counsel stand on the same ground. *Goodison v. Whelan*, 9 Ir. L. Rep. 90, Q. B.

The costs incurred in obtaining an order of the Court of Chancery, for liberty to bring an ejectment, in the name of a receiver, in a cause, are necessary costs in the ejectment suit, and the landlord is entitled thereto. *Hitchingham v. Hawkes*, 7 Ir. L. Rep. 158, Q. B.

Operation of 2 Geo. 1, c. 11, s. 14, 15.]—If the verdict be for the plaintiff, the defendant is not

entitled to his costs, whatever may have been the amount of damages. *Wynne v. Shaw*, 4 Ir. L. Rep. 221, C. P.

In trespass, for driving a coach against one in which the defendant was, *per quod* he was injured. The jury found 6d. damages, and 6d. costs, the judges having refused to certify that the trespass was malicious. Held, that the plaintiff was entitled to his full costs of suit. The 2 Geo. 1, c. 11, s. 15, comprising but two species of action—assault, and battery, and trespass, *qu. cl. freg.* *Chapman v. Spear*, 8 Ir. L. Rep. 278; S. C. affirmed, *Id.* 461, Ex. Ch.

Operation of 3 & 4 Vict. c. 105, s. 23, 24.]—The taxing master is bound to tax the costs of applications, under the 23rd and 24th section of the 3 & 4 Vict. c. 105, in order to have a judgment charged upon stock, in the books of the Bank of Ireland. *Guinness v. Armit*, 3 Ir. L. Rep. 359.

Quære, can the court give the costs of such application, against the fund charged, together with the payment of the judgment debt. *Id.*

The court will not direct a *fi. fa.* to issue under the 3 & 4 Vict. c. 105, s. 27, for the recovery of costs, which the defendant had become liable to pay, by not having appeared at the trial to confess lease, entry, and ouster. *McDonald v. Larcher*, 4 Ir. L. Rep. 329, C. P.

Where stock or funds, belonging to a judgment debtor, have been charged with the judgment debt, by an order of court, 3 & 4 Vict. c. 105, s. 23, the court has no power, under the 24th section, in the absence of the debtor, to award the costs of the charging order, out of the stock or fund so charged. *White v. Heron*, 5 Ir. L. Rep. 165, Ex.

Means of Recovering.]—Where a frivolous demurrer was filed, a motion to take it off the file was granted, and the party who filed it ordered to pay costs. Held, that an attachment might issue for these costs, as they could not be included in the execution, not being costs in the cause. *Anonymous*, 2 Ir. L. Rep. 66, Q. B.

Since the 11 & 12 Vict. c. 28, the plaintiff may issue a *capias ad satisfaciendum* for the costs of an ejectment, where they exceed £10, and though nominal damages only are included in the judgment. *Carroll v. Develin*, 1 Ir. Jur. 22.

COURT.—See OFFICERS. (OF SUPERIOR COURTS.)

COUNSEL.—See AMENDMENT. ASSISTANT BARRISTER.

In all criminal cases, even where the defendant brings a writ of error, the counsel for the crown are entitled to the reply. *Brady in Error v. Reg.* 4 Ir. L. Rep. 21, Q. B.; *S. C. Jones in Error v. Reg.* 4 Ir. L. Rep. 264, Q. B.; *Aliter in England, Id.*

A bill of exceptions should be always opened by a junior counsel. *Hemphill v. McKenna*, 7 Ir. L. Rep. 395, Q. B.

Every one is entitled to assert his right in a court of justice, by the statement of every fact that can, according to the rules of law, conduce to this end. This right may be delegated to counsel, and

is subject to the same limitation and control as if the party were pleading his own cause. Instructions to counsel are not the test by which to try whether, or not, the line of duty has been passed. Therefore, observations by counsel are not justifiable, unless they be warranted by facts proved, or which may be legally proved. *Butt v. Jackson*, 10 Ir. L. Rep. 120, Q. B.

The court will not permit a law argument to be opened by a counsel of the inner bar. *Lefanu v. Malcolmson*, 8 Ir. L. Rep. 418.

COUNTERPLEA—See CHALLENGE.

COUNTY CESS—See RATES.

COVENANT—See DEED.

Construction.—In the granting part of a lease the following clause was inserted, immediately after the demise of all that, and those, &c.—“And, also, saving, and reserving, to the said lessor, liberty to resume the whole, or any part of that portion, of the hereby demised premises, called the nine acres, being, &c.; allowing to the said lessee, his heirs, &c., the rent of £30 per acre, per annum, for so much as shall be resumed of the same, for, and during the remaining term that shall exist, of the demised premises.” Held, that this clause was a covenant, and not a condition, and, therefore, that an ejectment could not be brought upon it, even after a demand and refusal, to deliver up possession of the said nine acres. *Archbishop of Dublin v. Eaton*, 1 Ir. L. Rep. 168, C. P.

In 1724 a lease of lands was made for a term of 900 years, reserving a rent of “£100 sterling, currency and lawful money of Great Britain,” the money of Great Britain and Ireland being then the same. Held, that, notwithstanding the 6 Geo. 4, c. 79, the rent was not payable in British currency. *Neville v. Ponsonby*, 1 Ir. L. Rep. 204, Ex.

In covenant for rent by lessor against lessee, the declaration stated, that the lessor demised to the lessee certain premises, to hold from the first of May, 1846, for seven years “yielding during the said term, the yearly rent of £80, to be paid on every first of November, and first of May, in each, and every year.” It then stated, that the lessee covenanted that he would, “from time to time, during the term, pay the said rent, on the said days, and times, aforesaid.” The lessee set out the lease on oyer, and from the *reddendum*; it appeared that the first half year's rent was not to be payable until the 1st of November, 1847, “the lessee having already paid the year's rent to accrue due on the 1st of May, 1847.” Held, on demurrer, that the lease was set out according to its legal construction and operation, and that there was no variance. *Wrixon v. Walker*, 1 Ir. Jur. 223, Q. B. [Perrin, J., *dissentiente*.]

Covenant to pay a rent charge, does not run with the rent to the assignee of the rent charge. *Brewster v. Kidgill*, 12 Mod., 166, overruled; *Kennedy v. Stewart*, 7 Ir. L. Rep. 421, (n.) Q. B.

By deed—reciting that A. B., by his will, had devised to C. D. the sum of £10,000, to be paid

out of testator's C. estates, which he thereby charged, with the payment thereof, and which estates he devised to the defendant—it was witnessed that C. D. had granted to the plaintiff an annuity of £200, to be payable out of the interest of said sum of £10,000; and the deed contained a covenant by the defendant, that he would pay the said annuity during the life of the grantor, and that it should remain a charge on said C. estates, and there also was a covenant for further assurance by C. D. and the defendant. Held, that the covenant to pay this annuity was not contingent, upon the solvency of the fund. *Bruce v. Lord Ponsonby*, 7 Ir. L. Rep. 414, Q. B.

Held, also, that the defendant was estopped from shewing that the said C. estate was discharged from the payment of the annuity. *Ib*.

Covenant by lessor against lessee, the lease, besides the usual reservation of an annual rent of £528 14s. 7½d., and a covenant against assigning, or subletting, contained a covenant, whereby it was agreed that the lessor should not, during the term, plough, turn up, or convert into tillage, any part of the lands, except a field therein mentioned; nor cut, or saw, or take away from the demised lands, any part of the grass, meadowing, or hay, which might be growing upon the upland parts of the said premises, called the Bullock Park, nor any part of said premises, except on, &c.; and in case the lessee should assign, or let, or should plough, turn up, or convert into tillage any part of said premises, save as therein-before-mentioned; or should cut, saw, or take away, any part of the hay, or meadowing, which might be growing on said premises, called the Bullock Park, nor any other part of said premises, than the place previously excepted, save, by the permission of the lessor; “then, in any of those cases, the lessee, &c., should thenceforth, during the remainder of the term, pay, and yield up, to the lessor, &c., the yearly rent, or sum, of £1,057 9s. 3d., for the said demised premises, in the room, and stead, of the yearly rent, first thereby reserved, and made payable; such last-mentioned yearly rent to be recovered, and recoverable by distress, and by all the means whereby the rent therein firstly received, was, or might be recovered, and to be paid, and payable, at the time, and in the manner, as the said firstly reserved rent.” Held, that the sum so covenanted to be paid, was in the nature of an increased rent, or liquidated damages, and not of a penalty; and that, on the breach of a covenant, by conversion of a portion of the land into tillage, the jury were bound to find the increased rent, and were not at liberty to award arbitrary damages. *Smith v. Ryan*, 9 Ir. L. Rep. 205, Ex.

The declaration contained four counts on a lease; the third stated, that the deed contained a covenant for renewal, and, also, a covenant for title to make such renewal, and in the breach averred, that the defendant had not title to renew. Plea *non est factum* to all the counts. Held, that the third count could not be supported, by proof of a deed not containing a covenant for title to make such renewal, and, therefore, that a general verdict for substantial damages, upon all the counts, was bad. *Kean v. Strong*, 9 Ir. L. Rep. 74.

Held, that an unqualified covenant to renew, did not imply a covenant for title to renew. *Ib.*

Held, that the unqualified covenant to renew was not qualified by a covenant for quiet enjoyment, the covenants not being connected with each other. *Ib.*

A lease for years containing a covenant to renew, which was declared upon as absolute and unqualified, and the value of the interest under such lease, with the covenant for renewal, being proved, and no evidence of the eviction of the covenantor by title paramount, but mere evidence of an eviction, and a notice served by the defendant, stating, that he had no title to renew. Held, on exceptions, that the judge was right in refusing to direct the jury to find for nominal damages, as there was no evidence that the title to the term, if granted, would have been invalid. *Ib.*

A lease contained a covenant by the lessee, not to break up the land without the previous consent of the lessor in writing. The lessee agreed, if he broke up the land without such consent, to pay a penal rent of £10 for every acre so broken up. The lessee having applied for leave to break up the land, the lessor addressed to him two letters, which were in substance a statement, that if the lessee broke up the lands, in that year, with certain seeds, and pursued a specified system of culture during the two following years, the lessor would not seek to enforce the penalty in the lease. The lessee having broken up the lands, but not having carried out the required mode of husbandry, the lessor distrained for the penal rent, for the first year, the lessee replevied. Held, first, that the letters amounted to a permission to break up the lands upon certain conditions. Secondly, that the lessor could not distrain for the penal rent, though those conditions were not fulfilled; and, thirdly, that his remedy was by action, against the lessee, for the non-performance of these conditions. *Whitmore v. Segrave*, 10 Ir. L. Rep. 609, C. P.

Where, by indenture between A. and B., it was agreed that A., his heirs, &c., should not, during the continuance of the demise, "turn up, burn, or convert into tillage," any of the demised premises, known by the name of the lawn; and, by a further covenant, it was agreed, that "B. should be at liberty in each, and every year, during the continuance thereof, to burn, or till, eight acres of any other part, save the lawn; and that he should be at liberty to take four crops thereof, and then lay down the same in a husband-like manner; and that he should not take more than four crops off any part to be broken up, under penalty; but it was thereby understood, that the eight acres, so to be broken up, were always to be exclusive of the head garden." Held, that, upon the true construction of this covenant, B. was at liberty to till eight new acres in each year, and take four crops thereout, and that he was not prohibited from having more than eight acres in tillage in any one year. *Kelly v. Cullinan*, 3 Ir. L. Rep. 68, Q. B.

R., assignee of a lease for lives, devised the lands to trustees, in trust for his wife for life: remainder over for the whole of his interest. Held, that the wife was assignee of the testator's entire in-

terest for her life, *Maunsell v. Russell*, 2 Ir. L. Rep. 205, Ex. (note.)

Where in a lease there are covenants for renewal and quiet enjoyment, (with intervening covenants,) the first unlimited the latter qualified, and the covenants are not inconsistent with each other, the general covenant is independent, and uncontrolled, by the qualified covenant, and was held to be rightly set forth in the declaration as an unqualified covenant. *Kean v. Strong*, 1 Ir. Jur. 333, Ex. Ch.

Held, that evidence of the value of a lease was admissible, though not strictly applicable to the issue raised, for the purpose of guiding the jury in their estimate, the question being wholly one of damages. *Ib.*

Pleadings.—A., being the lessee by indenture of certain premises, assigned his interest therein to B., subject to the payment of the rent, and performance of the covenants in the original lease. This indenture contained a covenant by B. to keep A. harmless; and indemnified against all actions, suits, costs, and damages, on account of the rent and covenants in the original lease. B. never executed the assignment, but went into possession under it. Held, on demurrer, that B. was not liable, in an action of covenant, for not having saved, harmless, and indemnified A. *Brown v. M'Farra*n, 5 Ir. L. Rep. 212, Q. B.

Upon the execution of a lease of mines, the lessor misrepresented his title, to demise the premises, by stating, that he had the consent of parties interested in the premises demised, and that they would not interfere or disturb the possession of the lessee. In an action of covenant, for not working the mines thereby demised, to which the defendant pleaded, that the deed was obtained by the plaintiff from the defendant, by the fraud and crime of the plaintiff in making these untrue misrepresentations. Held, that these misrepresentations did not amount to such fraud or covin as would avoid the deed at law, and that this plea, though sustained in evidence, was not an answer to the action. *Hovenden v. Tilly*, 5 Ir. L. Rep. 462, Q. B.

Covenant, by the administratrix of the assignee of the lessee, against the executors of the lessor, for a breach of the covenant to renew, at the expiration of a lease, the declaration omitted to state, that the plaintiff sued as administratrix, and in the first and second counts set out a covenant by the lessor for himself, his executors, administrators, and assigns, to renew the lease at the expiration thereof; and, in the third count, set forth a covenant by the lessor, that he had full title to renew, and, averred as a breach, that he had no such title; and the fourth count averred generally, that he had no such title to renew. The defendant pleaded, to the entire declaration, that he was willing, and offered to renew, but that the plaintiff refused to accept a renewal, and to the first, second, and fourth counts, an eviction by title paramount. Held, on demurrer, that the first plea was bad, as to the third count, being no answer to it, and, therefore, bad to the whole declaration; and that the second plea was bad, it being no answer to an unqualified

covenant, to state an eviction by title paramount. *Kean v. Strong*, 5 Ir. L. Rep. 540.

Semble, the omission in the declaration of the plaintiff's title as administratrix, was immaterial, as claiming through her administration she was assignee of the lease, and, as such, was entitled to maintain the action. *Ib.*

Quere, is such an objection ground of general demurrer. *Ib.*

Semble, that the covenant being to renew at the expiration of the term, the true meaning of the covenant was to renew before its expiration; and the privity of contract, therefore, still subsisting, the action was maintainable. *Ib.*

Semble, the omission to state in the breaches to the several counts, that the defendants had any estate out of which they could renew, or that they had any power to renew, or to aver, a previous request, was immaterial, the covenant being an unqualified covenant, that the lessor, his executors, and administrators, would renew. *Ib.*

Semble, that the admissions in the pleas supplied the deficiencies, if any, of the averments in the declaration. *Ib.*

Covenant for non-payment of rent, on a lease for lives, by the devisee of the original lessor against the lessee, the declaration alleged, that the original lessor was seized in fee at the time of making the demise, and had devised the reversion to the plaintiff. Held, that a plea traversing the seizin, in fee of the lessor, at the time of making the demise, *modo et formâ*, was a good plea. *Lenon v. Palmer*, 5 Ir. L. Rep. 100, C. P.

Held, also, that a plea which traversed the seizin, in fee of the plaintiff, *modo et formâ*, was as traversing an inference at law. *Ib.*

A lease contained two distinct covenants, with distinct penalties; one of the covenants was, that the lessee should not build, &c., any house, &c., on the ground at the rear of the premises demised, whereby the value of the said premises would be deteriorated, or whereby such building might be considered a nuisance. The other covenant was, not to open any road or passage, whereby the same might be made a public thoroughfare, &c. In covenant on this lease, the plaintiff assigned as a breach, "that the defendant built, &c., certain houses upon the ground, in the rear of said premises, and did then, and there, open a certain public thoroughfare, whereby the said premises were considerably lessened, and deteriorated, in value." Held, that this was no breach of the covenant in the lease. *Ryan v. McMaster*, 6 Ir. L. Rep. 106, Q. B.

Plea, to this breach, "that true it is, that, since the making, the defendant did build, &c., two houses upon the said ground, &c.; nevertheless, &c., the value of the said demised plot of ground was not deteriorated, &c.; nor can, or may, the said buildings be considered thereby as a nuisance, or nuisances, to the said plot of ground, &c.," with a verification. Semble, this plea is bad, as argumentative, and as involving too large an issue, and should have concluded to the country. *Ib.*

Covenant for £32, two years rent ending the 29th of September, 1841, on a covenant to pay the rent half-yearly, on the 25th of March, and 29th of September. Plea, that on the 29th of

September, 1841, he paid the said sum of £32, of the original rent aforesaid. Held, that the plea was bad, not averring that it was accepted in accord and satisfaction. *Ib.*

Covenant for rent in arrear, the declaration averred, that the defendant covenanted to pay the yearly rent of £156, over and above all taxes, and impositions whatsoever; quit-rent, and crown-rent; excepted. Breach, that two years rent were in arrear, stating no exception or reference to the quit and crown rent. Held, on special demurrer, that this was a sufficient breach. *Allen v. Lenchman*, 9 Ir. L. Rep. 291, Ex.

A special traverse to a declaration in covenant, averring, certain things to have been the understanding of the parties to the deed, adding matter of agreement between them, without setting out the deed on oyer. Held bad, on special demurrer. *Kelly v. Cullinan*, 3 Ir. L. Rep. 68, Q. B.

In an action of covenant, a party is not bound to set out more of the covenant than is necessary for the purpose of the suit; therefore, when a lessee covenanted for himself, his "heirs, executors, administrators, and assigns," it was held sufficient, in an action against the assignee of the lessee, to describe the covenant, as entered into by the lessee for himself, his heirs, and assigns. *Hozier v. Powell*, 3 Ir. L. Rep. 395, Ex.

A conveyance need not be pleaded according to its legal operation and effect, when it is stated merely as the foundation of an action of covenant; and it is sufficient to set forth the words of the deed, without an allegation, that it is thereby witnessed. *Ib.*

In an action of covenant by the devisees of the lessor against the executrix of the lessee, the declaration stated, that heretofore, to wit, on the 21st of February, 1834, A. was seized to her and her heirs of a freehold in the premises *pur autre vie*, and that heretofore, to wit, on the 21st of February, 1834, she demised for a year to R. D., who "thereby then and there became possessed of the said premises for the said term, the reversion therein and expectant thereon belonging to the said A., and thereupon afterwards, to wit, upon the 22nd February, 1834," A., by indenture, re-leased for three lives to R. D., with a covenant for perpetual renewal, and at a fixed rent. And thereupon the said A., after the said R. D. became and was so seized of the premises, &c., "and after the said A. became and was seized of the reversion thereof, expectant on the said estate so re-leased as aforesaid, and during the continuance of said demise, and of the said last-mentioned reversion, to wit, on," &c., devised to the plaintiffs. The declaration further stated the deaths of A. and R. D., probate of his will to the defendant, and breach of covenant by non-payment of rent. Plea, that A., "at the time of the making" of the re-lease, was seized only for her life, and so continued until her death, and that after the making of the re-lease, and before the expiration of the said term, she died, whereupon the term created by the indenture ceased, *absque hoc*, "that before the making of the said indenture," A. was seized to her and her heirs, *modo et formâ*, &c. Held, upon general demurrer, first, that a devisable reversion was sufficiently

disclosed by the declaration: secondly, that the plea was bad, as tendering an immaterial issue. *Church v. Dalton*, 9 Ir. L. Rep. 355, C. P.

Covenant for rent by the devisee of the reversion against the lessee. The declaration stated, that by indenture made between P. B. of the one part, and the defendant of the other, P. B. did demise, grant, set, and to farm let, unto the defendant a farm of land, to hold for the life of M. F., and from and after his death, for the term of nineteen years. Held, on demurrer, that the demise was well pleaded, notwithstanding the want of an express averment of livery of seizin, that being implied in the statement of the demise. *Aldworth v. Riordan*, 9 Ir. L. Rep. 559, Ex.

In covenant, the declaration stated that P. B. being seized of the reversion in certain lands, duly made and published his last will and testament in writing, signed by him, and attested and subscribed in the presence of him, the said P. B., by two credible witnesses, according to the form of the statute, in such case made and provided. Held to be a sufficient statement of the execution of the will. *Ib.*

Quære, if this statement be objectionable even upon special demurrer. *Ib.*

Covenant for rent. The declaration stated that B., in his life-time, by indenture made between him of the one part, and D. of the other, did "demise, grant, set, and to farm, let, re-lease and confirm unto D., his heirs, &c., certain lands to hold," for and during the natural lives and life therein mentioned, and the survivor of them, at a certain rent, which D. covenanted to pay, "by virtue of which demise, and by force of the statute for transferring uses into possession, D. afterwards entered into the demised premises, with the appurtenances, and became and was seized thereof, for the said term so to him granted as aforesaid." Held, on demurrer, that notwithstanding the reference to the statute of uses, the deed could only operate at common law, and that the term demise imported livery of seizin. *O'Shea v. Dooley*, 9 Ir. L. Rep. 564, Ex.

Semble, that although no estate passed by the indenture, yet the grantee having entered under it, and covenanted for payment of the rent, he was liable to the grantor upon his covenant. *Ib.*

Where the deed is merely inducement to the action, and title is not deduced, it is not necessary in the declaration to plead the instrument according to its legal effect. *Ib.*

Covenant by executor of lessor against lessee for rent reserved on a lease for lives. The lives named in the lease need not be stated in the declaration, nor the continuance of them averred. *Ib.*

In covenant by the assignee of a rent-charge against one of the grantors, the declaration stated, that J. C. and J. S., H. S. and R. S., and each of them, granted to E. R. an annuity of £16 10s., charged on certain lands. The deed being set out on Oyer, contained a grant by H. S., with her husband's consent, and by J. C. and J. S., jointly and severally, according to their several estates and interests. Held, on demurrer, that the declaration was bad, the grant being pleaded as a grant by four persons, two of whom were strangers. *Vincent v. Scully*, 10 Ir. L. Rep. 28, Q. B.

A declaration alleging that J. C. and J. S. were

seized in fee, stated the grant as an absolute one, charging the lands for the use of H. S.; the deed shewed the grant to be for the life of H. S., provided R. S. so long live. Held, that an averment of the continuance of the estate in the rent-charge was necessary; and there being no allegation that R. S. was living, was a fatal omission. *Ib.*

Such averment is not implied in the statement that the rent-charge was continuing when the arrear became due; and there not being shewn any continuing rent-charge affecting the lands, the plaintiff, as assignee, cannot sue on the covenant. *Ib.*

An assignee is liable, on a covenant, for non-payment of rent, though at the time of the rent accruing due he was an infant, if he continue in the enjoyment of the land after attaining age. A declaration averring that the defendant continued in possession until the action was brought, and to which declaration infancy was pleaded, sufficiently implies that the assignee entered after assignment. *Mahon v. O'Farrell*, 10 Ir. L. Rep. 527, Q. B.

In a lease bearing date the 1st of November, 1600, the lessor, who held, under the Provost and Fellows of Trinity College, Dublin, demised the premises to the lessee for a term of 20 years, at a certain rent, and a small triennial fine, and covenanted that at the expiration of the said term he, his executors, administrators, and assigns, would renew the then present lease, or any future lease, which should be granted of the premises, by adding thereto such number of years as in that present demise, viz., for twenty years, and so on at the end or expiration of any term, he, the lessor, &c. should and would make out a new lease, or renew the present lease for twenty years. The said lease also contained a covenant on the part of the lessor for quiet enjoyment, as against his own acts, and the acts of those claiming under him. In an action for the breach of the said covenant for renewal, brought by the personal representative of the assignee of the lessee against the personal representatives of the lessor, the first count of the declaration, after stating the covenants, averred the entry by the lessee, the assignment on the 17th of April, 1820, and the death of the assignee in the same month, and that the plaintiffs had taken out administration to him, and entered and became possessed. It then averred the death of the lessor, in January, 1820, and the expiration of the term on the first of November, 1820; and then after averring performance of the covenants by the lessee, the assignee, and the plaintiffs, respectively, the breach was laid in the terms of the covenant. The second count was the same as the first, with the exception of a statement of a covenant to pay the triennial fines, and an averment of the payment of the same by the lessee, his assignee, and the plaintiffs, respectively, to the lessor during his life, and to the defendants since his death. The defendants pleaded two pleas of *non est factum*. The plaintiffs proved the lease, the payment of rent, and triennial fines, their title as assignees, and that the farm, with such a covenant, for renewal, was worth £1000. The defendants proved their eviction by ejectment on the title, and the execution of the *habere* by M. C., and that an application had

been made for a renewal, whereupon a notice was served, bearing date the first of November, 1821, endorsed on the back of a draft renewal on the plaintiffs, to the effect that the defendants were ready to grant a renewal in pursuance of the said draft, upon being satisfied with respect to certain marginal suggestions, and that M. C., under whom (as the notice stated) the lessor derived his interest in the lands, had served notice to quit, and an ejectment on the title on the defendants, and calling on the plaintiffs to take defence at their own risk, and to state whether they required such renewal. It also appeared that the defendants had offered the plaintiffs £500, as compensation for the breach of covenant. Held, that the second count of the declaration at least was sufficient, though there were no averments of notice of the assignment, or of the preparation and tender of a renewal and request of the plaintiffs to the defendants to execute it during the term. *Strong v. Kean*, 10 Ir. L. Rep. 137, Ex. Ch.

Where in a lease there are covenants for renewal and quiet enjoyment (with intervening covenants), the first unlimited, the latter qualified, and the covenants are not inconsistent with each other, the general covenant is independent and uncontrolled by the qualified covenant, and was held to be rightly set forth in the declaration as an unqualified covenant. Held, that evidence of the value of a lease was admissible, though not strictly applicable to the issue raised, for the purpose of guiding the jury in their estimate, the question being wholly one of damages. [Richards, B., *dissentiente*.] Held, that where the renewal, if granted, would be valueless, the grantor having no interest from which to renew, that the judge should have directed the jury to find for nominal damages. Held, that exceptions to different expressions in the judge's charge *seriatim*, without stating clearly what the judge did tell the jury, or what the defendant required him to tell them, was not a proper mode of framing a bill of exceptions, and that on this ground alone the exceptions should be overruled. [Per Blackburne, C. J.]

Held, that there having been a privity of estate existing at the time of the breach of covenant being committed, the action was maintainable. *Ib*.

Held, that the judge was right in refusing to direct the jury to find for the plaintiffs, with nominal damages only, the defendants not having proved an eviction by title paramount. *Ib*.

Held, that the notice of the 1st of November, 1821, should not have been withdrawn from the consideration of the jury, and that, therefore, a *venire de novo* should issue. *Ib*. [*Dissentientibus*, Perrin, J., Burton, J., and Blackburne, C. J.]

The declaration stated that J. K. covenanted with G. A., not to assign certain premises without his consent in writing, and in case of such assignment, that it should be lawful for G. A. to re-enter, "or to charge J. K. double the reserved yearly rent." Held, on special demurrer, that the assignee of J. K. was not liable upon the covenant as set forth in the declaration. *Aylmer v. Conlan*, 1 Ir. Jur. 21, Q. B.

Covenant for rent by administratrix of lessor against assignee of lessee. Plea, that the lessor

had nothing in the premises, except through M. K. deceased; that M. K. was possessed of the premises for the residue of the term until his death; that administration was granted to the lessor, whereby she, as administratrix, and not otherwise, became possessed of the premises for the said term; that the lessor died, "whereby all her estate in the premises ceased and determined." Replication, that the lessor was not, at the time of making said lease, possessed of the premises for the said time, as administratrix of M. K., as in the said plea alleged. Held, upon special demurrer, first, that the plea was bad, as it alleged that there was a total cessation of the estate in the premises; secondly, that the personal representative of the lessor was entitled to sue for the rent. *Kelly v. Shaw*, 1 Ir. Jur. 292, Q. B.

Damages.]—In covenant for suffering premises to be out of repair during the continuance of the term, it is no objection to a verdict that it gives full damages for the injury which the property suffered, the defendant being lessee in a lease of lives containing a covenant for perpetual renewal on the part of the lessor. *Nixon v. Denham*, 1 Ir. L. Rep. 100, Q. B.

Held, that evidence of the value of a lease was admissible, though not strictly applicable to the issue raised, for the purpose of guiding the jury in their estimate, the question being wholly one of damages. *Kean v. Strong*, 1 Ir. Jur. 333, Ex. Ch. [Richards, B., *dissentiente*.]

Held, that where the renewal, if granted, would be valueless, the grantor having no interest from which to renew, that the judge should have directed the jury to find for nominal damages. *Ib*.

CRIMINAL INFORMATION—See CRIMINAL LAW.

CRIMINAL LAW—See ARREST CERTIORARI.

Practice generally.]—On a motion to discharge a prisoner from custody, there being no offence charged in the information upon which he has been committed, notice must be given to the Attorney-General. *Reg. v. Carroll*, 4 Ir. L. Rep. 372. [Overruling *Reg. v. Stewart*, Batt. 139.]

To an indictment for misdemeanour, the prisoner demurred, and the judge of assize allowed the demurrer. The Crown brought a writ of error, and the judgment of the court below was reversed in Trinity Term. In the following term the Attorney-General moved that the prisoner should be brought up to receive sentence. Held, that the court had fully exercised its jurisdiction in reversing the erroneous judgment of the court below, and that it was not authorized to go further, and pass sentence upon the prisoner. *Reg. v. Houston*, 4 Ir. L. Rep. 174, Q. B.

In a prosecution for misdemeanour, if the defendant demur to the indictment, and the demurrer is overruled, he has no right to answer over to the offence charged against him, but sentence may be pronounced at once upon him. It is otherwise in cases of felony. *Ib*.

The court will not suspend judgment in a crimi-

nal case, pending a writ of error. *Reg. v. O'Connell*, 7 Ir. L. Rep. 338, Q. B.

The 6th of Anne, c. 10, s. 11, which requires all dilatory pleas to be verified by affidavit, applies to criminal cases. *Reg. v. Duffy*, 9 Ir. L. Rep. 163, Q. B.

The rule requiring a party to apply for a new trial within the four first days of term, applies equally to criminal, as civil cases; but if the court, upon looking into the notes of the trial, think there is a question to be raised, they will direct it to be argued. *Reg. v. Birch*, 9 Ir. L. Rep. 157, Q. B.

In cases of felony, when the indictment is of great length, the prisoner will be allowed to take out copies in payment of the usual fees. *Reg. v. Grace*, 10 Ir. L. Rep. 375, Q. B.

On a writ of error, by the prisoners, the court, in reversing the judgment, will vacate the verdict, and remand the prisoners. *Reg. v. Meehan*, 8 Ir. L. Rep. 153, Q. B.

Prisoners, under sentence for a felonious charge, are bound to assign error when brought up, without any rule being entered for the purpose. *Reg. v. Shea*, Bl. D. & O. 247.

An application for an order to have informations returned, for the purpose of grounding a motion, for admitting prisoners to bail, is not a motion of course. *Reg. v. Corbett*, 2 Ir. L. Rep. 265, Q. B.

After issue joined on an indictment, for a misdemeanour, a venue was awarded, returnable in Hil. T., and a trial at bar was fixed for a certain day in that term, and it was ordered, that, in case the trial so fixed, should not terminate before the last day of that term, then, that every succeeding day, if necessary, until the following term should be appointed for the continuation of the trial, and that the days so fixed, should, for the purpose of such trial, be taken to be part of such term. Held, that this order was within the scope of the statute, 1 & 2 Wm. 4, c. 31, and that the trial was properly continued in vacation. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

Pendency of former Indictment.—Indictments for sedition; after the bills were found, a *nolle prosequi* was entered by the Attorney-General, and information for the same offence filed. Plea, in abatement to the first information, that the indictment was still pending. Demurrer. Held, that the pendency of the indictment was no answer to the information.

Like plea, to second information. Replication, that there was no indictment pending. Held, the plea being bad, an informality in the information could not be taken advantage of. The demurrer by the Crown, to the plea, concluded, praying conviction, and the replication prayed final judgment. Held, there was no discontinuance.

Semble, there can be no discontinuance by the crown. *Reg. v. Mitchell*, 1 Ir. Jur. 4.

9 Geo. 4, c. 51.]—On a motion to quash an indictment. Held, that at Common Law, the pendency of a former indictment did not prevent the crown from calling on the prisoner to plead to a subsequent one, for the same offence, and that the 9th section of the 9 Geo. 4, c. 51, has not altered the law, except where notices of the prosecutor's

intention to prefer a bill of indictment, in the adjoining county, have been duly served, pursuant to the 7th, 8th, and 9th sections of that Act. *Reg. v. Duffy*, 1 Ir. Jur. 81, C. C.

Therefore, where a bill of indictment was preferred to the grand jury of the adjoining county, for an offence committed in a county of a city, under the provisions of the 9 Geo. 4, c. 51, and found there, but no notices were served, nor the informations removed from the custody of the clerke of the peace for the city. Held, that a new indictment might be preferred in the city. *Ib.*

Semble, two or more pleas in abatement can be pleaded together in a criminal case. *Ib.*

When separate indictments have been found, the court has no jurisdiction to restrain proceedings on one, until the other be disposed of, unless there be some allegation of illegality, or injustice, or violation of duty, on the part of the prosecutor. *Reg. v. Duffy*, 1 Ir. Jur. 188, C. C. [Per Ball, J., and Lefroy, B.]

Held, that the boundaries of the borough of Dublin, as defined by the 3 & 4 Vic. c. 108, are extended for the purposes, as well of criminal, as of civil jurisdiction. *Ib.*

Committal.—A committal by magistrate, not shewing a sufficient cause for committal, and being uncertain as to the time and place of his committal, is bad. *In re Gregg*, 3 Ir. L. Rep. 316, Q. B.

Caution, on examination of Prisoner.—A prisoner, having been brought before a magistrate, and being about to make a confession of guilt, was cautioned by the magistrate, in the following words—"Take care what you say, for whatever you say will be written down, and used for, or against you." Held, that such a caution was insufficient, and that the examination of the prisoner was not admissible in evidence. *Reg. v. Simpson*, 1 Ir. Jur. 200. [Per Pigot, C. B.]

High Treason.—Held, that the 10 Hen. 7, c. 2, extended the provisions of the 25 Ed. 3, to Ireland, and made it treason to levy war there. *O'Brien v. Reg. in Error*, 1 Ir. Jur. 169, Q. B.; S. C. Dom. Proc., *Ib.* 249.

Held, that the 1st and 4th sections of the 7 Geo. 3, do not extend to Ireland, and that, as the prisoners were not indicted, under the 11 & 12 Vic. c. 12, they were not entitled to the benefit of that act. *Ib.*

Held, that the word "treason," without any other word, or qualification attached to it, meant high treason, and the prisoner, therefore, was entitled to but twenty peremptory challenges. (9 Geo. 4, c. 54.) *Ib.*

Treason Felony Act, 11 & 12 Vic. c. 12.]—An indictment, under the 11 & 12 Vic. c. 12, charged, that the prisoner did compass, imagine, &c., and did express, and declare, by publishing a certain printing, containing in one part thereof, amongst other things, according to the tenor following, setting out a portion only of the printing. Held, on demurrer to the indictment, that this mode of laying the felonious publishing was sufficient, and that it was not necessary either to set out the whole printing, or to aver that the intention was

expressed by the printing set out. *Reg. v. Duffy*, 1 Ir. Jur. 81. [Per Perrin, J., and Richards, B.]

Held, that the several printings were not distinct felonies, and, therefore, the counts of the indictment were not open to the objection of duplicity. That, as the intention was sufficiently expressed by the articles themselves, there was no necessity for any innuendo. *Ib.*

Held, that the 2d, 4th, 5th, and 6th counts in the indictment, which alleged the compassing to have taken place on a certain day, and to have been then, and there, expressed by divers overt acts, thereafter mentioned, and which then proceeded to set out overt acts committed on that day, and on several days subsequent, were, so far as related to all overt acts subsequent to the day of the compassing, bad, as being repugnant and insensible. *Ib.*

Held, that the publications were properly laid as overt acts. *Ib.*

On demurrer to the indictment. Held, that publications were overt acts, and that the word "publication," as laid in the indictment, might be taken to mean a compassing on one day, and the expression of it on subsequent days. *Reg. v. Duffy*, 1 Ir. Jur. 188. [Per Ball, J., and Lefroy, B.]

Held, that parting with the control of printings or writings, so that they might be read, was a publication. *Ib.*

Held, that speeches delivered prior to the commission of the offence charged, might be given in evidence, for the purpose of explaining the meaning of the publications alleged to be felonious. *Ib.*

Abduction.—Held, that where the fraudulent abduction was effected by menaces of personal injury; that it is an offence within the 23rd section of, and not the 22d section of the 10 Geo. 4, c. 34. *Reg. v. Yore*, 1 Ir. L. Rep. 301, Q. B.

Upon the trial of an indictment, under the 10 Geo. 4, c. 34, s. 23, for fraudulently alluring away a girl under 18 years of age, and contracting matrimony with her. Held, that she was not an incompetent witness for the prosecution, either on the ground that she was the wife of the defendant, or that she has a direct interest in the event, in consequence of the provision, that, upon conviction of the offender, her property shall vest in trustees, for her sole and separate use. *Ib.*

Man Slaughter.—On application to admit to bail persons charged by a coroner's jury with manslaughter, the court will exercise a discretion, and, if it be satisfied that the offender will be made amenable to justice, the application will be granted. *Reg. v. Woods, and another*, 9 Ir. L. Rep. 71, Q. B.

Bigamy.—A marriage, without the degrees of consanguinity, forbidden by the 33 Hen. 8, c. 6, celebrated between Roman Catholics, by a Roman Catholic priest, is valid, and sufficient to make a second marriage a felony, within the Statute of Bigamy. *Reg. v. Burke*, 5 Ir. L. Rep. 549, Q. B.

A declaration made by parties, in order to the celebration of a marriage, and to the person who was to celebrate it, and by which he was induced to celebrate it, that they were competent to contract a valid marriage, would, on indictment for bigamy, against the party making the represen-

tation, conclude that person from denying the truth of it, for the purpose of invalidating the first marriage. *Ib.*

Semble, a voidable marriage is sufficient to constitute a second marriage bigamy, until annulled by a court of competent jurisdiction. *Ib.*

Illegal Combinations.—By the 4 Geo. 4, c. 87, certain societies, therein described, were declared unlawful combinations, and the members declared to be guilty of unlawful combination, and liable to certain penalties, therein specified. The 2 & 3 Vic. c. 74, recited, that it was expedient to extend, and render more effectual the provisions of the 4 Geo. 4, and declared certain other societies to be unlawful combinations, and that persons doing certain things should be guilty of unlawful combination, and be liable to such, and the like penalties, proceedings, and punishment, as if he were guilty of an unlawful combination, under the provisions of the 4 Geo. 4, and be proceeded against, and punished, in the manner, and according to the provisions of that act. And it was thereby further enacted, that "all the provisions of the said Act shall, and may, be put in force, and applied accordingly, for the punishment of any such offenders, and for the mitigation of such punishment, and for the application of penalties, limitation of actions, and other purposes therein specified, as if the same were repeated, and re-enacted, in this act, with reference to such offenders and persons respectively." In an indictment, charging certain offences, created by the 2 & 3 Vic. c. 74, the several counts concluded, "*contra formam statuti*." Held, upon writ of error, that this conclusion was sufficient, and, therefore, that the judgment of the court below, which allowed the demurrer, holding that the counts should have concluded, "*contra formam statutorum*," was erroneous, and should be reversed. *Regina v. Houston*, 3 Ir. L. Rep. 445, Q. B.

The 2 & 3 Vic. c. 74, declared, that from, and after the first of September, 1839, any, and every society established at the passing of the Act, or thereafter to be established, of the nature thereafter described, "shall be, and be deemed, and taken to be an unlawful combination, and confederacy; and then proceeded, "that is to say, any, and every society so constituted, that the members thereof may, or shall communicate with, or be known to each other by, or may use for the purpose of being known as such, any secret sign, or signs, or password, or passwords," &c.; the statute then gave a specification of the several other matters which bring a society within the meaning of the Act, and declared that the persons so offending, "shall be guilty of unlawful combination and confederacy." An indictment, under this statute, stated, "That on the 24th of August, and thence continually hath been, and still is established in Ireland, a society so constituted, that the members thereof might, and did, communicate with, and were known to each other by certain secret signs, and certain passwords; and that said James Brady, after the 1st of September, 1839, to wit on the 5th of October, &c., being then, and there, such member of the said society as aforesaid, unlawfully did act, as a member thereof, against the peace," &c.

Held, upon writ of error, brought to reverse the judgment after verdict, that this count was sufficient, without any averment, to the effect, that the defendant was thereby guilty of unlawful combination and confederacy. *Brady in Error v. Reg.*, 4 Ir. L. Rep. 21, Q. B.

Semble, that this count would be bad upon demurrer. *Ib.* [Per Perrin, J.]

Semble, that a count, under this statute, charging the defendant with having, "in his possession, a certain written copy of certain passwords, made use of in the said society," without setting them out, is bad. *Ib.*

An indictment, under the 2 & 3 Vic. c. 74, stated, "That, before the 24th of August, 1839, there was established in Ireland, to wit, &c., a society, so constituted, that the members thereof did communicate with, and were known to each other by secret signs, and passwords; and that the said society, so established, previous to the 24th of August, and from thence, until and at the time of the commission of the said offence, hereinafter, &c.; and the said society has not yet been dissolved, or put an end to, and that Richard Jones, before the 24th of August, was a member of the said society, and being such member, of the said society, did, after the 1st of September, 1839, act as a member of the said society; and did then, and there, commit the offence of unlawful combination and confederacy, against the peace, and statute, and contrary to the form of the statutes," &c. Held, to be sufficient after verdict. *Jones in Error v. Reg.*, 4 Ir. L. Rep. 264, Q. B.

The test—That an indictment is bad, if the facts stated in it may be true, and yet the prisoner innocent, is not invariably true. *Ib.*

Treason-Felony.—An indictment need not state the printings, and publications, therein stated to be felonious, they being merely evidences of the felonious intent, and requiring no *innuendo*. *Martin in Error v. Reg.*, 1 Ir. Jur. 50, Q. B.

Where a corporation were entitled by grant to the chattels of felons convicted within their boundaries. Held, that it was not a good ground of challenge, that the juror was a burgess of the city, and interested in the goods of the felon, the goods being vested entirely in the council in trust for the citizens.

Held, that it was not a good ground of challenge, that the juror being a rate payer, and liable to be rated to the borough rate, was interested in the goods of the felon, inasmuch as this interest, depending on several contingencies, was too remote.

A sentence directing the prisoner to be transported beyond the seas, without specifying any place, Held, to be good. The 50 Geo. 3, c. 32, vesting in the Lord Lieutenant the power of fixing the place of transportation. *Ib.*

Unlawful Drilling. 60 Geo. 3, 1 Geo. 4, c. 1.]—In an indictment, under the provisions of the 60 Geo. 3, and 1 Geo. 4, c. 1, the first count stated, that the prisoner "unlawfully was present, and did attend a certain meeting, dangerous to the peace, &c., for the purpose of training, and drilling, and without lawful authority." The second count charged the prisoner with "assisting to train, and drill;" and

the third count charged him with unlawfully training, and drilling, certain persons," then, and there, unlawfully assembled, and without lawful authority. Held, that the indictment was bad; first, for not stating, that "the meeting was assembled for the purpose of training themselves, and drilling, or being trained, or drilled, or for the purpose of practising military exercises without lawful authority; and, secondly, because it was not averred, that the meeting, in the indictment mentioned, was a meeting for the purposes therein mentioned, without lawful authority. *Gogarty v. Reg. in Error*, 1 Ir. Jur. 203.

Conspiracy.—Indictment for a conspiracy charging two offences of the same nature, and growing out of the same transaction is not bad for duplicity. *Reg. v. O'Connell*, 7 Ir. L. Rep. 338, Q. B.

To make a combination a conspiracy it is not necessary that the act agreed to be done to effect the common object be indictable. *Ib.*

The mere agreement to commit an offence is a conspiracy, though no act be done in execution of the scheme. *Ib.*

Indictment charging a conspiracy to cause the Queen's subjects to meet in unlawful and seditious assemblies, and thereby to intimidate the Government, and one of the overt acts laid in the indictment was a meeting at M. Held, that a ballad publicly hawked about, and sold at such meeting, was evidence against the parties charged with the conspiracy as part of the *res gesta*, and showing the character of the meeting, though the traversers may individually be ignorant of its contents. *Regina v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

The statutable proof of the publication of a newspaper is sufficient evidence not only against the proprietor but also against any person affected by his acts. *Ib.*

The act of one conspirator done in pursuance of the common object is evidence against his co-conspirators; therefore proof of the publication of newspapers by one of the conspirators in furtherance of the common object is admissible evidence against the rest. *Ib.*

But, per Perrin, J., are not evidence to establish the fact of the conspiracy. *Ib.* 356.

Injuries to Property.—Indictment under the 9 Geo. 4, c. 56, s. 24, charging three persons with pulling down and demolishing part of a dwelling-house, Held bad against two of those persons it not having been stated they were in possession of the premises. Held, secondly, that it was bad against all, it not having charged them with demolishing the whole house, or with beginning to demolish the whole, or with demolishing part with an intent to demolish the whole. *Reg. v. Hawthorne*, 4 Ir. L. Rep. 373, Q. B.

Murder.—Indictment for murder. A plea of *autre fois acquit* stated that the prisoner had been indicted for the murder of B., and that the murder of B. and the firing at A. were perpetrated at one and the same time and place, and upon one and the same occasion, and with one and the same felonious purpose and object, and by one and the same person, and thereby became and constituted one and

entire transaction and felonious crime. Held, on demurrer, that this plea was bad. *Reg. v. Gray*, 5 Ir. L. Rep. 524, Q. B.

The statement that this act constituted but one felony is a conclusion of law, and cannot be traversed. *Ib.*

An indictment for murder charged in one count that A. feloniously, &c. in and upon one B. did make an assault, &c. and did cast, throw and push her into the sea, by means of which said casting, throwing and pushing the said B. was then and there choked, suffocated and drowned, by means of which she then and there instantly died. The second count charged that he, the said A., on the same day did make an assault upon the said B., and with a certain stone which he then held in his right hand in and upon the right side of the head of the said B. did strike, giving unto her a mortal wound of which she then and there instantly died. The third count charged that he, the said A., on the same day did assault the said B., and with both his hands and feet did cast and throw her on the ground, and whilst there and then lying, with his hands and feet did kick her, and beat her about the breast, and giving to her by the casting and throwing, as also by the striking, kicking and beating, several mortal wounds of which she then and there instantly died. Held, that the means stated in the indictment by which the death was caused were not inconsistent. *O'Brien in error v. Reg.* 10 Ir. L. Rep. 337, Q. B.

Held, that the extinction of life being produced by the natural consequence of any of the acts proved, it is no objection to the indictment that it alleged different modes by which the death was caused. *Ib.*

In an indictment against A. B. for the murder of C. D. by having administered to her a potion containing poison; E. F. who had tasted a portion of the same draught as the deceased was called as a witness to describe her symptoms; G. H., a medical witness, who had attended the witness E. F. and the deceased, was asked as to the symptoms of E. F. Held that such evidence was admissible. Held, also, that the medical witness having heard the witness E. F. give her evidence as to her symptoms, might be asked whether, in his opinion as a medical man, such symptoms were those of a person under the influence of poison. *Reg. v. Thompson*, 1 Ir. Jur. 207, C. C. [per Crampton, J.]

Nuisance.—The erection of weirs in a tidal river is a nuisance to the navigation, and is an indictable offence at common law. *Reg. v. Ryan*, 8 Ir. L. Rep. 119, Q. B.

It is also indictable as a nuisance at common law to the public right of fishery, and is indictable also under the 5 & 6 Vic. c. 106, s. 22.

Per Crampton, J., that section does not create an indictable offence. *Ib.*

On the trial of an indictment at common law for a nuisance in a public, navigable river by erecting weirs, a finding by the jury that such weirs obstructed but to a very trifling degree, Held to amount to a verdict of guilty. *Reg. v. Haynes*, 7 Ir. L. Rep. 2, Q. B.

Perjury.—One witness was held to be sufficient to prove the perjury, the evidence being corroborated by a document under the hand of the prisoner.

Reg. v. Corcoran, Bl. D. & O 202, Com. C. [Coram Burton, J. and Richards, B.]

Intoxication.—As the prisoner, by the act of drinking immoderately, had helped to deprive himself of the power of recognizing his friend he should be held responsible for the consequence that had ensued, he was of opinion that a case of manslaughter had been made against the prisoner. *Reg. v. Darcy*, 1 Ir. Jur. 207, C. C. [per Crampton, J.]

Shooting with intent to kill.—An indictment charging a felonious assault, and a wilful and felonious shooting at a person, and wounding him, with intent to commit murder, is a sufficient charge of a capital felony within the 7 W. 4, and 1 Vic. c. 85, s. 2. *Hayes in Error v. Reg.* 10 Ir. L. Rep. 53, Q. B.

Semble, the non-averment that the wound inflicted caused a bodily injury dangerous to life is not a fatal objection to such indictment. *Ib.*

Criminal Information.—A conditional order for liberty to file a criminal information will be granted, although the prosecutor does not swear that he believes the defendant's language was used with an intention to provoke him to fight a duel, if a third party who was present on the occasion, out of which the prosecution arose make an affidavit to that effect. *Peard v. Maunsell*, 1 Ir. L. Rep. 257, Q. B.

An order upon magistrates to take informations will not be granted unless it appear that the informations of the party applying were tendered to the magistrates in writing, and the informations so tendered must be brought before the court where the application is made. *Ex parte Hughes*, 1 Ir. L. Rep. 292, Q. B.

In motions for leave to file criminal informations the parties applying are bound to disclose all the circumstances connected with the transaction out of which the complaint had arisen, as the suppressal of any will be ground of cause against making the rule nisi absolute. *Reg. v. Anderson*, 2 Ir. L. Rep. 262, Q. B.

When the affidavits are contradictory the court, on motion for that purpose, will allow the complainant to file supplemental affidavits, but if he do not so apply it will discharge the rule. *Ib.*

An information to authorise a conviction for any offence created by statute must negative every exception contained in the clause or statute creating the offence. *Reg. v. Nugent*, 5 Ir. L. Rep. 474, Q. B.

The omission of such a statement is a substantial defect in the information, and is not cured by the 7 & 8 Geo. 4, c. 53, s. 73, which provides that the justices may give judgment notwithstanding any defect of form in the information. *Ib.*

Supplemental affidavits may be filed by a prosecutor in a criminal information in reply to those of the defendant, if such refer exclusively to new matter introduced in the defendant's affidavit. *Reg. v. Birch*, 7 Ir. L. Rep. 386, Q. B.

The court will not change the venue for the trial of a criminal information because the witnesses to be examined reside at a distance. *Lord Lucan v. Cavendish*, 10 Ir. L. Rep. 538, Q. B.

On an application for a criminal information the conduct of the applicant is open to the scrutiny of

the court, and it will inquire into the provocation he may have given. The refusal of such an application is not an opinion of the court that the law has not been violated. When, therefore, the prosecutor insisted that what had been done was done in the exercise of a right essential to the discharge of his duty, which allegation was denied by the defendant, the court cannot decide such issue as preliminary to the exercise of its authority to grant a criminal information. *Butt v. Jackson*, 10 Ir. L. Rep. 120, Q. B.

A rule for a criminal information against the proprietor of a newspaper was discharged because it did not appear on the order that the paper had been read. *Reg. v. Lenehan*, 8 Ir. L. Rep. 215, Q. B.

Challenges.—Peremptory challenges are admissible in felonies, not capital. *Gray in Error v. Queen*, 6 Ir. L. Rep. 482. Dom. Proc. [overruling, *Reg. v. Gray*, 6 Ir. L. Rep. 259, Q. B.]

Where a person indicted for felony challenged a juror peremptorily, which challenge was overruled on demurrer, and the challenge, demurrer, and judgment thereon were entered on the *postea*. Held, notwithstanding such judgment, that the prisoner was entitled to move the court in arrest of judgment, and was not compelled to bring a writ of error. *Reg. v. Gray*, 6 Ir. L. Rep. 259, Q. B.

It appeared on the record, that every person whose name was on the panel at the time of the trial was present, and no objection made to their qualification. Held, that the only ground of challenge to the array in such a case was the undifference or default of the sheriff. *Hayes in Error v. Reg.*, 10 Ir. L. Rep. 53, Q. B.

The 3 & 4 Wm. 4, c. 91, s. 18, does not refer to jurors in attendance on criminal cases; the 18th and 34th sections of that statute are directory, and not mandatory. *Ib.*

It is no ground of challenge to the array that certain jurors were on the panel who did not appear upon the jurors' book. *Ib.*

A challenge to the poll that the juror was not summoned, as by law he ought. Held to be insufficient, the summons being merely to secure his attendance. *Ib.*

Semble, that the 3 & 4 Wm. 4, c. 91, s. 18, applies to grand jurors, at commissions of oyer and terminer, and jail delivery. *Reg. v. Duffy*, 1 Ir. Jur. 81, Com. C. [Per Perrin, J.]

Held, on challenge to the array, that the disproportions of members of different religious persuasions was not admissible in evidence to the triers. *Reg. v. Duffy*, 1 Ir. Jur. 188. Com. C. [Per Ball, J., and Lefroy, B.]

Jury.—See GRAND JURY.

A jury charged with the trial of persons indicted for a capital offence, having remained enclosed for a considerable time to consider their verdict, returned into court and intimated to the judge that there was no likelihood of their agreeing, who, thereupon, discharged them without consent, and without objection, on the part of the prisoners, or of the crown, and without any fatality having occurred, and remanded the prisoners. The prisoners being again indicted for the same offence, at

the following assizes, pleaded pleas, in the nature of *puis darreign* continuance. The crown replied, and the prisoners demurred to the replication. Held, that the demurrer should have been allowed, and that the judge had no discretion to discharge the jury, unless a case of evident necessity had existed. *Conway v. Reg.*, 7 Ir. L. Rep. 149, Q. B.

On a motion for a trial it appeared, that the name of one of the jurors was J. J. R., but on the juror's book; and on the jury panel the name was J. R., and by that name answered, and was sworn, no objection being made by the traversers counsel. Held to be no mistrial. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

In cases of misdemeanour, the jury will be allowed to separate at the adjournment of the court each day during the continuance of the trial. *Ib.*

New Trial.—A motion for a new trial will be entertained in a misdemeanour case after a trial at bar. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

Under the provisions of the 3 & 4 Wm. 4, c. 91, it is the duty of the Recorder of Dublin annually to revise the lists of the jurors, and to cause a list to be made out, and delivered to the clerk of the peace of the said city, for the purposes of the ensuing year. On motion for a new trial, on the ground that these general jury lists, from which were framed the juror's book, and the special jury list, were fraudulently dealt with, for the purpose of prejudicing the traversers in their defence. Held, that this was not a proper ground for a motion for a new trial. *Ib.*

The rule requiring a party to apply within the first four days of term for a new trial, applies equally to criminal, as civil cases; but if the court, upon looking into the notes of the trial think there is a question to be raised, they will direct it to be argued. *Reg. v. Birch*, 9 Ir. L. Rep. 157, Q. B.

Caption.—It is no objection to the form of the caption of an indictment for conspiracy, that it does not state which of the jurors, who found the indictments were sworn, and which affirmed; or, that those who so affirmed, had a right to do so. The objection is met by the 6 & 7 Vict., c. 85, s. 2. *Reg. v. O'Connell*, 7 Ir. L. Rep. 338, Q. B.

Where the caption stated, that "by virtue of a commission, under letters patent, bearing date, &c., and directed to A. B., C. D., and E. F., and others, in said letters named," &c. Held, that the commission was not a joint one, and that the three persons named had full power to act without the others. *O'Brien v. Reg. in Error*, 1 Ir. Jur. 169, Q. B.

Where the caption of the indictment stated, that "It was presented on the oaths of good and lawful men of the county of the city," &c., omitting the words "sworn," and charged." Held, the caption being a pleading, this pleading was sufficiently certain. *Martin in Error v. Reg.* 1 Ir. Jur. 50, Q. B.

Held, that it being stated in the caption that it was presented by "good, and lawful men," naming twenty-three, was a sufficiently certain averment, that the indictment was found by twelve good, &c. *Ib.*

Judgment and Sentence.—A. was indicted at

the Assizes of M. for bigamy, and, a verdict of guilty recorded, subject to certain objections taken to the evidence by the defendant's counsel, and which were reserved for the consideration of the twelve judges. No sentence was then pronounced. The majority of the judges having subsequently decided against the objection, at the following assizes the crown counsel called upon the judge, then presiding in the Criminal Court, to pronounce judgment upon the prisoner, which he declined to do, upon the ground that the judgment being discretionary, he had not jurisdiction. The proceedings were then removed by *certiorari* into the Court of Queen's Bench, when it was held, first, that the next going judge of assize has jurisdiction to pronounce judgment in such cases; and, secondly, that this court has an inherent jurisdiction to do so, in all cases, in which, in the exercise of its discretion, it may think fit to do so. *Regina v. Charlton*, 2 Ir. L. Rep. 50, Q. B.

Where two persons, (man and wife,) were found guilty of an aggravated assault, and the sentence of the judge was, that they should be imprisoned for the space of nine calendar months, to be kept in solitary confinement one week in every six, during that period, and to pay a fine of £500. Held, on writ of error, that the part of the sentence awarding solitary confinement, was bad, as having been unknown as a punishment in the common law; and, as to the particular offence of which they had been convicted, unauthorized by any statute. *Holland and Wife v. Reg. in Error*, 2 Ir. L. Rep. 335, Q. B.

Held, that where a sentence is bad in part, it is bad in the whole, and must be reversed. *Ib.*

In a prosecution for a misdemeanour, if the defendant demurs to the indictment, and the demurrer is overruled, he has no right to answer over to the offence charged against him; but sentence may be pronounced at once upon him. It is otherwise in cases of felony. *Reg. v. Houston*, 4 Ir. L. Rep. 174, Q. B.

The judgment cannot be arrested for the vice of the indictment if any one count be good. *Reg. v. O'Connell*, 7 Ir. L. Rep. 338, Q. B.

The judgment is not vitiated by a finding of the jury against the traverser on a portion of a count for a conspiracy. *Ib.*

On an indictment, containing two counts, each charging a capital felony, separate judgments of execution were awarded. Held good. *Hayes in Error v. Reg.*, 10 Ir. L. Rep. 53, Q. B.

In an indictment for murder, containing several counts, charging different means of accomplishing the death, not inconsistent with each other. Held, that a general finding and judgment was good. *O'Brien in Error v. Reg.* 10 Ir. L. Rep. 337, Q. B.

Semble, the more convenient course would be to take the verdict of guilty upon the count, to which alone the facts in evidence were applicable. *Ib.*

The court will not pronounce final judgment on an indictment for a felony not capital, a demurrer thereto being disallowed. *Ib. Reg. v. Duffy*, 1 Ir. Jur. 167. Com. C. [Per Perrin, J., Richards, B.]

Held, that the allocutus was sufficient, where the prisoner was asked, why the said, &c., "should

not proceed to judgment. *O'Brien v. Reg. in Error*, 1 Ir. Jur. 169, Q. B.

Motion in Arrest of Judgment.—Duplicity is not such an objection as can be taken advantage of on a motion in arrest of judgment. *Reg. v. O'Connell*, 7 Ir. L. Rep. 338, Q. B.

Venus.—But slight evidence of the place, in which the transactions were alledged to take place, will be sufficient in criminal cases. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

CROWN.

Escheat.—Semble, that leases for lives do not escheat to the crown. *Tisdale v. Tisdale*, 2 Ir. L. Rep. 41, Q. B.

Costs.—The crown having failed on a demurrer to the inquisition and return of the sheriff to a writ of extent, the crown applied for liberty to quash the former proceedings, and issue a new extent. Held, that the court might make it part of the terms, upon which they would grant the application, that the crown should pay to the defendant the costs of the former proceedings. *Reg. v. Perrin*, 4 Ir. L. Rep. 429, Rev. Ex.

Rights.—The right to appoint a clerk of the peace, for the city and county of Londonderry, is vested in the crown, not in the *custos rotulorum*. *Kennedy v. Gregg*, 8 Ir. L. Rep. 225, Q. B.

Buildings in the possession or occupation of the crown, or in the possession or occupation of public servants of the crown, in trust for the crown, and for public purposes, are not liable to be rated for grand jury cess, even though comprised in the police valuation; and the General Post Office, being such a building, is exempt. *Earl of Londsdale v. Wilson*, 8 Ir. L. Rep. 412, C. P.; *S. C. nomine Graydon v. The Marquis of Clanricarde*, 1 Ir. Jur. 301, Ex. Ch.

The property of the crown can be made liable by express enactment only, and not by implication. *Ib.*

No subpoena shall in future issue for the production of any record in the custody of the paymaster of civil services, or of any other officer of her Majesty, distinct from those under the control of the several courts, without the order of the courts, or one of the judges thereof, upon special application, in the cause wherein the same shall be deemed necessary, and notice of such application must be given to the crown solicitor of the district wherein the record is deposited, and the order served on the officer, in whose custody it is, with the writ of subpoena *duces tecum*. *In re Attorney General*, 5 Ir. L. Rep. 185, C. P.

Where a question arose, in whom the right of appointment was vested under a particular statute, Held, that the office being a new one, and the crown not having interfered in the first instance, the right devolved at common law upon the head of the court. *Reg. v. Sugden*, 1 Ir. Jur. 58, Ex. Ch.

Grants.—The grant of a ferry by the crown is a valid grant, though given after Magna Charta. *Hemphill v. McKenna*, 8 Ir. L. Rep. 43, Q. B.

The right of lessees deriving under such grant is not limited, as by a direct mathematical line, from one point to another, but extends to any part of the river within the specific limits, and such lessees may change the localities of transit to any point within these limits. *Ib.*

In an action of trespass, in a several fishery a *fiant* for a lease of the fishery granted by Queen Elizabeth, with proof of payment of rent under the lease. Held to be sufficient evidence, to presume a seizin in the crown, without proof of enrolment of this lease. The want of enrolment is an objection to the validity of the lease, not its admissibility as evidence. *Gabbett v. Clancy*, 8 Ir. L. Rep. 299, Q. B.

DAMAGES.

In Particular Actions.—See TITLES.

DEBT—See BOND. DEED. JUDGMENT.

An Act of Parliament empowered vestries to present certain sums, for certain purposes, to be raised off the inhabitants, and to appoint proper persons to *applot* and *levy* the sums so presented. Held, that the persons appointed could recover the sums applotted by them in an action of debt. *Brady v. Bellew*, 6 Ir. L. Rep. 348, C. P.

Debt on bond, against the heir of the obligor. Plea, that the plaintiff recovered a judgment, on the same bond, against the administratrix of the obligor, and sued out a *ca. sa.*, under which the administratrix was arrested, and was in custody. Replication, that she was discharged under the Insolvent Act, and that the judgment, debt, and damages, remained unpaid. Rejoinder, that, at the time of the commencement of this action, the administratrix was still in custody, under the *ca. sa.* Held, on demurrer, that the rejoinder and plea were bad; the judgment and execution, against the personal representative, not being a satisfaction of the debt, against the heir, who was liable in respect of the real assets descended to him. *Hewitt v. McGeown*, 1 Ir. L. Rep. 84, Ex.

Debt by the assignee of the bond, executed in pursuance of a writ of replevin, issuing out of Chancery, the declaration stated, that the condition was to prosecute the suit "with effect, and without delay." Plea, that the defendant did prosecute the suit, without delay. Upon demurrer to the plea, it was admitted the pleas were bad; but it was objected, the declaration was also bad, for not stating, that the bond was executed upon a distress for rent. Held, that the defect in the declaration was cured by the implied admissions, in the defendant's pleas, of the plaintiff's right to sue. *Igoe v. O'Hara*, 1 Ir. L. Rep. 155, Q. B.

Debt on an English judgment. Plea, that the judgment, in the original action, had been recovered on a bond conditioned for the payment of an annuity, and that no memorial of such bond had been enrolled, pursuant to the 53 Geo. 3, c. 141, s. 2, Eng., whereby the bond was void. Semble, that this plea would be bad upon demurrer. *Sims v. Thomas*, 3 Ir. L. Rep. 415, Ex.

In a declaration in debt, for rent reserved on a demise, an averment of entry, with time and place, is not necessary. *Potter v. Dolphin*, 8 Ir. L. Rep. 110, C. P.

Debt, the plaintiff in the third count declared, on a parol demise, in the common form; the defendant pleaded to that count, that the plaintiff, at the time of the making of the *nil habuit in tenementis*, replication, that at the time of making the demise, he had a sufficient estate. Held, on special demurrer, that this replication was ill. *Maher v. Figgis*, 8 Ir. L. Rep. 292, Ex.

DEBTOR AND CREDITOR—See ASSURANCE.

Compositions.—The plaintiff, a trader, having become embarrassed in his circumstances, proposed to his creditors to compound their debts for 6s. 8d. in the pound. The defendant, one of the creditors, refused to accede to the composition, unless, prior to his signing the deed, he received goods to the value of 3s. 4d. in the pound. The plaintiff gave to the defendant goods to the amount required, and the defendant, in consideration, signed the composition deed. Held, that the plaintiff was entitled to recover from the defendant the amount for which the goods so delivered were sold by the defendant. *Hely v. Hicks*, 3 Ir. L. Rep. 92, Ex.

In an action against the defendant, as drawer of a bill of exchange, it appeared, that the bill in question, with others, had been drawn by defendant upon, and accepted by D., to secure a debt due by D. to the plaintiffs. D., having become embarrassed in his circumstances, and a commission of bankruptcy having issued against him, called a meeting of his creditors, who signed an agreement to accept a composition of 7s. 6d. in the pound, to be secured by the drafts of D. on the defendant. The plaintiffs, and other creditors of D., who signed the composition agreement, annexed to their respective signatures a reservation in the following terms—"Without prejudice to any additional security we may hold." It further appeared, that the arrangement, with respect to the composition, was entered into with the knowledge, and concurrence of the defendant, and that the plaintiffs, at the time of signing the agreement, held no other security for the debt so due by D., than his said acceptances of the defendant's drafts. Held, that, notwithstanding the reservation annexed to their signature, the plaintiffs, by signing the agreement for a composition, had discharged the defendant from his original liability, as surety upon the bills, so drawn by him, and accepted by D., to secure the debt of the latter. *Grundy v. Meighan*, 7 Ir. L. Rep. 519, Ex.

A., being indebted to B. in a large amount, and greatly embarrassed, called a meeting of his creditors, at which B. refused to attend, or to sign any composition deed, unless a part of his debt was secured to him. A. accordingly drew a bill on C. for £150, which C. accepted, and at the same time wrote a letter to B., authorising him to sign the composition deed, without prejudice to the security of C., which B. then held, namely, the bill for £150, immediately after B. signed the composition deed, annexing to his signature the words, "With-

out prejudice to C.'s securities he held." Held, that these words were not sufficient to put the general creditors on inquiry, as to what such securities were; and that the bill being given by C. to B. as a consideration for his signature to the composition deed, B. could not recover on this bill against C. *Lindsay v. Rogerson*, 8 Ir. L. Rep. 179, Ex.

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DECLARATION—See PLEADING.

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DECEIT—See ACTION. FRAUD.

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DECISIONS OVER-RULED, OBSERVED UPON, &c.

Coyne v. Bartley, 1 Al. & Nap. 301, not followed; *Nerney v. Walker*, 2 Ir. L. Rep. 40, Ex. *Res. v. Steward*, Batt. 139, over-ruled; *Reg. v. Carroll*, 4 Ir. L. Rep. 372, Q. B.

Res. v. Baker, Carth. 6, over-ruled; *Reg. v. Charleton*, 2 Ir. L. Rep. 50, Q. B.

Tomb v. Commissioners of Belfast, 1 Ir. L. Rep. 164, reversed, 2 Ir. L. Rep. 308, Ex. Ch.

Gilman v. Connor, 1 Ir. L. Rep. 346, not followed; *Tuthill v. Bridgman*, 2 Ir. L. Rep. 361.

Wheatright v. Jackson, 5 Taunt. 109, observed upon; *Hely v. Hicks*, 3 Ir. L. Rep. 99, Ex.

Rossiter v. Rossiter, 1 Jon. & C. 153, observed upon; *Macculagh v. Sharpe*, 3 Ir. L. Rep. 261, Ex.

Desprey v. Mitchell, 5 Mad. 87, not followed; *Lilly v. Stafford*, 3 Ir. L. Rep. 300, Q. B.

Kempston v. Saunders, 12 B. Moo. 44, S. C. 2 C. & P. 366, observed upon; *Maguire v. Goddard*, 3 Ir. L. Rep. 306, Q. B.

Decisions on striking out objectionable pleas observed upon; *Sims v. Thomas*, 3 Ir. L. Rep. 420, Ex.

Smith's Case, 1 East. P. C., S. C., 2 Bos. & Pul. 127, questioned; *Brady v. Reg.* 4 Ir. L. Rep. 21, Q. B.

Smith's Case, Al. Reg. Cases, 327, observed upon; *In re Larkin's*, 4 Ir. L. Rep. 46, Ex.

Edwards v. Kelly, 6 M. & Sel. 204, commented on; *Bull v. Collier*, 4 Ir. L. Rep. 116, C. P.

Brandling v. Barrington, 9 B. & C. 475, observed upon; *Murphy v. Leader*, 4 Ir. L. Rep. 139, Q. B.

Evans v. Brown, 1 Esp. 169, questioned; *Mowlds v. Power*, 4 Ir. L. Rep. 163, Q. B.

Connor v. McCarthy, Batt. 643, and *Roe v. Pierce* 2 Camp. V. P., questioned; *Frewen v. Ahern*, 4 Ir. L. Rep. 185, Ex.

Stoddart v. Palmer, 3 B. & C. 2; *Purcell M'Namara*, 9 East 157, observed upon; *O'Loughlin v. Fogarty*, 5 Ir. L. Rep. 61, Ex.

Grant v. Ellis, 9 M. & W. 113; and *Daniel v. Bingham*, 4 Ir. L. Rep. 285, observed upon; *Daly v. Bloomfield*, 5 Ir. L. Rep. 65, Q. B.

Resolutions of Lord Coke approved of; *Coppinger v. Bradley*, 5 Ir. L. Rep. 274, Q. B.

Bryant v. Clutton, ———, observed upon; *Coppinger v. Bradley*, 5 Ir. L. Rep. 286, Q. B.

Keiley v. Ahern, Beat. 18, overruled; and *Jackson v. Jackson*, 2 Law Rec., N. S. 36.

Delacour v. Macarthy, 1 L. Rec., N. S. 43, n. and *Denny v. O'Connell*, Long & T. 629, com-

mented on questioned; *Delap v. Leonard*, 5 Ir. L. Rep. 287, Q. B.

Roache v. Johnson, 1 Hay & Jon. 246, S. C., 1 Law Rec. N. S. 100, 1 Ex.; and *Potter v. Ryan*, Smythe 22, overruled; *Davis O'Hara*, 5 Ir. L. Rep. 337, Q. B.

A case in 1 Rolls. Ab. 104, disapproved of; *Scott v. Nelson*, 5 Ir. L. Rep. 212, Q. B.

Res. v. Mountnorris, Ir. T. Rep. 460, overruled; *Reg. v. Feeney*, 5 Ir. L. Rep. 437.

Knox v. Kelly, 1 Dru. & W. 542, commented on; *Geraghty v. Abbot*, 8 Ir. L. Rep. 60, Ex.

Walsh v. Feely, 3 Law Rec., N. S., S. C., 1 Jon. 413, overruled; *Fawcett v. Hall*, Al. & Nap. 248, affirmed; *Porter v. French*, 9 Ir. L. Rep. 514 Ex.

Burchall v. Ballamy, 5 Bur. 2693, overruled; *Crean v. Crean*, 2 F. & S. 10, observed upon;

O'Driscoll v. M'Cartney, 9 Ir. L. Rep. 570, Ex.

Stevens v. London Assurance Company, Al. & Nap. 29, overruled; *O'Brien v. ——— Company*, 10 Ir. L. Rep. 183.

Baker v. Swayne, 1 Jo. & Car. 231, overruled; *Cossey v. Horner*, 10 Ir. L. Rep. 221, Q. B.

Foulkes v. Mowlds, 5 Ir. L. Rep. 507; and *Crotty v. Gregg*, 8 Ir. L. Rep. 8, considered; *French v. Tottenham*, 10 Ir. L. Rep. 245, C. P.

Ball v. Gordon, 9 M. & W. 345, disapproved of; *Southey v. Magan*, 10 Ir. L. Rep. 250, C. P.

Roache v. Johnson, 1 L. Rec. N. S. 100, S. C. *Hay v. Jon.* 246, overruled; *Elliot v. Fieley*, 10 Ir. L. Rep. 485, Ex.

1 W. Saunders, 227, note 1; *Sweetapple v. Jesse*, 5 B. & Ad. 31; and *Harris v. Goodwin*, 2 Scott, N. C. 467, commented on; *Barry v. Cambie*, 6 Ir. L. Rep. 49, Ex. Ch.

Williams v. Leper, 3 Burr. 1886, commented on; *Fennell v. Mulcaly*, 8 Ir. L. Rep. 434.

Howard v. Shaw, 9 Ir. L. Rep. disapproved of; *Delany v. Newland*, 1 Ir. Jur. 238, Ex.

Drue v. Baylis, 1 Freeman 402, approved of; *Kelly v. Shaw*, 1 Ir. Jur. 292, Q. B.

Hart v. Hopkins, 6 Q. B. 937, approved of; *Mac Evers v. Berkeley*, 1 Ir. Jur. 299, Ex.

Willis v. Newham, 3 You. & Jer. 518, considered and approved of; *Murtagh v. Crawford*, 1 Ir. Jur. 14, Ex.

Quære, if the rule in *Willis v. Newham*, be applicable to the 3 & 4 Wm. 4, 27, *In re Commissioners of Wide Streets, Cork*, 1 Ir. Jur. 9; [per Smith, M. R.]

Jameson v. Farrer, 3 Ir. E. Rep. 513, considered; *Mitchell v. Bulfin*, 1 Ir. Jur. 143, Ex.

Barrett v. Birmingham, Flan. & Kel. 556, considered; *Hobson v. Burnes*, 1 Ir. Jur. 227, Q. B.

Collier v. Jones, 1 H. & B. 321, overruled; *Stevenson v. Stephens*, 1 Ir. Jur. 39.

Trimleston v. Kemmis, 9 Cl. & Fin. 777, commented on; *Parsons v. Purcell*, 1 Ir. Jur. 213, Q. B.

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DEEDS—See ARBITRATION. COVENANT. DEBT. LANDLORD AND TENANT. (LEASES.)

Generally.—A lease by a tenant for life, under a leasing power, reserving rent to the lessor, his "heirs and assigns," with whom, also, the covenants were made, instead of the persons entitled in re-

inremainder. Held, to be good. *Hosier v. Powell*, 3 Ir. L. Rep. 395, Ex.

A., being possessed of certain premises for two terms of years, under separate leases, at the yearly rent of £12, and £16, respectively assigned the said premises "to B., subject to the payment of the yearly rent of £44, and to the performance of the covenants," in the original leases. A., subsequently by deed reciting, that he was entitled to a profit rent of £16 per annum, out of the premises in question, sold, and conveyed his interest therein to C. Held, that there was a sufficient reservation of rent on the assignment from A. to B., and that C., as the assignee of the former, was entitled to maintain an action of debt, against the latter, for the recovery of the arrears of the rent. *Clarke v. Coughlan*, 3 Ir. L. Rep. 427, Ex.

Rent may be conveyed, severed from the reversion, so as to give the grantor an action of debt for the arrears. *Ib.*

Where lands were demised for years, *habendum*, "from the expiration of the present leases, made by the lessor to the aforesaid, each, and several parties," the "first payment of the rent to be made on the 29th of September, next ensuing, the possession thereof." Held, that the lease was not to commence in possession, until all the existing leases had expired. *Stoddart v. Neylan*, 5 Ir. L. Rep. 118 note, Ex.

Where A., by an indenture, reciting that he was indebted in a certain sum to B., for payment of which, he proposed to assign to C. certain premises, assigned and released those premises to C., during his interest therein, subject to the payment of rent, &c., upon trust, that the assignment thereby made to C., was for the sole use and benefit of B. Held, that the legal estate, in those premises, were thereby vested in B. *Lord Kingston v. Ready*, 5 Ir. L. Rep. 367.

[Construction.]—A lease on which £170 5s. 2d. yearly rent was reserved, provided, "That, as long as the said H. H., his heirs, &c., shall continue to occupy the lands, and premises, &c., without permitting the erection of any other house than that, and the offices thereto belonging, in which the said H. H., his heirs, &c., shall, himself, or themselves, *bonâ fide* reside, without letting, setting, alienating, assigning, or, otherwise, disposing of all, or any part of the lands, and premises, &c., unless by consent in writing, under the seal, &c., of G., Earl of W., his heirs, &c., for alienation in any manner, as aforesaid, that then the said H. H., his heirs, &c., shall only to pay to G., Earl of W., his heirs, &c., the sum of £85 2s. 7d. yearly, in time and manner aforesaid. Held, that a letting in con-acre, was not a letting within the contemplation of the said proviso. *Lord Westmeath v. Hogg*, 3 Ir. L. Rep. 27, C. P.

Semble, that the rent reserved in the lease was substantially a penal rent, so as to induce the court to construe any ambiguity in the proviso, against the lessor. *Ib.*

Quære, is a letting in con-acre generally a breach of covenant against sub-letting. *Ib.*

By lease, of 1719, the grantor demised, "All that part of the town-land of B., containing 509

acres, arable meadow and pasture, for their lives, renewable for ever; bounded on the South by Derry-goree, on the North and East by Lough Neagh, and on the West with John Tough's and James Wallwood's lands, situate, &c., with all, and singular, the rights members privileges, advantages, easements, and appurtenances thereunto belonging, excepting all mines, minerals, and quarries of stone and coal, escheats, warfes, estrays, deodanda, courts leet, and courts baron, seneschalships, and all other royalties, privileges, immunities, and franchises, whatsoever;" with liberty of hunting, hawking, fishing, and fowling, over the same. Held, that 400 acres of bog, which lay within the limit of the boundaries of this demise, passed thereunder, in addition to the 509 acres of arable meadow and pasture land. *Dawson v. Bell*, 3 Ir. L. Rep. 140, Q. B.; S. C., affirmed, 5 Ir. L. Rep. 229, Ex. Ch., S. C., nomine *Jack v. McIntyre*, affirmed on appeal, 7 Ir. L. Rep. 552, Dom. Proc.

By lease of 1803, A. demised to B. the house, offices, and lands of Griston, (except the bog,) containing 67 acres, for lives, renewable for ever, at a rent of £2 5s. 6d. per acre, with liberty of the commonage of the bog, in as large and ample a manner as theretofore enjoyed by Frederick Massy. Held, first, that the soil of the bog did not pass under this demise, but a mere right of commonage. Held, secondly, that, upon the trial of an ejectment, for non-payment of rent, brought to evict this lease, evidence of the way in which B. theretofore used the bog cannot be received, to shew that the intention of the parties was, that a right to the soil of the bog was to pass. Held, thirdly, that the rent issued only out of the land, and that no part of it was charged upon or issued out of the bog. *Gubbins v. Massy*, 3 Ir. L. Rep. 239, Q. B.

Articles of agreement, executed by A. and B., whereby A. granted, bargained, sold, and leased unto B., all that and those, the lands of, &c., for some time actually in the possession and tenancy of B., to have, and to hold, unto B., his heirs, executors, &c. and from the 25th of March, *next ensuing*, for, and during the term of the following lives, and the survivors, and survivor of them, or for the term of 31 years concurrent therewith, or for which ever of them as shall longest last or subsist; that is to say, "&c., naming the lives," at the yearly lump rent of £40 clear, &c., said rent to be paid by two equal even and half-yearly payments, that is to say, on every 29th of September, and 25th of March next, leases to be perfected at the request of either party, with the usual clauses, and covenants, between landlord and tenant. Held, that instrument amounted to a present actual demise, for the term of 31 years, and was not so far, as respected said term, a mere executory agreement. *Lander v. Duggan*, 4 Ir. L. Rep. 86, Q. B.

The legal operation of a lease for three lives, or thirty-one years, when properly expressed, is a freehold lease for three lives, with a contingent remainder for 31 years; the years not to have a legal existence until the determination of the lives. *Ib.* [Per Burton, J.]

The words "Sterling lawful money of Great Britain," in a lease executed before the Currency Act came into operation, may import British cur-

if such appears on the face of the deed, to ascertain the intention of the parties. *Whelan v. Ey*, 4 Ir. L. Rep. 334, C. P.

execution of a lease, three days before the Act came into operation, and the reservation of the rent in two fractional sums, "sterling money of Great Britain," which were equivalent to the decimal sums of £10, and £120, Irish money, were sufficient indications of the intention of the parties, that the rent was to be payable in Irish currency. *Id.*

827 A. demised certain lands to B., *habere* for one life, and twenty-one years. The deed contained a proviso, that if B., his heirs, &c., assign, or sublet, without consent, under seal and seal of A., his heirs, or assigns, the lease should, at the election of A., be utterly void. In 1829, by indenture, in consideration of a marriage between C. and E., and £30 as a marriage portion, conveyed said lands in these words—"I, the said A., do hereby grant, bargain, and confirm, unto C., his beloved son, the full one-half of said lands—the other half of said lands to be held and enjoyed by the life of B., and M., his wife—but when please God to call the said B. and M., then, or death, the whole farm to devolve to C., his heirs, &c." This indenture was executed in the presence of the two sub-letting acts, and with the consent of the lessor, but it was subsequently ratified by his heir. The heir was a minor at the time he ratified. Held, first, that the deed was, as a covenant, to stand seized. Held, secondly, that the assignment was void, under the condition of the subletting act, unless confirmed by the landlord, his heirs, &c. Held, thirdly, that the provisions of the 7 Geo. 4, c. 29, the operation by the heir, although a minor at the time of the ratification, was sufficient. *Davis v. B.*, 4 Ir. L. Rep. 353, Q. B.

A deed executed 1752, P. D. conveyed his estate to trustees, to the use of himself for remainder to his three daughters, H. L. K., A. L. K., and A. L. K., for their respective lives, and share alike, remainder to trustees for life, and sons of the said daughters, in tail male, in fee; and it was provided, that, in case any one or two, of the said daughters should happen to die without issue male, of her or their bodies, then, as to such part, or parts, of the said lands, of her or them so dying, to the survivors, or survivor, of the said daughters, as tenants in common, in case of the death of the survivors, during the respective lives, or life, of the survivors, or survivor; and after the determination of the respective estates of such survivors, or survivor, to trustees, to preserve, with power, under, to the first, and others sons of such survivors, or survivor, in tail male; and in case of the death of the said daughters dying without issue, then as to their respective shares, to the use of their respective daughters in tail general, and in the event of the death of one or two of the said daughters dying without issue, then as to her or their share, or shares, to the use of the daughters of such survivors, or survivor, share and share alike, as tenants in common

of the respective shares of such survivors—in case of two survivors, to the daughters of such survivor, in case there be but one in tail general—and in the event of all dying without issue, remainder over, with ultimate remainder, to the right heirs of P. D. P. D. died shortly after the execution of the said deed, without having made any disposition of the reversion of in fee; H. L. R. died in 1784, without issue; M. L. L. died in 1793, leaving three daughters; (a fourth having died in infancy, in 1778,) of whom L. E. S. was one; and A. L. L. died in 1799 without issue. Held, that in 1779 L. E. was entitled, under the foregoing settlement, besides a vested remainder in tail, in one fourth of her mother's, one third of the D. estate, expectant upon the death of her mother, and aunt's, without issue male, to a contingent remainder in tail, in one-fourth of each of the respective one-third of her aunt's, (H. L. K., and A. L. K.,) of the said D. estate, expectant upon the demise respectively without issue. *Cole v. Sewell*, 5 Ir. L. Rep. 190, C. P.

In 1772 the said L. E. S. executed a post-nuptial settlement in which was recited the foregoing deed of 1752, and another settlement of 1794, under which she was entitled to a vested estate tail in the B. estate on the death of her father, and that L. E. S. was entitled to divers shares in remainder or reversion expectant upon, and to take effect in possession after the determination of certain prior estates in several parts of the lands thereafter mentioned. It also recited another post-nuptial settlement of 1776, in which was recited the title of L. E. S. to certain shares in remainder or reversion expectant, and her intention to limit and assure the same, and witnessed that an order to bar the estates in remainder or reversion expectant, and to take effect as aforesaid, then vested in her without prejudice to precedent estates—she and her husband covenanted to levy fines of the said undivided parts, &c. to enure to the following uses, viz. that the trustees should, out of the hereditaments comprised in the said deeds of 1749 and 1752 first falling into possession, take an annuity of £300, and out of those next falling into possession take a similar annuity for her separate use, and subject thereto to the use of her husband for life, remainder to herself in fee. The deed of 1779 then went on to recite that no fines had been levied under the said deed of 1776, and that L. E. S. was desirous of securing payment of certain debts, and, subject thereto, to settle the said remainders and reversions expectant, and to take effect as aforesaid for the benefit of her two children (a son and a daughter), and had agreed to settle the same, and all her right and interest in the premises to the uses thereafter mentioned, and it was witnessed, that in order to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, then vested in L. E. S. without prejudice to the estates prior to said remainders, &c. then vested, the said L. E. S. and her husband covenanted to levy fines of all her undivided shares, &c. in remainder or reversion expectant, and to take effect as aforesaid in the B. and D. estates to enure to trustees for 1000 years to raise the amount of the aforesaid debts with remainder to other trustees for 1500 years to raise £5000 for L. E. S. remainder to trustees for 2000 years to raise an annuity

of £100 out of the estate first falling into possession, and a similar annuity out of that next falling into possession for the maintenance of her said son, remainder to trustees for L. E. S. for life remainder to the trustees for 3000 years to raise £3000 for the said daughter, remainder to the use of the said son and his issue in strict settlement, remainder to the use of the said daughter, and to all other daughters in tail general, and no remainder after. There was also a covenant on the part of the husband to pay the said debts in the event of the death of L. E. S. and all her issue before the death of her father, and before the death of the survivors of the three daughters of P. D., so that the terms of 1000 years would not vest. Fines were levied in 1779, in pursuance of the covenant in the foregoing deed. Held, that all the estates and interests (contingent as well as vested) in said D. estate to which L. E. S. was entitled under the limitations of the settlement of 1752 passed, and were bound by the said settlement of 1779, and the fines levied in pursuance thereof. *Cole v. Sewell*, 5 Ir. L. Rep. 190, C. P.

A partition having been made in 1809 of the said D. estate one-third of the same was allotted to L. E. S., and in 1814 a bill was filed by the trustee of the term of 1000 years in the deed of 1779, claiming the whole of the lands allotted to L. E. S. as comprised in the term, and L. E. S. insisting by her answer that one-fourth only was affected by the settlement of 1779, on a reference it was reported by the Master that the whole was subject thereto, and a final decree was accordingly pronounced for a sale of the whole of the said one-third of the D. estate. Afterwards by a deed executed in 1825, it was witnessed that for the barring all estates tail thereafter mentioned, L. E. S. and her then husband conveyed all the D. estate allotted in severalty to L. E. S., and an undivided one-third of the said B. estate (which had come into possession) to a trustee that two recoveries might be suffered of said lands; and it was covenanted that they should enure as to such of the said undivided parts as were comprised in the said deed of 1779 to the uses in the said deed mentioned, and in the confirmation of it, and in particular of the term of 1000 years; and after reciting that three specified denominations of the land were not comprised in the deed of 1779, or the fines levied thereof, and the said equity suit, and the decree for the sale of the lands therein, and in the deed of 1779 recited; and that L. E. S. had agreed to make the said denominations subject to the said term, and the trusts thereof, it was agreed and directed that the said recoveries should enure to confirm the sale of the said three denominations for the term of 1000 years, and to give effect and validity to the said decree, and subject to the said term to such uses as L. E. S. should appoint; and as concerning the land comprised in the indenture of 1779 to such further and other uses as had not been thereby declared of and concerning the same as L. E. S. should by deed or will appoint. Held, that the whole of the D. estate, which was allotted in severalty to L. E. S. by the partition, save only the three omitted townlands, was limited and made subject to the uses of the said settlement of 1779 by the deed of 1825, and the recoveries suffered in pursuance thereof. *Id.*

A lease for lives renewable for ever contained an agreement that it should be lawful for the landlord, his heirs and assigns, to enter and search for mines, &c., and carry away the ore, and further "to have, hold, and enjoy 200 or 300 acres, at their election, of the land most contiguous to the mines, making an abatement to the tenant for the same." Held, that this was a covenant and not a condition. *Croker v. Orpen*, 6 Ir. L. Rep. 351, Q. B. [Burton, J. *dissentients*.]

A. in 1781 by lease demised certain premises to B. his executors and assigns for a term of 61 years, and three lives concurrent with a proviso, that in case the lives should drop within 61 years then the lease should be good for 31 years. In 1802 he demised the same premises to B., *habendum* to him and his heirs for the life of C. in the place, room, and stead, and by way of exchange for the life of D., the surviving in the lease of 1781, with a proviso that if C. died within the space of 11 years the lease should subsist for that period, this latter lease contained covenants not in the former lease. Held, that the new lease of 1802 operated as a new lease, and passed a legal estate. *Bowen v. Keatinge*, 9 Ir. L. Rep. 61, Q. B.

W. H. being seized of an estate tail in Whiteacre, certain judgments were obtained against him in 1824. Upon his marriage subsequently in that year Whiteacre was settled upon him for life with remainder for the benefit of the issue of the marriage, and a recovery was suffered to the uses of the settlement. In 1825 W. H. by purchase acquired Blackacre in fee. In 1826 several other judgments were obtained against him. In 1829 E. agreed to lend W. H. £2000 upon mortgage of his fee in Blackacre, and of his life estate in Whiteacre, provided the judgment creditors of 1824 would release Blackacre from their judgments, to which they assented, and then (1829) executed a deed poll, which recited that W. H. being desirous to have Blackacre clear of incumbrances had requested the judgment creditors of 1824 to release it from their judgments, and that they being satisfied that the residue of the lands of W. H. were a sufficient security agreed thereto, and by the operation they released, exonerated, and for ever discharged Blackacre from their respective judgments, and from all writs of execution and executions, and every other writ then sued out, or thereafter to be sued out against Blackacre by virtue of their respective judgments or otherwise in relation thereto, and they agreed (for their respective judgments only) to indemnify W. H. for all costs, damages, and expenses which should at any time be incurred by reason of Blackacre being attached in execution under these judgments. Afterwards W. H. executed the proposed mortgage to E. Held that the legal effect and operation of the deed poll of 1829 was to exonerate Blackacre as well as Whiteacre from the rights and remedies of the judgment creditors of 1824. *Handcock v. Handcock*, 10 Ir. L. Rep. 565, C. P.

By indenture of the 19th of October, 1738, A. granted to J. M. and his heirs, certain lands, and amongst them "10 acres of Creggan," excepting mines, minerals and quarries, with liberty to A., his heirs and assigns, to enter and dig, bore, search

d carry away, all mines, minerals, &c. By of settlement, of the 2nd of January, 1739, nted to trustees and their heirs "all that and he baronies, townships, manors, towns, lands, mrents, and hereditaments" thereafter men- amongst which were the "10 acres of Creg- and also "the water corn-mill of, and with gh, sucken, and molenture, growing, arising, row or arise out of the said lands," and "the r fee-farm rents out of the premises men- " and "the reversion and reversions, remain- l remainders yearly, and the rents, issues, and of all in and every the aforesaid baronies, lord- nanors, or reputed manors, lands, tenements, aments, and premises, and all parts, parcels, embers, or reputed parts, parcels, and mem- the said premises, or any of them," to hold tain uses. By another deed of the 12th of 1822, were all "the baronies, castles, manors, lands, quarter-lands, fee-farm rents, and rents, tenements, and other hereditaments, heir and every of their rights, royalties, mem- and appurtenances, &c." subject to incum- upon certain trusts. Held, in an action of ent to recover the quarries and limestone on of the lands so granted, that the words in deed were sufficient to pass the quarries. *nnell v. McKinty*, 10 Ir. L. Rep. 514.

fraudulent Deed, 10 Car. 1, sess. 2, c. 3 Ir.]— issue under the Interpleader Act, to try er a certain deed of assignment was fraudu- r not, the simple question as to whether it tended to defeat or delay particular creditors a sufficient test of its *bona fides*. Semble, is enough for the party impeaching the deed w that it is within section 10 of the 10 Car. 2, c. 3, Ir., so as to enable him to make out *ad facie* case, and that it then rests with the party to prove that he is exempted from the ion thereof, and protected by the 14th sec- of the same statute. *Holt v. Kelly*, 1 Ir. Jur. Q. B.

priorities—Registry.]—A. being seized of cer- ands for lives renewable for ever, under a of 1796, by a deed bearing date the 19th of st, 1836, in consideration of a certain annuity, yed all his interest in these lands to B. In B. died leaving A. surviving him, having pre- y made his will, whereby he devised and be- hed the lands of Glennalougha, part of said to C. and D. for a term of 500 years, to the B. for life, with remainder over, and ap- ed C. and D. executors of his will. After the of B., C. executed a memorial of the deed of and had it registered upon the 19th of May, In May, 1840, A. conveyed those lauds, yed others, to the use of other persons, in de- ion of the conveyance made to B., and this was registered on the 14th of May, 1840. upon a conflict of priorities between these eeds, that C. was entitled, within the meaning e Registry Acts (6 Anne, c. 2, and 8 Geo. 1,) to register this deed, both in his character of r to B. and also in his character of assignee *Murphy v. Leader*, 4 Ir. L. Rep. 139, Q.B.

Held also, that the Registry Acts ought to re- ceive an equitable construction.

Held, that the rule of giving an equitable con- struction to Acts of Parliament, passed for the public benefit, in order to extend the remedy, and suppress the mischief contemplated by the Act, is a well established and subsisting rule. *Id.*

Alteration and interlineation.]—On the trial of an ejectment against over-holding tenants, the lessors of the plaintiff produced and proved the ten- ant's part of the lease, which purported to be a lease for thirty-one years, "*and during the life of A., (one of the lessees), which ever should last longest.*" The words in italics were interlined, and were introduced with the consent of B., the granter of the reversion under whom the lessor of the plaintiff derived. Held that the interlineation did not avoid the lease, and that on the expiration of the thirty-one years, an ejectment might be main- tained against the lessees, as over-holding tenants. *Stoddart v. Neylan*, 5 Ir. L. Rep. 116, Ex.

Stamps.]—The clause in the 56 Geo. 3, c. 56, sched. p. 1, (imposing additional duties on leases, &c. executed by power of attorney,) is applicable to leases, &c., for terms not exceeding three lives, or thirty-one years. *Mannis v. McCarthy*, 5 Ir. L. Rep. 372, Q. B.

A deed of assignment executed by the sheriff, on a sale under a *fiat facias*, requires an *ad valorem* stamp within the 56 Geo. 3, c. 56, sched. part 1. *Nagle v. Ahern*, 3 Ir. L. Rep. 41, Ex.

An instrument which is in form a lease, may be stamped as such, though its legal operation be that of an assignment. *Magrath v. Magrath*, 3 Ir. L. Rep. 89, Q. B.

By indenture made between A., of the first part, B. and C. his wife, of the second part, and E. and F., trustees of the marriage settlement, of the third part, after reciting that B. and C. had received from A. £850, part of C.'s fortune, which was charged and chargeable on the estates of A., and that B. had agreed to lend £800, part of the £850, A., in con- sideration of the £800 paid to him by B., conveyed by way of mortgage certain lands to E. and F. upon the trusts declared in the said marriage settlement of a sum of £1300 secured as therein mentioned. At the conclusion of the indenture there was a decla- ration that a certain sum described as the balance of C.'s fortune, and as still remaining unpaid, and charged on the estates of A. exclusive of a sum of £714 mentioned in the settlement, should be vested in E. and F. upon the trusts of the said sum of £1300. The deed was impressed with a stamp of £2 under the 5 & 6 Geo. 3, 56, Sched. Part 1, and was offered in evidence as a mortgage and conveyance of the legal estate, but rejected for the insufficiency of the stamp. Held, that it was rightly rejected, as it con- tained other matters not incident to the mortgage, and, therefore, required an additional stamp duty. *Murphy v. Connolly*, 6 Ir. L. Rep. 116, Ex.

Semble, That besides being stamped as a mort- gage it should have been stamped as a settlement. *Id.*

A. being in arrear with his landlord, B. who had distrained his goods for such arrears, by a deed ex- ecuted between them it was witnessed that in con-

sideration of B. releasing and discharging A. from the payment of such arrears, and in consideration of five shillings. D. assigned and surrendered to B. the said premises for the remainder of the term unexpired, and also the goods and chattels so distrained to hold the same as his own proper goods and chattels for ever. Held, that such a deed required only a surrender stamp, and that an *ad valorem* duty on the sale of the goods was not necessary to render it admissible evidence in that particular action. *White v. White*, 7 Ir. L. Rep. 50, Q. B.

A deed-pole in point of form a mortgage of lands in a foreign country, containing in the recitals a power of attorney, and containing also special covenants for the execution of a proper instrument according to law in that country, with a covenant for further assurance. Held to be a mere agreement for a mortgage, and not to require a £5 stamp. *Campbell v. Hynes*, 8 Ir. L. Rep. 12, Q. B.

Held, that the party objecting to the stamp as insufficient was bound to shew that the deed operated as a mortgage in the country where the lands were situate. *Id.*

Premises were demised for three lives renewable for ever, at a yearly rent and a fine, in a subsequent part of the lease the timber trees growing upon the premises were conveyed to the lessee, the stamp upon the lease was admitted to be sufficient for the rent and fine. Held that the grant of the trees, which had been already demised, did not change the character of the lease, so as thereby to render it a conveyance, and, consequently, that no additional stamp was required. *Peacock v. O'Grady*, 1 Ir. Jur. 363, Q. B.

Deed of Submission.—See ARBITRATION.

DEFAMATION—See CASE, (ACTION ON.)

DEFENCE—See EJECTMENT.

DE INJURIA—See PLEADING.

DEMAND—See EJECTMENT. ENTRY.
PRACTICE.

DEMISE—See DEED. EJECTMENT.

DEMURRER—See PLEADING.

DETAINDER—See ARREST.

DEVISE—See WILL.

DISCONTINUANCE—See PLEADING.

DISHONOUR.

Notice of.—See BILL OF EXCHANGE.

DISPENSARY—See MANDAMUS. GRAND JURY.

DISTRESS—See REPLEVIN.

DISTRINGAS—See JURY.

DOCUMENTS.

Production of.—See PRACTICE.

DUBLIN.

Boundaries.—See MUNICIPAL CORPORATION.

DUPLICITY—See PLEADING.

EASEMENT.

To a declaration in trespass, *qu. cl. fr.*, and, erecting pens and tables thereon, the defendant pleaded the general issue, and at the trial proved a demise of the *locus in quo*, for a term of years, on the following terms—"All that and those, that part of the house known as 119, North King-street, corner of Smithfield, consisting of the small room of the bar, of said house fronting Smithfield, &c., together with the front part of said premises, extending from said office, to the centre of the said Smithfield-market." Also gave evidence of a custom, for the owners of houses in Smithfield, to let their frontage to sale masters at a rent, and of the commission of the trespass complained of. On the other hand, the defendant gave evidence of there being no such usage—that Smithfield was a public market—and, in evidence of no title the lessor of the plaintiff to demise the frontage, the judge directed the jury, that, if they believed that on a market day, the plaintiff had taken possession of the *locus in quo*, and was in actual possession of the said frontage demised to him; and, while in possession, the defendant thereon, against the will of the plaintiff, they should find for the plaintiff. Held, that the direction was correct, and that it was not competent for the plaintiff, on these pleadings, to raise any question beyond that of possession, and the commission of the act of trespass, while in that possession. *Coffey v. Burris*, 6 Ir. L. Rep. 298. [Doherty, C. J., and Torrens, J., *dissentientibus*.]

On writ of error, Held, that the direction of the judge was incorrect. That he should have explained to the jury the distinction between a right to exclusive possession, which would have enabled the plaintiff to maintain this action, and such a right of occupation as was necessary for the enjoyment of an easement, which was not sufficient to maintain an action of trespass—and to have directed the jury, that if they believed that the plaintiff had a right to the exclusive possession, they were to find a verdict for him, but if they believed he had only a right to an easement, they ought to find for the defendant, the action not being maintainable. *Coffey v. Burris*, 7 Ir. L. Rep. 509, Ex. Ch.

ECCLESIASTICAL COMMISSIONERS—
See CHURCH TEMPORALITIES ACTS.

ECCLESIASTICAL COURT—See PROCTOR.

ESIASTICAL LAW—See EXECUTION.

EJECTMENT—See COVENANT. DEEDS.
PLEADING.

I. ON THE TITLE.

II. NON-PAYMENT OF RENT.

I. ON THE TITLE.

Amendment.]—See TITLE. AMENDMENT.

Service.]—The court does not require the service of a party resident out of the jurisdiction. *v. Ejector*, 8 Ir. L. Rep. 3, Q. B.

Service of an ejectment on the doctor and governor of a Lunatic Asylum, will not be deemed good service of a lunatic confined there, although he has no own relations. *Synge v. Ejector*, Bl. D. & L. Ex.

Service of an affidavit of the service of an ejectment on the defendant must be entitled strictly in accordance with the frame of the demises, as laid in the declaration. *Lynch v. Ejector*, 2 Ir. L. Rep. 240, Ex.

Service of an ejectment on a married woman as a *feme sole*, requiring her with an ejectment, the court will set aside a defence taken accordingly by her. *O'Brien*, 1 Ir. Jur. 128, Ex.

Service of an ejectment, *nunc pro tunc*, on the assignee of an insolvent debtor, will be permitted, where the ejectment has not been served before the first day of term. *Fordel v. Ejector*, 3 Ir. L. Rep. 347, Ex.

Service of an ejectment substituted on a co-trustee other being out of the jurisdiction. *Ganley v. Ejector*, 3 Ir. L. Rep. 367, C. P.

Service of an action of ejectment on the title, this court will not require a party resident out of the jurisdiction, to be served. *Lessee Moore v. Ejector*, L. Rep. 3, Q. B.

Service of an affidavit to ground a motion for deeming service of a summons in ejectment already had, good service. Held insufficient, proper inquiries not having been made for the defendant. *Lessee Simpson v. Ejector*, 6 Ir. L. Rep. 44, Ex.

Notice to Quit.]—The notice to quit was served on the receiver, appointed by the Court of Chancery in the matter of the lessor of the plaintiff, a receiver. Held, that an attested, and compared copy of the order, in the minor matter, referring it to the master to approve of a proper person to be receiver, an attested and compared copy of the order, stating A. to be a proper person to be receiver, and an attested and compared copy of the order, requiring the tenants to pay their rents to such receiver were sufficient evidence of the fact that A. was the receiver, in the minor's matter. *Crosbie v. Barry*, 1 Ir. L. Rep. 232, Ex.

Held, that it must be presumed that the receiver had authority to determine the tenantry, by the service of the notice to quit. *Ib.*

Service of an affidavit, that such receiver was *virtute officii*, authorised to serve this notice. *Ib.*

Service of an affidavit on a notice to quit, the notice was served by an agent of the landlord, without stating that he signed as agent; the agent had a power of

attorney for receiving rents, but which did not give him authority to determine tenancies. There was also some evidence of a parol authority, by the landlord to the agent, to serve this notice. Held, that the verdict for the plaintiff should not be set aside. *Lord Sligo v. Davitt*, 3 Ir. L. Rep. 146, Q. B.

A lease for lives, commenced on the 29th of September, 1811, expired 4th of March, 1835. On the 20th of March following, the bailiffs of the landlord having taken possession, the defendants were let back, on signing the following document—"Sir,—Allow us back into the possession of the land lately held by us under Mr. Cooper, and we will consider ourselves monthly tenants; and will yield up the possession of the aforesaid lands on getting one month's notice, and that without litigation and trouble."—March 20, 1835. The defendants continued to pay the same rent, and on the same days, as under the expired lease, until served on the 8th of September, 1838, with notices to quit on the 25th of the following March, as on the day of the determination of the tenancy. These notices were signed by the land agent of the landlord, who stated himself to be such. An ejectment had been brought, and was ready for trial at the Spring Assizes, 1840, but was not then tried. On the 23d of March, 1840, another notice to quit, on the 29th of the September following, was served on each of the defendants. Held, that the service of the second notice was no waiver of the previous notice. That the first notices were sufficient. That the fact of the agent having signed the notices as such, and of the ejectment having been brought on the said notices, established a sufficiency of authority in him to serve the notices. *Cooper v. Flynn*, 3 Ir. L. Rep. 472, C. P.

Ejectment by the landlord, on a notice to quit, signed by his agent and receiver. Held, that the subsequent bringing of the ejectment was not sufficient proof of the agent's authority to serve the notice to quit. *Frewen v. Ahern*, 4 Ir. L. Rep. 181, Ex.

A mere receiver of rents, as such, has no authority to serve a notice to quit. *Ib.*

Where a notice to quit is given by a person who is described therein as acting under a power of attorney from another. Semble, that on the trial of an ejectment, brought upon such notice to quit, the power of attorney must be produced and proved. *Ib.*

A tenant is precluded from disputing his own statement, with respect to the commencement of his tenancy. *Ib.*

An authority to serve a written notice to quit, is not sufficient to authorise the party to give a parol notice to quit. *Wood v. Ahern*, 6 Ir. L. Rep. 95, Ex.

If the process server first read the original, and then the copy of the notice to quit. Held, to be a sufficient comparison, to make the service of such copy good service. *Ib.*

A receiver appointed by the Court of Chancery, has authority, by virtue of his office, to determine a tenancy, by service of a notice to quit. *Keating v. Cleary*, 6 Ir. L. Rep. , Ex.

Quære, if a subsequent recognition by the land-

lord, of the authority of an agent to serve a notice to quit, be in any case sufficient to make the notice good. *Ib.*

Such subsequent recognition should be before ejectment brought. *Semble*, it should be six months before the period limited by the notice for giving up possession of the premises. *Ib.*

Where a bill and answer have been put in evidence by the plaintiff, solely for the purpose of shewing the pendency of a cause, and, to establish the authority of the receiver, in that cause, to sign a notice to quit. The contents of such bill and answer cannot be given in evidence for the defendant. *Parsons v. Purcell*, 1 Ir. Jur. 213, C. P.

Semble, that even were it otherwise, admissions contained therein could not be made evidence of a written instrument not produced. *Ib.*

Trimleston v. Kemmis, 9 Cl. Fin., commented on. *Ib.*

Demise.—The notice to quit required the defendant to quit upon 1st of November, or at the end of the year of the tenancy, which should expire next, after the end of half a year, from the time of the service of the notice; and the demise laid in the ejectment was laid upon the 1st of November. Held, that the demise was laid a day too soon. *Lynas v. Hamilton*, 3 Ir. L. 304, Q. B.

The demise stated that fifteen persons had jointly and severally demised, and at the trial it appeared, that the legal title, to the premises in question, was vested in but one of those persons. Held, that this demise was bad, not being consistent with the title proved. *McAuley v. Molloy*, 4 Ir. L. Rep. 360, Q. B.

If a landlord recover in ejectment, his title has reference to the day of the demise, and the tenant is a trespasser from that period. *Nugent v. Phillips*, 8 Ir. L. Rep. 17, Q. B.

Venus.—The ejectment was brought for lands in one county, and after issue joined and before trial, those lands were, by virtue of a statute, declared to be within the boundaries of another county, and at the trial a verdict was found for the plaintiff. Held, that a motion for a non-suit, on the ground that the court had no jurisdiction, could not be maintained, the parties having appeared, and tried the issues. *Heywood v. Reynolds*, 6 Ir. L. Rep. 1, Q. B.

Semble, the proper course would have been to have put the question upon the record, and then moved in arrest of judgment. *Ib.*

Quære, is this a mistrial, and cured by the statute 17 & 18 Car. 2, c. 12. *Ib.*

In an ejectment for recovery of premises situate in that part of a county at large, which has been by the provisions of the statute, 3 & 4 Vic. cc. 108 & 109, included within the boundaries of a borough, which is a county in itself, the venue must be laid in the latter county. *Evans v. Barber*, 10 Ir. L. Rep. 481, S. C. BL D. & O. 59. Ex.

The court will not change the venue in an action of ejectment on the title, when there have been two verdicts for the defendant in a previous ejectment about the same lands, in which he was the lessor of the plaintiff, upon the grounds of prejudices prevailing in his favour amongst the jurors of the county

where the lands are situated. *Jackson v. Lodge*, 1 Ir. L. Rep. 161, Q. B.

Lessor's Title.—Where in an ejectment on the title by the executor of a co-lessee in a lease for years, it appeared that the granting part of the lease gave separate portions at separate rents to the respective lessees, but the *habendum* and covenants in the lease were joint, and it further appeared that the testator died, leaving the co-lessors surviving, and his widow, who subsequently married the defendant, and that the widow and the defendant continued since the death of the testator to pay rent, sometimes to the executors and sometimes to the head landlord, until the time of bringing the ejectment; upon the trial a verdict was had for the plaintiff subject to three objections: first, that the lease was a separate lease for the three tenants respectively, and could not be received in evidence, as it had but one stamp and ought to have had three; secondly, that by being received in evidence it was established as a joint lease, and the executors had no interest as the co-lessees took by survivorship, or if the deed operated as a deed of partition as well as a lease it required an agreement stamp; and thirdly, that the payments of rent by the defendant and his wife constituted a tenancy from year to year. On motion to set aside the verdict and enter a non-suit upon these grounds, Held, first, that the lease was a joint lease; secondly, that the lease required an agreement-stamp; thirdly, that there was evidence to go to the jury of a tenancy from year to year, and which question ought properly to have been left to them; but as the result would be the same upon a new trial the court refused to grant one, and made the rule for a non-suit absolute. *Kennedy v. Hayes*, 2 Ir. L. Rep. 186, Q. B.

In ejectment on the title the plaintiff proved a lease of 1775, made by his grandfather, and receipt from R. of rent reserved thereby for some time previously, and up to 1833, R. not being in possession or shewn to be connected with the lease of 1775, otherwise than by payment of rent in amount the same as that reserved by the lease; he further proved that he was heir at law of the lessor, and that the lease had expired; it also appeared that the defendant and some others were in possession for several years, and had not paid any rent to the lessor, but subsequently abandoned without any thing being levied under it, Held, that under such circumstances a notice to quit or demand of possession was not necessary before bringing the ejectment. *Bagrell v. Boland*, 2 Ir. L. Rep. 293, Q. B.

In 1768 a tenant demised for three lives in pursuance of a supposed covenant for perpetual renewal at £28, and his son who was tenant for life under a settlement in 1806, and subsequently in 1830 on each occasion of the falling of a life in the lease of 1768, demised by way of renewal in pursuance of the supposed covenant and died in 1838, when the remainder-man, the lessor of the plaintiff, entered and continued to receive the rents till 1836, when on the death of the last *cestui que vie* in the original lease he brought his ejectment after a demand of possession, but without notice to quit. Held, that the question of a tenantry from year to year was properly left to the jury, and they having found in

firmative that the verdict ought to stand. *Bellingle*, 2 Ir. L. Rep. 296, Q. B.

The lessor of the plaintiff gave in evidence a lease in ground, bearing date the 4th of May, 1825, containing a clause of forfeiture in case same was not paid on within four years, and proved the forfeiture. The declaration in ejectment contained two counts, one upon the 5th of May, 1829, and the other upon the 1st of January, 1841. Upon the first count it was objected by the defendant that 12 years had elapsed since a notice to quit or a demand of possession was necessary to entitle the lessor to maintain his action. Held that the lessor was not entitled to bring this action without a demand of possession at least. *Johnson v. Russell*, 4 Ir. L. Rep.

The defendant was put in possession by a brother-in-law of the lessor of the plaintiff, who lived in the house with her, and tilled the lands, and the defendant afterwards stated to the defendant that "as the lands were to be canted, she was that he had got them sooner than any other person." Held that the ejectment could not be maintained without a previous demand of possession. *Coady*, 4 Ir. L. Rep. 298, C. P.

A grantor in a fee-farm reserving rent, and a right of re-entry to him, his heirs and assigns, assigns it to a third party, the condition is extinguished, and an ejectment cannot be maintained by the heir or grantor on an entry for condition broken. *Orrison*, 5 Ir. L. Rep. 2, Ex. Ch.

A demand of rent on which to ground an ejectment for condition broken at common law, must be a demand of the whole arrear, but only a part of a single gale; the re-entry and demand must be made at a particular time, namely, thirty days after the rent has fallen due. After that time, the right of entry, which accrued due, by non-payment of the antecedent gales of rent, now constitute the arrears, is gone, *quoad* arrears, but it still exists, and is in force as long as any gale falls due, and remains unpaid. note. [Per Pennefather, B.]

G. took an absolute estate, *quasi* in fee, with an executory devise over to his brothers and sisters, in event of his dying without issue, living at the time of his death, and E. G. died without issue. An ejectment by the representatives of the person entitled under the executory devise, against the heirs of E. G., after the death of the latter, is not maintainable, that a demand of possession was not necessary. *Geary v. Synan*, 5 Ir. L. Rep. 509, Ex.

A mortgage deed provided, that the mortgagees should not be at liberty to take any proceedings out of the mortgage debt, until they had given three months notice. Held, that in an ejectment brought by the mortgagees, and by the assignees of the mortgagor, the absence of such notice could not be relied on by a third person, who insisted that the title being vested in the assignees of the mortgagor. *O'Brien v. Bernard*, 6 Ir. L. Rep. 1, B.

Held, that outstanding tenancies vested in defendants who suffered judgment by default, are no defence to an ejectment. *Ib.*

Where, under the 3 & 4 Vic. c. 105, s. 19, has

extended all the lands, without a demand of possession. *Ib.*

Quære, is a right of re-entry at common law necessary to entitle a landlord to maintain an ejectment, under the ejectment statutes. *Delap v. Leonard*, 6 Ir. L. Rep. 473, Ex. Ch.

In an ejectment on the title an agreement was given in evidence, whereby the defendant agreed to hold the premises for six years, which had just expired when the ejectment was brought, and by which he was to have the option of renewing for six years longer, and was bound to give six months previous notice, if he intended to give up possession at the termination of the first six years, which it appeared he did not give. Held, that the defendant was not entitled to a notice to quit. *Thompson v. Andrews*, 1 Ir. L. Rep. 285, Q. B.

A notice to quit was given by the mother of the lessor of the plaintiff who was an infant, describing herself as his guardian and next friend. She was neither a guardian appointed by the Court of Chancery, nor a testamentary one. Held, that the infant could not give authority to her to act on his behalf, and, therefore, that the notice was insufficient to determine the tenancy. *Reade v. Kennedy*, 1 Ir. Jur. 127, Q. B.

Property had been devised, previously to her marriage, to a wife, for her life to her separate use. The marriage settlement did not affect the premises in question, but contained a covenant, on the husband's part, not to interfere with the management of the wife therein. The parties separated soon after the marriage. The defendant had never dealt with any other persons, in respect of the premises, than the wife and her agent, and had paid rent on the receipts of the wife. Held, that a notice to quit, signed by the wife, and describing the holding as under herself, was sufficient. *Dankert v. Wilson*, 1 Ir. Jur. 141, Q. B.

Upon the expiration of a lease for lives, which contained the following covenant—"That the lessor, his heirs, or assigns, upon the death or demise of the before named four lives, or *cestui que vie*s, should, and would add, and insert to the time, or term of that demise, the natural life of such person, as should be nominated by the said lessee, his heirs and assigns, in the place, and in the stead of the said four lives, during which the said estate should be continued, in consideration that the said lessee, his heirs and assigns, should lay out, and expend in building a dwelling house, upon the said premises, the sum of £200, within the period of four years next ensuing. An ejectment was brought, and the judge directed a verdict for the plaintiff, no evidence of the fulfilment of the condition having been given, and no demand of possession proved; subsequently to the trial, evidence of a substituted contract, which was performed, was discovered. Held, that a new trial should be granted, for the purpose of submitting the new evidence to the jury. *Baker v. Harte*, 1 Ir. Jur. 247, Ex.

Held, that if the original contract, or the substituted one, were performed by the defendant, the lessor of the plaintiff could not sustain the ejectment without a demand of possession. *Ib.*

Particulars of Demand.]—In an ejectment on the title, where the question was one of part and parcel, the court, upon the application of persons served with the ejectment, who were at a loss to know the particulars of the land sought to be recovered, made an order restraining the lessor of the plaintiff from proceeding in the ejectment, until he should furnish a bill of particulars, with a map annexed, and specifying by metes and bounds the premises which he sought to recover. *Ross v. Ejector*, 2 Ir. L. Rep. 25, Q. B.

Defence.]—When separate defences are taken to an ejectment on the title, the court will order them to be consolidated upon terms. *Gregory v. Archer*, 1 Ir. L. Rep. 97, Ex.

When the premises sought to be recovered by an ejectment are described in the declaration by one name (A.), and the person in possession claims them by another name (B.), the course for the person served is to take defence "for the lands of B. in the possession of the defendant, called in the declaration in ejectment the lands of A." *Earl of Listowel v. Ejector*, 1 Ir. L. Rep. 313, Ex.

A party cannot rule the lessor of the plaintiff to declare for lands in his possession until he has taken defence. *Ib.*

According to the practice in Ireland a party served with an ejectment, and who takes defence is deemed to be in possession of the premises sought to be recovered by the ejectment, and it is not necessary to give at the trial evidence of his possession. *Ib.*

A party whose interest has arisen subsequently to the service of the ejectment will not be permitted to take defence. *McKiernan v. Shenkin*, 4 Ir. L. Rep. 180, Ex.

Where several parties have taken defence in an ejectment the court compelled them to consolidate their defences, and each of them to furnish the plaintiff with a bill of particulars of the lands for which he had severally taken defence. *Boyle v. Ejector*, 4 Ir. L. Rep. 220, C. P.

In the absence of fraud the court will not, unless in very strong cases, set aside a defence to an ejectment on the title for matter arising subsequently to defence taken. *Drought v. Murphy*, 5 Ir. L. Rep. 113, Ex.

Lands were devised to an infant, who with his mother, continued in possession of the premises from the time of the testator's death, and the trustees nominated in the will brought an ejectment against the mother, laying demises in their own names and in that of the minor, the court, under the circumstances, set aside the demise by the trustees in the minor's name, and gave him liberty to take defence to the ejectment by his mother and guardian. *Foley v. Foley*, 6 Ir. L. Rep. 235, Ex.

If two defendants appear by the same attorney the court will dispense with the usual affidavit that the plaintiff's title to the entire premises is the same. *French v. Cahill*, Bl. D. & O. 241, Ex. [per Pennefather, B. Cham.]

Judgment as in case of non-suit.]—If a party allow a conditional order for judgment as in case of a non-suit to be made absolute, he cannot afterwards object to the proceeding for irregularity. In

ejectment the defendant may file a second declaration, and enter up judgment as in case of non-suit without entering a rule for liberty to proceed on giving a term's notice. *Kenny v. Coffey*, 5 Ir. L. Rep. 225, Q. B.

The lessor of the plaintiff served notice of trial after defence taken; but before he had filed a second declaration, the cause was held to be at issue by the plaintiff's act in serving notice of trial, and after the lapse of three terms from the service of the notice, the court gave liberty to file the second declaration, and judgment thereon as in case of non-suit. *Creagh v. Creagh*, 6 Ir. L. Rep. 528, Ex.

Judgment.]—The defendant, after service of the ejectment, but before defence, died; judgment was entered. The court refused to set aside this judgment, and allow the widow of the deceased tenant to take defence before she had taken out administration. *Hastings v. Ejector*, 4 Ir. L. Rep. 404, C. P.

Habere.]—After verdict and before judgment the lessor of the plaintiff died. Held, that the judgment entered and *habere* executed thereon on behalf of the persons in whom the title of the lessor of the plaintiff was continued was not irregular, but that it should distinctly appear by affidavit that it was executed on behalf of the persons representing the title of the lessor. *Newton v. Byrne*, 3 Ir. L. Rep. 35, Ex.

The execution of an *habere* will not be suspended for the purpose of giving a party an opportunity of filing a bill in a Court of Equity to sustain his rights. *McDonald v. Lawton*, 4 Ir. L. Rep. 303, C. P.

Points saved at the trial were ruled with the plaintiff, and execution stayed for a fortnight at the instance of the defendant. But the court refused further to enlarge the stay of execution for the purpose of enabling the defendant to file a bill in a Court of Equity for an injunction to restrain the execution of the *habere*. *Loughnan v. Loughnan*, 6 Ir. L. Rep. 27, Ex.

After an *habere* has been executed, returned and filed, the court will not in general grant a renewal of it, and the party applying should come in at the earliest opportunity. *Lady Sandford v. Ejector*, 6 Ir. L. Rep. 457, Q. B.

On the death of the lessor of the plaintiff, after the issuing, and before the execution of an *habere*, the court will grant a renewal of it. *Lord Powerscourt v. Ejector*, 7 Ir. L. Rep. 196, Q. B.

The court will not permit an *habere* to be renewed unless there be a fraudulent or forcible repossession. *Rowley v. Ejector*, Bl. D. & O. 146, Ex.

Evidence.]—A. the lessor, his title being admitted, proved a deed of 1792, whereby his father conveyed certain lands, of which those in the ejectment formed a part, to a trustee, in trust for the lessor, and B. his brother, for life with cross-remainders. B. died without issue in 1824, and receipt of rent by him up to that time from the defendant was proved. On cross-examination of one of plaintiff's witnesses it appeared that upon several occasions the defendant shewed to the lessor an instrument under which he alleged he held the lands, and which the lessor at all times alleged to be a forgery; it also appeared that the lessor had in court that instrument, or some document connected with the defendant's title to

l, which he said was greatly obliterated. A o quit on the 1st of May, or at the end of six from that day, had been personally served re defendant, and a demand of possession pon the 2nd of May, upon which the eject- as brought. The judge who tried the case l the jury, if they believed there was a lease instrument in writing evidencing the tenant- find for the defendant, but if they should ere was not, or that it was altered or oblite- a material part, to find for the plaintiff. hat this direction was erroneous, there being ence to warrant any question being left to y as to the existence of such instrument, or s obliteration or alteration if it did exist. . *McCarthy*, 4 Ir. L. Rep. 157, Q. B. on, *J. dubitante*.]

l, the facts proved a tenancy from year to nd the receipt of the notice to quit by the ant without objection, although in the alter- was evidence of the determination of the y upon the 1st of May, in the absence of all e on the part of the defendant upon either of oints. *Ib*

erson in possession of part of the lands sought icted is an incompetent witness for the det who had taken defence for all the lands in laration mentioned, although such person had erved with the ejectment, and had not taken e, and judgment had been marked against the ejector. *Purcell v. Donnelly*, 6 Ir. L. Rep. ix.

lessors of the plaintiff having proved a lease, the at of rent under it to them by the defendants, a deed made within twenty years of the og of the ejectment, which recited, that A. being in fee in the premises in question had conveyed e by a former deed to B., the conveying party lessors of the plaintiff in the deed produced, deed both A. and B. covenanted with the les- the plaintiff for quiet enjoyment. The lessors plaintiff having given no further evidence of rmer deed of conveyance from A. to B. Held, e defendants, setting up no title of their own, not rely on the recitals in the deed produced e lessors of the plaintiff, to show an outstand- ate in A. *Maunsell v. Curry*, 8 Ir. L. Rep. Ex.

ld, that proof of the determined lease and of yment of rent under it to the lessors of the iff is, until displaced, sufficient evidence of title reversion to sustain the ejectment. *Ib*.

eland agent of a landlord, under his directions, l a notice to quit, on which the ejectment was ht The tenant at the trial produced a lease l by the agent, and under which the tenant had ered as a freeholder, and the certificate of his ry thereunder, kept in the landlord's office. that the tenant was bound to prove that the had a power of attorney to execute leases from ndlord, and that such alleged adoption by the ord did not dispense with the necessity of such l, and that the judge was right in refusing to t the lease in evidence. *Lord Gosford v. Robb*, L. Rep. 217, Q. B.

be 104th section of the 6th W. 4, c. 14. (Bankrupt- Enacts, "that in actions by or against any person

acting under a commission of bankruptcy no proof of the petitioning creditor's debt, trading or bank- ruptcy shall be required at the trial, unless notice be given that the party intends to dispute some of such matters." Held, that this section is applicable to ejectments. *O'Brien v. Bernard*, 6 Ir. L. Rep. 6, Q. B.

Held, that where there are several lessors, they are not bound to give evidence of those distinct matters without notice, and that, though but one of them be the assignee of the bankrupt. *Ib*.

Held, that such lessor need not appear upon the record to be assignee, if, at the time of taking de- fence to the ejectment, the defendant knew of the proceedings in bankruptcy. *Ib*.

Held, that depositions by the defendant, in the bankruptcy, were admissible evidence of that fact. *Ib*.

Held, that proof of outstanding tenancies, vested in defendants who suffered judgment by default, are no defence to an ejectment. *Ib*.

New Trial.]—Ejectment on the title. The issue comprehended two questions, viz., a part and parcel question, and of the existence of a *cestui que vie*, and the attention of the judge was not directed to the 7 Wm. 3, c. 8, and the jury found for the de- fendant, without stating, or having been asked by counsel or judge on which of these grounds their verdict was founded. *Coote v. O'Fallon*, 3 Ir. L. Rep. 265, C. P.

If a defendant have judgment of non-suit against him for non-appearance at the trial to confess lease, entry, and ouster, the court will not grant a new trial upon any terms, unless it clearly appear that the defendant has a just legal defence to the action. *McDonald v. Lawton*, 4 Ir. L. Rep. 303, C. P.

Writ of Restitution.]—Seven persons applied for a writ of restitution, on the ground that they were dispossessed under an *habere*, and stated in their affidavit that their holdings formed no part of the premises in the ejectment, and were not pointed out to the view jury, who tried the case, as part of the premises sought to be recovered; and it was answered, that four of the tenants had since accepted new agreements, and that the other three were not dispossessed. They not occupying any part of the premises. The writ was refused. *Wynne v. Swift*, 2 Ir. L. Rep. 159, Q. B.

A writ of restitution will not be granted to a tenant who has lain by for a period of eight months after the execution of the *habere*, and permitted the landlord to repair, and re-let the premises, though the latter had obtained judgment on the ejectment, upon entering into a consent to execute a lease for three lives of the premises in question to the tenant. *Martin v. Pierce*, 9 Ir. L. Rep. 297, Ex.

Security for Costs.]—See COSTS.

Mesne Profits.]—See TRESPASS.

EJECTMENT FOR NON-PAYMENT OF RENT.

Amendment.]—See AMENDMENT.

Service.]—When a party cannot be served with the summons in ejectment, the court, upon a pro-

per affidavit, will deem service good by posting, &c., but it will not make an order to substitute service in ejectment cases. *Earl of Derby v. Ejector*, 1 Ir. L. Rep. 291, Q. B.

The court will not make the order that the service be deemed good, unless it appears that person to be served could not be served, in consequence of his keeping out of the way to avoid it. *Connolly v. Ejector*, 1 Ir. L. Rep. 38, Q. B.

Service on the parties in possession of the premises, the landlord of which was out of the jurisdiction, deemed good service, the court directing that the premises should be posted with a copy of the ejectment, notice, and order. *Bourne v. Ejector*, 3 Ir. L. Rep. 363, C. P.

Service of an ejectment substituted on the co-trustee of a trustee residing out of the jurisdiction. *Lessee of Gandon v. Ejector*, 3 Ir. L. Rep. 367, C. P.

The court—when all the parties to be served cannot be discovered, and every person interested, who could be discovered, was served, and also a receiver appointed, at the instance of the mortgagee of the lease sought to be evicted—will deem the service of an ejectment for non-payment of rent good service, the same having been posted on the premises, (in Dublin,) but the residence of the parties in Dublin must be negatived, and the exertion made to discover them particularly stated. *Barclay v. Ejector*, 1 Ir. L. Rep. 160, Q. B.

Service—upon the brother of the persons to be served, he admitting that he was aware of their residence, and declining to give the particulars, and he receiving the rent of the premises, and paying it to these ladies—was deemed good. *Lord Talbot de Malahide v. Ejector*, 1 Ir. L. Rep. 114, Q. B.

An application to the court that the posting of the premises, and service of the caretaker, may be deemed good service, negatives an intention of proceeding under the 15 & 16 Geo. 3, c. 27, as against an absconding tenant. *Stewart v. Sisson*, 3 Ir. L. Rep. 135, C. P.

It is not necessary to make any application to the court previous to marking judgment against an absconding tenant. *Id.*

The premises were held under a lease *pur autre vie*. The lessee was dead. Held, that the defendant in possession, who was duly served with the ejectment, could not object to the non-service of the heir at law, who could, under the circumstances, have title as special occupant only, and which title the evidence negatived. *Rulledge v. Jennings*, 3 Ir. L. Rep. 268.

It is unnecessary to serve the assignee of a mortgage, under the lease, if he be not in possession, though the mortgage deed, and the assignment of it, were duly registered. *Jack v. Macnamara*, 10 Ir. L. Rep. 597, C. P.

Service will be deemed good when a case of agency, by relationship or management of affairs, is made. *McGrath v. Ejector*, Bl. D. & O. 146, Ex.

The affidavit of service should be filed before the rules to plead are entered. *Doe v. McEgan*, Bl. D. & O. 206, Q. B.

One defendant may set up, as a defence at the trial, the non-service of another, having a legal or

beneficial interest. *Jack v. Gannon*, Bl. D. & O. 158, Ex., N. P. [Per Pigot, C. B.]

Service of an ejectment for non-payment of rent on the lessee, and under tenants, by putting the same under their respective doors, which were closed for the purpose of preventing personal service, was deemed good service, posting the premises with the ejectment and order. The lessee having moved in the Rolls to stay proceedings in the ejectment suit. *St. George v. Ejector*, 4 Ir. L. Rep. 133, C. P.

In an ejectment at common law for non-payment of rent, where a party could not be served with the summons, the court deemed a service, by posting on the premises, and by service of the summons, and declaration on another person, who had the key of the premises, and who stated that she was authorised to let or treat for them good service on that party. *Doe v. Ejector*, 7 Ir. L. Rep. 498, Ex.

Where mortgagees reside out of the jurisdiction, the court will not hold service of an ejectment, for non-payment of rent good, upon their solicitor in an equity cause, although it was instituted to sell the lands, the subject of the ejectment, and was still pending. *Lessee Macnamara v. Ejector*, 6 Ir. L. Rep. 421, Q. B.

In an ejectment for non-payment of rent, service on the receiver, over the premises, sought to be evicted. Held good service. *Lessee Carroll v. Ejector*, 6 Ir. L. Rep. 423, Q. B.

Lodgment of Money in Court.—The defendant tendered the lessee the rent reserved in the lease, but the lessors of the plaintiff refused to receive less than a penal rent reserved therein, the defendants were allowed to lodge in court the rent so tendered. *Young v. Bell*, 3 Ir. L. Rep. 217, Q. B.

Declaration in Ejectment.—In an ejectment for non-payment of rent, the second declaration must correspond with the copy of the declaration served upon the tenants, and any variance is fatal. Therefore, when the copy of the declaration which was served, described the premises as situated in the parish of St. Mary, and the second declaration described of St. Mary's Lane, the plaintiff was nonsuited. *Russell v. Thynne*, 2 Jon. 733.

Lessors Title.—G. T. demised a house and premises from June, 1827, for 30 years, to G. H., in consideration of £1200 fine, and £500 per annum. G. T. brought an ejectment for non-payment of rent in 1838. The defendant gave evidence of a deed made between G. T., and G. H., dated 27th July, 1829, surrendering two drawing rooms, part of the demised premises, to G. T. It was executed by G. T. alone, and contained this proviso—"Provided always, nevertheless, and it is hereby declared, and agreed, by and between the said parties to these presents, to be the true intent and meaning thereof, and the same are upon this express condition, that nothing herein contained, shall in any manner prejudice, or affect the covenant, for payment of the said yearly rent of £500, or any other covenant in said lease contained, on the part of the tenant, his executors, &c., or any of the clauses,

is, or agreements therein contained, or any remedies for the recovery of the said, or the of the said covenants, conditions, &c., on of the said G. T.—but that the entire of yearly rent shall still be, and continue out of the same—and the said covenants, be, and continue in full force, &c., as to residue of said demised premises, and not surrendered—and the said G. T. shall have the remedies for the recovery of said rent, enforcing said covenants, &c., as if these proceedings had not been made any thing.” Held, that this surrender did not operate to destroy the re-entry, but that it alone, as taken in conjunction with the original lease, constituted an agreement, minute, or contract, within the 25 Geo. 2, *Thompson v. Home*, 1 Ir. L. Rep. 179, Q. B. Being possessed of certain premises, under a lease for thirty-one years, still unexpired, the reversion in fee of which belonged to B. agreed to permit and suffer B to take possession of, and occupy for the purpose of planting a small portion of the demised premises, upon the condition of the yearly rent reserved by the lease being reduced to a certain sum agreed upon. The yearly rent was paid for some time by A. Held, that the oral agreement amounted to a re-demise. *v. Leonard*, 5 Ir. L. Rep. 287. [Burton, J., *concedit*.]

Held, that by the operation of this re-demise, the doctrine of re-entry, at common law, was suspended, and that no ejectment could be brought at common law for breach of this condition. *Ib.*

Held, that a right of re-entry, at common law, was necessary to entitle a landlord to maintain an ejectment, under the ejectment statutes. *Ib.* [Pender, C. J., *dissentiente*.]

A lease containing the usual clause, empowering the landlord to re-enter and distrain, in the event of the rent remaining unpaid for the space of twenty days, after either of the gale days specified in the lease, and providing, that in case there should be a sufficient distress to satisfy the rent and arrears, it should be lawful for the landlord to re-enter and re-possess as of his former estate; and it was proved that the rent was due for two years, the first half at the last gale day. Held, that the landlord of the plaintiff was entitled to recover on a writ of re-entry laid after the last gale day, and before the expiration of the twenty-one days. *Kingston v. J. J.*, 5 Ir. L. Rep. 313, C. P. [Ball and Torrey, *dubitantibus*.]

It was not necessary to prove that there was a sufficient distress on the premises to satisfy the rent and arrears. *Ib.*

Where premises were laid in the names of three or five persons, and in the names of the husbands of some of them; the lease proved at the trial was one made by the father of the co-parceners to the person from whom the defendant derived, but no deduction of title from the father to the lessors of the plaintiff was proved. Payment of rent for three years prior to the ejectment, was proved to the co-parceners alone. Held, that such payment was sufficient evidence of title, as against the co-parceners, to maintain an ejectment for non-

payment of rent. *Hyndman v. Bailey*, 8 Ir. L. Rep. 143, Q. B.

A lessee who has demised for the same lives and years for which he holds the lands, cannot maintain an ejectment for non-payment of rent under the Irish Ejectment Statutes. *Porter v. French*, 9 Ir. L. Rep. 514, Ex.

To constitute the relation of landlord and tenant, within the meaning of the ejectment statutes, there must be a reversion; and when there is no reversion an ejectment for non-payment of rent cannot be maintained. *Ib.*

At the time of bringing the ejectment, the title of the lessor of the plaintiff, to a portion of the premises sought to be evicted, was for the same lives as were contained in the defendant's lease. Held, that as to so much of the rent as issued out of that portion of the premises, the plaintiff ceased to have a reversion, and that a verdict which passed for the entire of the premises, and for the whole of the rent, could not be maintained. *Peacock v. O'Grady*, 1 Ir. Jur. 363, Q. B.

1 & 2 Wm. 4, c. 31, s. 12.]—In proceeding under the 1 & 2 Wm. 4, c. 31, s. 12, it is not essential to the regularity of the proceedings, that the right of re-entry accruing in the term should be the first and only right of re-entry that has accrued, but the Act is applicable to such cases, though one or more previous rights of re-entry may have accrued before the term in which the ejectment is brought. *Jones v. Ejector*, 9 Ir. L. Rep. 574, Ex.

Where the gale days were the 1st of November, and the 1st of May, the lease contained a clause of re-entry, if the rent should be twenty-one days in arrear; more than one year's rent was due in November, 1844, a further half year became due on the 1st of May, 1845. Held, that a right of re-entry accrued under the terms of the statute, on the 22d of May, 1845, though a right also existed in November, 1844. *Ib.*

Held, that the express contract of the tenant, giving the landlord a right to re-enter, if the rent were in arrear for twenty-one days, gave him a right of re-entry on the 22d of May, independently of the rule laid down in *Keely v. Ahearn*, Batty, 18 note. *Ib.*

Held, that this statute applies to ejectments for non-payment of rent. *Ib.* [Richards, B., *dubitantibus*.]

Held, that the objection on these grounds were properly made before the defendant appeared. *Ib.*

Particulars of Demand, 9 & 10 Vic. c. 3.]—A summons in ejectment contained the following notice—"The lessors of the plaintiff claim £84 10s. 9½d., being for over one year's rent, up to the first day of November, 1846. The times at which the same accrued due being as follows, that is to say up to November, 1846, £61 5s. 4½d., balance of old arrear £23 5s. 4½d. Held, that this was a sufficient notification within the terms of the 9 & 10 Vic. c. 3, of the particulars of the landlord's demand. *Bowen v. Cleary*, 10 Ir. L. Rep. 449, Ex.

Defence.—A defendant may be required to confine his defence to the lands in his actual possession. *Horsfall v. Jennings*, 4 Ir. L. Rep. 218, C. P.

An insolvent in possession being served with an ejectment, and having taken defence thereto, the court directed the defence to be altered, by the insertion of the name of the assignee for that of the insolvent, or that the latter should give security for costs. *Hoy v. Dillon*, 5 Ir. L. Rep. 243, C. P.

A defendant will not be allowed to take defence for a part only of the premises, although he claims to hold from the lessor of the plaintiff, under a lease of the said part, executed previously to the lease, sought to be evicted, and there is but one half year's rent due thereunder; but the court will give him permission to take defence for the whole of the premises in the ejectment, and have a verdict entered for him, on proving at the trial, either that a year's rent was not due under the lease sought to be evicted, or that he is in possession under the alleged prior lease. *Barrington v. Wolfe*, 5 Ir. L. Rep. 428, C. P.

A defendant cannot be compelled to confine his defence to the part of the land actually in his possession. *Purser v. Connellan*, 9 Ir. L. Rep. 266, Ex.

In the Common Pleas defence may be taken at any time previously to judgment having been marked against the casual ejector. *Blake v. Golding*, 9 Ir. L. Rep. 446, C. P.

A lessee took general defence, and gave a consent for judgment, with stay of execution, upon that consent judgment having been marked against him, and the time for which execution had been stayed having expired, one of his under tenants took defence, judgment not having been marked against the casual ejector. The court refused to issue an *habere* as against the lessee, though collusion was charged against him and the under tenant. *Ib.*

A motion after judgment, for liberty to take defence, will be refused without an affidavit of merits, though the judgment be by default, and the rule to plead served but no affidavit of service filed. *Doe v. M'Egan*, Bl. D. & O. 206, Ex.

A defence describing the lands and premises for which the defence is taken is regular, and the judgment marked, as for want of a plea, will be set aside. *Williams v. Ejector*, Bl. D. & O. 277, Q. B.

The court will give a defendant liberty to confine his defence to the premises in his possession, for the purpose of raising the question, whether they are a portion of those for which the ejectment has been brought. *Doe v. Ejector*, Bl. D. & O. 292, Ex.

A defence taken by a bankrupt, against whose assignee judgment has been marked, was set aside, and the name of a solvent under tenant, against whom judgment, had been also marked, was allowed to be substituted. *Hickman v. Behan*, 1 Ir. Jur. 80, Q. B.

1 Geo. 4, c. 87.]—The tenant held under a lease for one life, and forty-one years, to commence from the death of the *cestui que vie*, and, by a subsequent deed, the parties agreed that the *cestui que vie* died upon a certain day, an ejectment having been brought against the tenant, under the 1 Geo. 4, c. 87, and a conditional order obtained, requiring

the tenant to enter into the terms, by that act prescribed before being admitted to take defence, it was insisted as cause, that the term being uncertain, that the order was irregular, in not stating that the deeds, under which the tenants held, were produced in court when it was obtained, and the court refused to make the order absolute. *Orpen v. Ejector*, 2 Ir. L. Rep. 291, Q. B.

25 Geo. 2, c. 13, s. 2.]—Ejectment. The document relied upon, as being an article, minute, or contract in writing, within the 25 Geo. 2, c. 13, s. 2, purported to be a deed of attornment, whereby the defendant, among several others, acknowledged the ancestor of the lessor as his landlord, and covenanted with him, his heirs, executors, administrators, and assigns, to pay a certain rent for the premises, but referred to certain leases or agreements, whereby they held the said lands, as then existing. Held, that, in this form of action, it was necessary to prove the document under which the defendant held, and that it could not in the present case be said that he held under the instrument which had been relied on. *Warner v. Martin*, 3 Ir. L. Rep. 79, Q. B.

Quære, does an ejectment for non-payment of rent lie in the case of a tenancy from year to year. *Ib.*

Evidence.—In an ejectment for non-payment of rent an office copy of the ejectment and affidavit of service, duly attested by the filacer, is sufficient evidence of these documents on the trial of the ejectment in the Assize Court without proof of their having been examined. *Boyle v. Kieran*, 2 Ir. L. Rep. 273, Q. B.

Judgment.—A third party who did not claim under a lease sought to be evicted, but who claimed a small portion of the lands included in that lease, and in his possession under a prior lease made by the same lessor took defence. Held that the plaintiff might mark judgment, notwithstanding such defence, he undertaking not to disturb the party in the possession of that portion. *O'Brien v. Keogh*, 8 Ir. L. Rep. 185, Ex.

Habere.—The court refused to renew a writ of *habere*, the writ having been executed, and a new possession given. *Mahon v. Ejector*, 3 Ir. L. Rep. 345, Ex.

If possession of the premises be forcibly re-taken after execution of an *habere* the writ will be renewed. *Lee v. Ejector*, 5 Ir. L. Rep. 172, Ex.

A renewal of an *habere* was granted where the defendants having taken forcible possession after the *habere* had been executed, and before the return had been filed. *Graydon v. Ejector*, 5 Ir. L. Rep. 435, Q. B.

Upon the renewal of an *habere*, the tenants having given the acknowledgment required by the 9 & 10 Vic. c. 111, s. 8, the lessor will be put under terms not to execute it until the tenants may be able to reap the crop sown since the former *habere*. *Wilmington v. Ejector*, Bl. D. & O. 193, Q. B. [per Perrin, J. in chamber]

S. P. *Irvine v. Ejector*, Bl. D. & O. 275, Q. B. [per Perrin, J.]

The Court of Exchequer will not allow a tenant who has signed the acknowledgment under the 9 & 10 Vic. c. 111, s. 8, to remain in possession till he has reaped the crop sown by him since the former *habere*. *Jordan v. Ejector*, 1 Ir. Jur. 240, Ex.

Judgment against the casual ejector. The affidavit filed pursuant to the 4 Geo. 1, c. 5, for the purpose of ascertaining the rent, stated that there was due to the lessor of the plaintiff the sum of £31 2s. 6d., being the balance of the six years' rent. Held, that the affidavit was defective in omitting to state that more than one year's rent was due, and the court accordingly set aside the *habere*, and let the defendant in to take defence upon terms, notwithstanding a subsequent affidavit stating that the sum of £31 2s. 6d. was more than five years rent of the premises. *Doyle v. Ejector*, 7 Ir. L. Rep. 383, Ex.

Writ of Restitution.—Several under-tenants were dispossessed under the *habere* upon the 10th of January, 1838, but allowed to return into possession and remain undisturbed until the 11th of January, 1840, when they were again dispossessed by an *habere* upon a judgment in *scire facias* in this cause, and of the proceedings in which the tenants swore they knew nothing. Held, that a writ of restitution should issue to restore these parties to their possession. *Ashley v. Ejector*, 2 Ir. L. Rep. 264, Q. B.

The court will not grant a writ of restitution on the application of the sheriffs who had executed the *habere* outside the limits of their bailiwick, the dispossessed tenant making no affidavit. *Archbishop of Dublin v. Ejector*, 3 Ir. L. Rep. 12, Q. B.

Ejectment by one tenant in common against another for the entire of the premises, to which the defendant took the usual defence. Held, that proof of actual ouster was not necessary. *Dudgeon v. Dudgeon*, 10 Ir. L. Rep. 534, Q. B.

Lessor's name being used without authority.—When the name of a party was used as a lessor of the plaintiff in an ejectment on the title without his sanction or privity, and also without his being aware of the circumstances until after a final judgment in the House of Lords for the defendant, and application to him for payment of costs, the court ordered the attorney who made use of his name to pay the costs in the first instance, but refused to strike the name of the party out of the ejectment and proceedings in the cause. *Lord Trimbleton v. Kemmis*, 5 Ir. L. Rep. 432, C. P.

Judgment in the Queen's Bench in ejectment for non-payment of rent. A cross ejectment was brought in the Exchequer in the name of a trustee not served in the ejectment in the former court; a motion to set aside the proceedings in the Exchequer, on the ground that the trustee had given no authority, was refused. *Duckett v. Mowlds*, Bl. D. & O. 281, Ex.

Changing venue.—See PRACTICE. (VENUE.)

ELECTION LAW.

Registry of Voters.—The mere production of his former certificate, without any examination upon oath, is *prima facie* evidence of the claimant's right to register anew, under the 27th section of

the 2 & 3 Wm. 4, c. 88. Any person qualified, under the 18th section, to oppose a claim of original registry, may oppose a claim of renewal, and insist that the person producing the certificate, whether he be the claimant himself, or his agent, shall submit to examination. In such cases of registry anew, no affidavit need be made by the claimant. *In re Seton and in re McClelland*, 1 Ir. L. Rep. 119. [per Woulfe, C. B.]

When a claimant has been rejected by the barrister for any other cause than insufficiency of value, the duty of the appellate court is not to hear the case, *de novo*, but merely to examine, and decide upon the validity of the cause assigned. *Ib.*

A claimant seeking to register anew, under the 27th section of the 2 & 3 Wm. 4, c. 88, may cause his certificate to be produced by an agent, without his necessarily appearing in person. The production of the certificate, by the third person, is of itself evidence of agency. *Ib.*

A party claiming to register anew, under the 27th section of the 2 & 3 Wm. 4, c. 88, should give in evidence the original certificate. *In re Rafferty*, 1 Ir. L. Rep. 279. [per Woulfe, C. B.]

On application to register anew, under the 27th section of the 2 & 3 Wm. 4, c. 88, Held, that a certificate of former registry was valid, though it omitted to state the voter's addition, or the county in which he resided. *In re Reilly*, 2 Ir. L. Rep. 245. [per Woulfe, C. B.]

Sessions, Place of Holding.—The power of adjournment, conferred upon the Lord Lieutenant, by the 33d section of the 2 & 3 Wm. 4, c. 88, applies to all future Registry Sessions, as well as to the first Special Sessions, held under the act. *In re McKee*, 2 Ir. L. Rep. 249. [per Woulfe, C. B.]

Notice of Registry.—The notice of registry must state distinctly the situation of the premises. A description, as of upper or lower C. street, is insufficient. *In re Savage*, 1 Ir. L. Rep. 281. [Woulfe, C. B.]

The notice stated the residence of the applicant to be in North Cumberland Street. There were two North Cumberland Streets, Upper and Lower. Held, to be insufficient. *In re Finlay*, 1 Ir. L. Rep. 137. [per Woulfe, C. B.]

The notice of registry stated the claimant's residence to be in Bishop Street, without stating whether it was in the county, or the city of D., the claimant actually residing in the county. Held, that the notice was defective. *In re Sinnott*, 1 Ir. L. Rep. 188. [per Woulfe, C. B.]

Occupancy.—An administrator, and one of the next of kin, lived in the house of the intestate. The administrator was allowed to register as a householder, it not clearly appearing that the occupation of the next of kin was, in respect of his distributive share, so as to make it a joint occupancy. *In re Daly*, 1 Ir. L. Rep. 238. [per Woulfe, C. B.]

A salaried clerk, occupying a house in such capacity, is not entitled to register thereout as a freeholder. *In re Gorman*, 1 Ir. L. Rep. 282. [per Woulfe, C. B.]

Freemen.—The applicant claimed to register as a voter as being free by birth, and produced certificate of admission as a freeman by birth, at Michaelmas Assembly, 1838. The claimant being sworn, was examined as to his having taken the usual oaths before the Lord Mayor and Sheriffs, and of his having obtained the Town Clerk's certificate produced; but refused to answer any questions, upon cross-examination, touching the validity of his admission to the corporation, for which reason he was rejected. Held, by the twelve judges, that he was rightly rejected. *In re Disney*, 1 Ir. L. Rep. 139.

The validity of the admission of a freeman claiming to register, under the 2 & 3 Wm. 4, c. 88, may be questioned at the registry. *Ib.*

When a freeman, having served notice of registry, changed his residence, he need not serve a new notice. *In re Hall*, 1 Ir. L. Rep. 284. [per Woulfe, C. B.]

The time of the service of an apprentice commences from the date of his indenture, and his admission by the Lord Mayor is not conclusive evidence of his right to such admission. *In re Farrell*, Bl. D. & O. 16. [per Brady, C. B.]

Value—Beneficial Interest.—A beneficial interest of £10 per annum, remaining after a due apportionment of the rent, upon that part of the premises out of which the leaseholder seeks to register his vote. Held, to be a sufficient qualification, under the 2 & 3 Wm. 4, c. 88, although such interest be not over and above the entire rent to which the premises are legally liable. *In re McKee*, 2 Ir. L. Rep. 249. [per Woulfe, C. B.]

The "solvent tenant test," is not the only test to be applied in estimating the value of the property required to confer the elective franchise, under the 2 & 3 Wm. 4, c. 88. *In re Larkin*, 4 Ir. L. Rep. 46, Ex. [per Brady, C. B.]

A tenant holding under a lease, with the following proviso, "provided the landlord's interest shall so long last," cannot register for want of interest. *In re Kinsella*, Bl. D. & O. 15. [per Brady, C. B.]

In determining the clear yearly value of premises, under the 2 & 3 Wm. 4, c. 88, s. 7, the proper criterion of value is the amount for which the premises would let; the tenant paying the ordinary burdens incident to occupation. *In re Whitaker*, Bl. D. & O. 123. [Per Blackburne, C. J.]

Held, that the 10th section of the 2 & 3 Wm. 4, c. 88, did not apply to cities. *Ib.*

Jurors—Form of Oath.—The form of oath prescribed by the 10 Geo. 4, c. 8, is not the proper form to be administered to jurors empanelled on registry appeals to try questions of value under the 2 & 3 Wm. 4, c. 88. The jurors empanelled, on such appeals, are to be sworn to try whether the freehold, or leasehold, in right of which the claimant of the elective franchise seeks to register his vote, under the 2 & 3 Wm. 4, c. 88, is, or is not, of the clear yearly value, at which the claimant seeks to register, over and above all rent and charges, payable out of the same, except only public, or parliamentary taxes, county, parish, or church cesses or rates, or cesses on any town, land, or division of any parish or barony, wherein the

said freehold or leasehold is situated. *In re Larkin*, 4 Ir. L. Rep. 46. [per Brady, C. B.]

Form of Order of Rejection.—The order of rejection of a claim to register, when not grounded on insufficiency of value, should state the reasons which influenced the court below in making it, and so much only of the facts of the case as bear upon those reasons. *In re Savage*, 1 Ir. L. Rep. 281. [per Woulfe, C. B.]

ELEGIT—See EXECUTION.

ELIZORS.

Where there was no coroner for the last three years in the county of which the defendant was sheriff, the court directed elizors to be appointed, the *cap. ad sat.* being against the sheriff. *Pardo v.*, 10 Ir. L. Rep. 447, Ex.

ENTRY—See EJECTMENT.

For Condition Broken.—See *Orr v. Stevenson*, 5 Ir. L. Rep. 2, Ex. Ch.; and *Delap v. Leonard*, 5 Ir. L. Rep. 287, Q. B.

ERROR—See PRACTICE AT LAW. CRIMINAL LAW.

ESCHEAT—See CROWN.

EVIDENCE—See ASSUMPSIT. DEST. COVENANT, &c.

[The evidence applicable to the different matters, will be found under the respective titles.]

Generally.—An objection was made to the evidence of a witness, that he had given parol testimony, as to a written document, there being proof of service, on the defendant's, of a notice to produce it. Held, that the defect was cured by the subsequent production of the instrument by the defendant, as part of his evidence, on a different issue, in the same trial. *Daly v. Kelly*, 3 Ir. L. Rep. 174, C. P.

Quære, can parol evidence of a payment, by means of a bill of exchange, be given, without producing the bill, or proving the loss of it, or notice on the opposite party to produce it. *Ib.*

Semble, that where a rule is made for the exclusion of witnesses during the trial, and a witness remains, the party objecting to the testimony should make the objection when the witness comes upon the table; after examination the objection is too late. *Farrell v. Maguire*, 3 Ir. L. Rep. 187.

Semble, that in such case, the conduct of the witness is matter for observation upon his testimony, and not for its exclusion. *Ib.*

Where the declaration is entitled generally of the term, it is open to the party to give at the trial parol evidence, of the actual time of the commencement of the suit. *Taylor v. White*, 5 Ir. L. Rep. 43. [per Brady, C. B.]

If a pleading contain an averment of some act, the averment of which was unnecessary, in order

to sustain the action, the proof of such averment is not necessary. *Davis v. O'Hara*, 5 Ir. L. Rep. 37, Q. B.

The mutilation of a deed is no reason against its admissibility in evidence, if it come out of the proper custody, and there is enough to shew that it had been a deed, that it had been executed, and that it had conveyed an estate; so that the upper part of the first skin of an indenture, bearing date in 1679, which had originally consisted of two or more skins, and which appeared to have been severed with a sharp instrument, and on the back of which were the names of the witnesses attesting the execution, though not of the executing parties, and coming from the proper custody, and which appeared to convey estates, in pursuance of certain articles of 1668, which had been previously given in evidence, was held to have been properly admitted. *Trimleston v. Kemmis*, 5 Ir. L. Rep. 380, Dom. Proc.

In an ejectment by J. T., Lord T. claiming as tenant in tail, under a settlement of 1686, against H. K., who claimed as assignee of T. K., the original lessee of N. Lord T., the father of the lessor of the plaintiff. A conveyance of the lands in question, by the said N. Lord T., to a third party S. R. in fee, subject to the said leases, which, with other leases, made by the same party, and his immediate ancestor, were contained in a schedule annexed to the deed, was held to have been properly admitted in evidence. *Trimleston v. Kemmis*, 5 Ir. L. Rep. 380, Dom. Proc.

An abstract of the title of N. Lord T. to the lands in question, found among the family papers in the possession of the said T. K., the land and law agent of the said N. Lord T., after his death in 1823, and which abstract contained notes in the hand writing of the said T. K., the father of H. K., was held not to have been admissible in evidence against the said H. K., who claimed under an assignment executed in 1804, there being no evidence at the time at which the entries were made. *Id.*

Matters judicially Noticed.—The court will take judicial notice that a particular day of the month falls upon Sunday. *Pearson v. Shaw*, 7 Ir. L. Rep. 1, Q. B.

Admissions on the Record.—Since the rule requiring the bill of particulars to be served with the declaration, it is evidence to shew the items of the plaintiff's demand. *Flood v. Lennon*, Bl. D. & O. 9, N. P. [Brady, C. B.]

Admissions and Declarations.—Though declarations made by a party in possession of an estate are admissible against his own interest, yet a declaration by a party in possession of what he has heard other persons say, is not admissible to cut down or defeat his estate. *Trimleston v. Kemmis*, 5 Ir. L. Rep. 380, Dom. Proc.

A declaration by a party in possession is inadmissible in reply, so far as it is confirmatory only of the plaintiff's original case; and the issue being whether a life estate had been surrendered in 1747 to R. Lord T., one of the plaintiff's ancestors, an admission by the son of the said R. Lord T., while

in possession of the relative interests of the said R. Lord T., and the said tenant for life, at the time of the death of the said R. Lord T.'s father in 1746, was held to have been properly rejected, as immaterial to the issue. *Id.*

An affidavit made by the clerk of the plaintiff's attorney is not admissible as evidence against the plaintiff. *White v. Dowling*, 8 Ir. L. Rep. 128, Q. B.

The admission in an answer in Chancery is only secondary evidence, though a party may therein swear he executed the particular deed in question. *Lord Gosford v. Robb*, 8 Ir. L. Rep. 217. [Per Pennefather, C. J.]

To a letter, addressed by the attorney of the plaintiff to "Mr. Thomas Beddy, Sadler, Drogheda," the description of one of the trustees, in a trust deed, and transmitted by post, an answer was received a few days after by the attorney, signed, "Thomas Beddy," alluding to the contents of the former letter. Held that the latter letter must be considered as the letter of the person to whom the former was addressed, and that its contents were admissible in evidence against him. *Bradley v. Barton*, 10 Ir. L. Rep. 363, Q. B. [Crampton, J., *dissentiente*.] S. C., Bl. D. & O. 117, N. P.

A vendor offered by letter wool, described as of a particular quality, at a certain price, which proposal was not accepted; two months after there was an agreement, between the same parties, for the purchase of the same wool, at a different price. Held, that the first letter might be read to prove the vendor's representations as to the quality of the article. *Harrison v. Balfe*, Bl. D. & O. 22, N. P. [Per Ball, J.]

Proof by Secondary Evidence, Recitals, &c.—The plaintiffs claimed as devisees under a will, the original of which was not forthcoming, but to let in secondary evidence of its contents. Searches for the original were proved to have been made in the proper office of the Prerogative Court, and also in that of Ecclesiastical Court, of the diocese in which the testator died. Held, that it was not necessary to search among the original wills deposited in those offices, it being sufficient to examine merely the official books of the respective courts, in which copies of wills are entered according to course and practice of the office. *Geary v. Synan*, 5 Ir. L. Rep. 509, Ex.

In an action for the disturbance of a fishery the plaintiff proved a lease to him of the *locus in quo*, by a corporation, which, to be valid, required the consent of certain parties thereto. The lease recited that such consent had been obtained. Held, that such was sufficient proof of its validity, without actual proof of such consent, which the jury might presume; no evidence to the contrary having been given, and the *onus probandi* lying on the party who asserted the invalidity of the instrument. *Gubbett v. Clancy*, 8 Ir. L. Rep. 299, Q. B.

If a lease be not produced, the party requiring its production may give secondary evidence, whether obtained by accident or otherwise. If the deed not produced is in the hands of third parties, and is witnessed, its execution must be proved; it is otherwise if in plaintiff's hands. A recital in a deed read by a party, is sufficient to rebut secondary

evidence given by the same party, that the contents of the recited deed differ from the recital, and held that the jury should presume a deed to have been made in accordance with the recital, rather than believe the evidence given to contradict it. *Flood v. Moriarty*, Bl. D. & O. 165, N. P. [Per Pigot, C. B.]

A notice to produce a document, served the evening before the day of trial, is not sufficient to enable the party serving it to give secondary evidence of the contents of that document. *Mauvssell v. Curry*, 8 Ir. L. Rep. 257, Ex.

If a plaintiff's witness be supposed to be collusively withheld by the defendant, the court will send an issue on that fact to the jury, and if it be found in the affirmative, will allow evidence of the handwriting of the witness to be given as if he were dead. *Keating v. Smith*, Bl. D. & O. 159, N. P. [Pigot, C. B.]

Proof of Handwriting.—A witness who admits a particular document to be the handwriting of the defendant, may be asked—"If there are any peculiarities, and whether they are the same as those in the document in question," the signature to which was disputed. *Davis v. Bell*, Bl. D. & O. 181, N. P. [Pigot, C. B.]

Presumption.—See PROOF BY SECONDARY EVIDENCE.

Lands were vested in trustees, named in an Act of Parliament, upon trust to sell, and invest the money for certain purposes; and it was enacted that all, and every part and parts of the lands which should not be sold for such purposes, should remain vested in the trustees in trust for such persons, and for such estate therein, as they would be entitled to, if the Act had not passed. Held, that a conveyance from the trustees to the beneficial owner might be presumed. The latter having, three years after the passing of the Act, suffered a recovery, and executed to the plaintiff a conveyance of the lands, under which there had been an uninterrupted possession for thirty years. *Hoxier v. Powell*, 3 Ir. L. Rep. 395, Ex.

Competency of Witnesses.—Trespass, *qu. cl. fr.* by A. against B. There was another action at the same assizes by B., against A., C., D., and others, for trespass on the same close, for the same period of time. C. and D. justified under A. Held, that C. and D. were admissible as witnesses, on the part of A., in the first action, to prove possession of the close in him, and that the fact of their being parties to the second action, was not sufficient to exclude their testimony in the first. *Gillespie v. Cumming*, 3 Ir. L. Rep. 504, Ex.

A mere liability to an action does not exclude the testimony of a witness who claims an interest in the subject of the suit in which he is sought to be examined. *Ib.*

In an action of trespass *qu. cl. fr.* the wife of the landlord of the plaintiff was produced as a witness, and proved the fact of the holding of the premises in question from her husband, and the commission of the act of trespass complained of. Held, that the witness was competent to prove every fact material

to the issue, even though her evidence might eventually tend to exonerate or to charge her husband. *Burris v. Coffey*, 6 Ir. L. Rep. 298, C. P. S. C. 7 Ir. L. Rep. 509, Ex. Ch.

If a man be incompetent to be examined as a witness on the ground of interest, the evidence of his wife is likewise inadmissible. If a witness be incompetent to be examined upon any point on the ground of interest, he is incompetent to be examined at all. *Ib.*

To a declaration in replevin the defendant pleaded that the goods were the property of A. Held, that A. was not a party to the suit, nor a person on whose individual behalf the action was defended, and therefore was a competent witness. *Kemp v. Mathews*, 9 Ir. L. Rep. 405, Q. B.

A partner and shareholder in the London and Dublin Bank, (a company trading under the 6 Geo. 4, c. 42,) is not admissible as a witness on behalf of the bank. *Perrott v. Humphrey*, Bl. D. & O. 216, Ex.

Examination of Witnesses.—A witness cannot, for the purpose of impeaching his credit, be cross-examined as to the contents of depositions sworn by him on a former occasion, unless the depositions be produced. *Pujolas v. Holland*, 3 Ir. L. Rep. 333, Ex.

Records, and Proceedings in Courts of Law.—Two actions relating to the same subject-matter were tried at the same assizes; the verdict in that first tried, was offered in evidence on the trial of the second. Held, that it could not be given in evidence until judgment had been entered thereon. *Gillespie v. Cumming*, 3 Ir. L. Rep. 504, Ex.

A special verdict in a suit respecting the lands in question, between one of the lessors of the plaintiff's ancestors while in possession, and a third party unconnected with the defendant by blood or estate, was held to be inadmissible against the defendant. *Trimleston v. Kemmis*, 5 Ir. L. Rep. 380, Dom. Proc.

A judgment involving a general right, though between other parties, is admissible against a third person. *Hemphill v. McKenna*, 8 Ir. L. Rep. 43, Q. B.

On an issue in replevin as to whether a person of the name of Garvin was tenant at a certain period to A. or B. Garvin was produced on the trial as a witness, and an attested copy of an affidavit made by a person of the same name in a cause in the Court of Exchequer in 1839, was offered in evidence, in which the allegations as to facts were different to the evidence Garvin now gave. Held, that such attested copy was admissible in evidence, proof being given of the identity of the person who made the affidavit with the person produced at the trial. *Garrin v. Carroll*, 10 Ir. L. Rep. 323, Q. B. [Perrin, J. *dis. dubitante*.]

Bills, Answers, and Proceedings in Equity.—The attested and compared copy of an order in a minor matter, referring it to the Master to approve of a proper person to be receiver; an attested and compared copy of the report stating A. to be a proper person to be receiver, and an attested and compared copy of the order requiring the tenants to pay their rents to A. as such receiver. Held to be suf.

cient evidence of the fact that A. was the receiver of the minor matter. *Crosbie v. Barry*, 1 Ir. L. Rep. 232, Ex.

A deed of compromise of an Equity suit made between the lessor of the plaintiff and a third party, as held to be admissible in evidence where its relevancy to the issue appeared by the bill, answer and decree in the cause; the bill having been filed by the administrator, *pendente lite*, of the said N. Lord T. against his agent for an account, among other things of the proceeds of the said sale to S. R., and the bill, answer, and decree were held to have been properly admitted in evidence as explaining the effect of the deed of compromise. *Trimleston v. Kemmis*, 5 Ir. L. Rep. 380, Dom. Proc.

A bill in Chancery filed by the lessor of the plaintiff against T. K., the original lessee of the lands in question, but after his assignment thereof, and amended against the H. K., the defendant; was held to have been properly admitted in evidence to shew the subject-matter of the said suit, and that the plaintiff claimed as heir at law of his father, the same having been at an earlier stage of the suit put in evidence by the plaintiff himself for the purpose of reading admissions in the answer of the defendant. *Ib.*

Seemingly, the bill was admissible for the same purpose even if not previously given in evidence by the plaintiff. *Ib.*

The admission in an answer in Chancery is only secondary evidence, though a party may therein swear he executed the deed in question. *Lord Gosford v. Robb*, 8 Ir. L. Rep. 220. [per Pennefather, C. J.]

Sentences and Proceedings in the Ecclesiastical Courts.—In an action for the recovery of necessities supplied by the plaintiff to the defendant's wife during her separation from her husband, which was alleged to have been caused by the cruelty of the husband, or by his careless desertion and abandonment of her. Held, that a sentence of an ecclesiastical court, dismissing a suit by the wife for a divorce and for alimony, grounded upon the husband's alleged cruelty, and to which the husband set up as a defence, the wife's adultery, was admissible in evidence. *Day v. Spread*, 4 Ir. L. Rep. 247. [Perin, J. *dissentiente*.]

Held, that such a suit is not *res inter alios acta*. *Ib.*

In an action brought against one of three executors, on a covenant of the testator, Held, that the inventory taken before probate was evidence to charge him with the assets therein specified. *Rowan v. Jebb*, 10 Ir. L. Rep. 216; S. C. Bl. D. & O. 52. N. P. Q. B.

Parol Explanation of Written Instruments.—To a *scire facias* the defendant pleaded the statute of Limitations; Replication, an acknowledgment in writing contained in the defendant's schedule in the insolvent Court, in which he admitted himself to be indebted to the conuzee of the judgment in three bonds. These bonds differed in amount and date from that on which the judgment was entered, and the defendant rejoined that there was no acknowledgment. Held, that parol evidence was admissible to shew that one of the bonds mentioned in the sche-

dule was identical with that on which the judgment had been entered. *Hanun v. Power*, 8 Ir. L. Rep. 505, Q. B. [Perriu, J. *dissentiente*.]

Hearsay and Reputation.—An inquisition taken in the year 1614 was deemed sufficient evidence as a matter of reputation of the existence of a certain place, without proof of the commission on which it was grounded. *Gabbett v. Clancey*, 8 Ir. L. Rep. 299, Q. B.

Variance.—Lands were leased after the passing of the 4 Geo. 4, c. 99, and an establishment for the composition of tithes within the parish, at a yearly rent of £184. 8s. 6d., together with £7. 1s. 6d. for tithe payable half-yearly, and the landlord, after the passing of the 1 & 2 Vic. c. 109, distrained for half a year's rent due, viz. one-half of the foregoing rent and tithe, minus one-eighth of the latter, and in an action of replevin avowed for the full amount of the said one-half year's rent and tithe without deducting the one-eighth. Held to be no variance. *Burke v. Dignam*, 3 Ir. L. Rep. 368, C. P.

Quære, is the rent reserved in the foregoing lease a rack-rent. *Ib.*

Commission to examine Witnesses.—A commission was issued, not being able to attend before a jury, to examine witnesses under the 3 & 4 Vic. c. 105, s. 69, for the trial of an issue out of Chancery, but the examination was directed to be taken *vivâ voce*. *McLain v. Enery*, 4 Ir. L. Rep. 268, Q. B.

The proper period to apply for a commission to examine witnesses abroad under the 3 & 4 Vic. c. 105, s. 66, is after issue joined. *McCance v. Vance*, 5 Ir. L. Rep. 115, Ex.

Order for commission to examine witnesses out of the jurisdiction. *Malley v. O'Malley*, 6 Ir. L. Rep. 154, C. P.

The costs of a commission to examine witnesses under the 3 & 4 Vic. c. 105, are in general costs in the cause, and will not be given against the party applying for it. *Corporation of Dublin v. Stephens*, 8 Ir. L. Rep. 265, Ex.

A commissioner residing near the witness to be examined *primâ facie* is the proper person to be appointed. *Ib.*

On an application for a commission to examine witnesses by the plaintiff, the court refused to put him under terms to pay the costs of a former withdrawal of notice of trial, the defendant having neglected to enter the rule to stay proceedings till the costs were paid. *Ib.*

The costs of a commission to examine witnesses are always costs in the cause. If the defendant apply for the commission, the plaintiff is entitled to the costs of the motion. *Harris v. Good*, 1 Ir. Jur. 216, Ex.

A defendant is entitled to the costs of a commission to examine witnesses, though the witness examined was not produced, or his depositions read, the plaintiff by his order not having provided for that contingency. *Kemmis v. Macklin*, 10 Ir. L. Rep. 7, C. P.; S. C. Bl. D. & O. 222.

Expenses of Witnesses.—The application for the expenses of a witness under the 54 G. R. is a chamber motion, and cannot be moved before the full court. *Shaw v. Belcher*, 4 Ir. L. Rep. 332, C. P.

EXAMINATION OF WITNESSES.—

See WITNESSES.

EXCEPTIONS—See PRACTICE.

EXCHEQUER (CHAMBER)—See JURISDICTION.

EXCISE—See REVENUE.

EXECUTION—See SEQUESTRATION. SHERIFF. BANKRUPT. ARREST.

Generally.—In the case of a judgment entered by warrant of attorney on a bond conditioned for payment of a sum of money by instalments, the court will not allow execution to issue for any more than the instalments which have become due at the time of the application. *Rigley v. Birch*, 4 Ir. L. Rep. 14, C. P.

The court would not allow execution to be issued on a judgment collateral to secure an annuity which was more than twenty years old, and no payment or acknowledgment, although it had been revived in the meantime, the defendant being resident in America, and having no property in this country. *Kelly v. Clarke*, 4 Ir. L. Rep. 403, C. P.

The assignee of a judgment entered within a year may issue execution without a *scire facias*. *Kane v. Bridgeman*, 5 Ir. L. Rep. 222, Q. B.

A plaintiff having obtained judgment with a stay of execution until a certain day, is entitled to issue his execution on that day, if the money be not paid. *Rogers v. Davis*, 8 Ir. L. Rep. 399, Q. B.

A judgment creditor who had obtained the sequestration of a benefice, is entitled to be paid the fruits of his execution, in priority to the claim of the debtor's successor in the benefice, for the value of dilapidation, found under a commission of dilapidation. *Casey v. Horner*, 10 Ir. L. Rep. 221, Q. B.

A plaintiff cannot act upon two concurrent writs of *ca. sa.* and *fi. fa.* at the same time. Where a *ca. sa.* and *fi. fa.* having issued together, a small sum only was levied under the former, and before returning the *fi. fa.* the defendant was taken under the *ca. sa.* the court discharged her out of custody.—*Fennell v. Dempsey*, 1 Ir. Jur. 64, Q. B.

Ca. Sa.—A defendant who has been arrested under a *capias ad satisfaciendum*, will be discharged from custody, the endorsement on the writ not being pursuant to the 43rd general rule. *Hunter v. Reddy*, 3 Ir. L. Rep. 106, Q. B.

The defendant was arrested in October, and by mistake made his application for his discharge under the 3 & 4 Vic. c. 105, in Michaelmas Term, which failed. Held that he was not guilty of such laches as would deprive him of the benefit of the informality of the non-endorsement of the writ, as required by the 43rd general rule. *Harrison v. Hanley*, 3 Ir. L. Rep. 137, C. P.

The defendant was arrested in July, 1838, under a *capias ad respondendum*, and was detained until November, 1838. An application by the defendant on the 16th January, 1841, to be discharged,

there being no endorsement, pursuant to the 43rd general rule, was discharged on the ground of laches. *Murphy v. Prendergast*, 3 Ir. L. Rep. 216, Q. B.

A *ca. sa.* with the abode and addition, or other description of the defendant, in compliance with the 43rd rule is irregular. *Murdock v. Gregg*, 5 Ir. L. Rep. 559, Ex.

The defendant was arrested in December; he became aware of the irregularity on the 10th of March, when the Barons were on circuit. A chamber motion on the return of the Chief Baron was directed to stand till term. Held not to be too late. *Ib.*

Elegit.—A return to an *elegit*, stating that the sheriff has delivered a moiety of the lands by "metes and bounds." Held to be a sufficient return. *Nerney v. Walker*, 2 Ir. L. Rep. 39, Ex.

Where an *elegit* executed under the 3 & 4 Vic. c. 105, extending all the lands of the creditor, Held that the sheriff's return to the inquisition is the period of the commencement of the *elegit* creditor's title, and that a return, dated the 13th February, 1841, was an execution executed more than two months before the issuing of a commission on the 17th of May, 1841. *O'Brien v. Bernard*, 6 Ir. L. Rep. 6, Q. B.

Accounting.—In directing an account to be taken of the receipts of a creditor in possession, the court will order an account of what, without wilful default, might have been recovered. *Leary v. Quarry*, 5 Ir. L. Rep. 176, C. P.

Sheriff's duty in the execution of writs.—See SHERIFF.

Discharge of defendant from custody.—See ARREST.

Sequestration.—See SEQUESTRATOR.

Setting aside Executions.—The court will set aside an execution issued after the death of the plaintiff. *Borbridge v. Freeman*, Bl. D. & O. 213, Ex.

The court will set aside an irregular execution, though the defendant be guilty of laches, if the proceedings be founded upon a parliamentary appearance. *Tilly v. Newman*, Bl. D. & O. 240.

EXECUTORS AND ADMINISTRATORS.

- I. GENERALLY.
- II. RIGHTS, DUTIES, AND LIABILITIES.
- III. ADMINISTRATION OF ASSETS.

I. GENERALLY.

To enable a personal representative to satisfy a judgment probate or letters of administration must be obtained from the Prerogative Court, though the judgment has been paid off in the life-time of the co-nazee. *Lowry v. Walker*, 6 Ir. L. Rep. 127, Ex.

Quære, is an executor or administrator entitled to search for judgments against his testator or intestate. *In re Bagot*, 8 Ir. L. Rep. 295.

Where administration is not granted to the plaintiff, but to the party through whom he derives, it is not necessary in a *scire facias* to make proferat

the letters of administration, or set out the particulars thereof. *Barry v. Hoars*, 4 Ir. L. Rep. 97, Q.B.

The widow of an intestate was entitled to an undivided moiety of a leasehold property of her husband. Held, that having taken out administration she thereby acquired a legal estate in that moiety. *Casey v. Deering*, 8 Ir. L. Rep. 183, Q. B.

Held, that express assent, on the widow's part, to take that moiety was not necessary. *Ib.*

II. RIGHTS, DUTIES, AND LIABILITIES.

Actions by and against.—Covenant for rent against the administrator of a lessee for years. The declaration stated "all the estate, &c. term of years to come and unexpired, property, profit, &c. in the said premises by assignment thereof, came to and vested in the defendant, who thereupon then and there entered into and upon all and singular the said premises, and was thereof possessed from thence hitherto." The defendant pleaded, 1st. *non est factum*; 2nd. that the estate did not vest *modo et forma*. On this plea issue was joined; there were seven other pleas on which no question was raised. To support this issue the plaintiff gave in evidence the lease, and the letters of administration of the goods of the lessee granted to the defendant. The judge told the jury to find for the defendant, unless they were of opinion he was assignee, otherwise than as administrator; verdict for the defendant. On exceptions to this charge, Held, that proof of the letters of administration, without proof of entry by the administrator, sustained the issue. *Green v. Listowel*, 2 Ir. L. Rep. 384, Ex.

To a declaration in *assumpsit* against an administratrix the defendant pleaded that by a certain indenture of lease C. demised to the intestate certain lands at a yearly rent; "that the intestate covenanted for the payment of the rent, and that at the death of the intestate there was due and owing as and for the rent reserved a large sum of money, viz. the sum of £100, and which said sum is still in arrear and unpaid;" that she had fully administered the goods of the intestate, except goods to the value of five shillings, which were not sufficient to pay the debt due to C. on foot of the indenture. Replication that the defendant had goods of the intestate to be administered of the value of the damages in the declaration, over and beyond the goods in the plea mentioned. Held, that upon this pleading it was not admitted by the plaintiff as a fact to go to the jury that the precise sum of £100 was due and owing to C. for the rent reserved by the lease. *Duane v. Walsh*, 6 Ir. L. Rep. 243, Ex.

On the death of the lessee for life the heir at law took possession of premises demised to the lessee, and the rent having become due after the death of the lessee the executors of the lessee were compelled to pay it to the lessor. Held, that the heir at law was liable in an action for the money so paid by him. *Kirkwood v. Burke*, 7 Ir. L. Rep. 387, Q. B.

Held, that the executor was not bound to sue in his representative capacity. *Ib.*

A landlord distrained, and died without appointing an executor; neither a detention of that distress nor a new distress by a person who subsequently took out administration will sustain an avowry sub-

sequent to the grant of the letters of administration. *Rogers v. Dejoncourt*, 7 Ir. L. Rep. 482, Q.B.; S. C. 8 Ir. L. Rep. 450, Ex. Ch.

To a declaration in *indebitatus assumpsit* against an administratrix, containing counts for use and occupation. Plea, that before she had any notice of the demand, and before she had any notice of the making of the said promises, she had fully administered. Held bad, as tendering an immaterial issue. *Commissioners of Education v. Loughnan*, 9 Ir. L. Rep. 167, Q. B.

In an action against one of three executors on a covenant of the testator, Held, that the inventory taken before probate was evidence to charge him with the assets therein specified. *Rowan v. Jebb*, 10 Ir. L. Rep. 216; S. C. Bl. D. & O. 51, N. P., Q. B. [Per Blackburne, C. J.]

III. ADMINISTRATION OF ASSETS.

Generally.—A. died having two accommodation acceptances of B.'s outstanding, and which were not due till after the death of A. The executor *de son tort* to A. took up these bills passing his own draft on another person in lieu of them, and which B. took in satisfaction of the debt. Held, that the passing of these securities by the executor was a discharge of the assets to that amount, and so far a due administration of the assets. *Carrigan v. Muldowney*, 1 Ir. L. Rep. 254, Q. B.; S. C. 1 J. S. 550.

FALSE IMPRISONMENT—See CASE. TRESPASS.

FATHER.

Liability to provide for child.—A father is not under any legal obligation to provide for the support of his child, and to make him liable for necessities supplied for the maintenance of the child, there must be a contract expressed or implied, nor will the fact that the father has permitted the child to live with the mother while she lived apart from him, be any evidence that she is an agent of the father, or that she has any authority from him to contract debts for the maintenance of the child, where he disputes the legitimacy of such child. *Day v. Spread*, 4 Ir. L. Rep. 247, Q. B.

FEE FARM—See EJECTMENT ON THE TITLE.

FEME COVERT—See HUSBAND AND WIFE.

FEIGNED WAGER.

See *Jones v Ryan and wife* in the Court of Common Pleas, and *Duparcy v. Jackson* in the Court of Exchequer for the forms used under the 8 & 9 Vic. c. 109, s. 19, (the Act abolishing feigned wagers) in the trial of issues from Courts of Equity. Bl. D. & O. 46.

FERRY—See GRANT.

FIAT—See ARREST.

FIERI FACIAS—*See* EXECUTION. SHERIFF.

FISHERY—*See* TRESPASS.

FORGERY—*See* BOND AND WARRANT.

FRAUD—*See* BILLS OF EXCHANGE. CONTRACT.

FRAUDS (STATUTE OF)—*See* GUARANTEE. CONTRACT.

FREEMAN—*See* REGISTRY.

FRIVOLOUS PLEAS AND DEMURRERS—*See* PLEADING.

GENERAL RULES—*See* PRACTICE.

GENERAL ISSUE—*See* ASSUMPSIT. CASE. TRESPASS. TROVER.

GRAND JURY.

I. ASSESSMENTS.

II. JURORS.

I. ASSESSMENTS.

Where by local Acts (58 Geo. 3, c. 2, and 55 Geo. 3, c. 82,) certain premises were exempted from Grand Jury assessments, and the general Grand Jury Act directed in general terms that the levy of all grand jury assessments should be under it without exempting any particular property or persons, and did not notice these local Acts. Held, that the latter Act repealed them. *Jones v. Hayes*, 1 Ir. L. Rep. 341, Q. B.

Appointment of Applotters.—Where it appeared that a meeting was called for the purpose of appointing new applotters under the late Grand Jury Act, (6 & 7 W. 4, c. 116,) and it was sworn that the proceedings would not be carried on in consequence of the tumult occasioned by persons who deponent believed acted in this manner to prevent such appointment, and the time had nearly expired within which the applotment should be made under the terms of the Act, an absolute order for a *mandamus* was granted. *Reg. v. Clendinning*, 1 Ir. L. Rep. 350, Q. B.

Presentments.—A presentment was passed in Easter Term, 1839, and two traverses taken by the same person, one for inutility, and the other for damages. The court, in the Michaelmas Term following, on a motion to quash the presentment, refused to entertain objections as to the insufficiency of the affidavit, and estimate upon which the presentment was founded. *Reg. v. M. Kay*, 2 Ir. L. Rep. 16, Q. B.; S. C., 1 J. & S. 672.

Held, that the presentment being expressed to be made upon condition, that a certain sum would be advanced by the Board of Public Works and Mr. L., did not render the presentment void. *Ib.*

An Act of Parliament, after providing for the

appointment of medical officers to the Dublin goals by the grand jury, directs—"That it shall, and may be lawful for the grand jury aforesaid, at every presenting term, after such appointment, to present a reasonable sum, to be as a salary for such physician." Held, that the grand jury were the proper judges of the reasonableness of the sum to be given, and where it appeared, that although for several years the surgeon and physician had been receiving £400 a year, and their duties had greatly increased since that sum had been first allowed, and the grand jury reduced the salary to £300 a year, the court refused to alter the warrant. *In re Harty and Read*, 3 Ir. L. Rep. 312, Q. B.

Semble, the court has jurisdiction to interfere and alter the warrant, not only where the sum presented would be illusory, but when that sum would be a denial of justice. *Ib.*

A presentment for enlarging a goal was made at a presenting sessions, under the 6 & 7 Wm. 4, c. 116, and was subsequently approved of by the grand jury at the ensuing assizes. Held, that such presentment did not come within the terms of the 27th and 28th sections of that Act, and that if it had been approved of by the grand jury at the assizes, it was not necessary that it should again be laid before the magistrates and cess-payers, at the sessions, for their approval. *In re presentment, Grand Jury of Fermanagh*, 4 Ir. L. Rep. 394, Q. B.

The coroner of a county gave orders to two medical men, one for £4 10s., and the other for £2 10s. The treasurer of the grand jury paid the former, but refused to present the latter. The court would not give any direction to, or make any order upon the grand jury, in respect to the sum of £2 10s. *In re Thornhill*, 4 Ir. L. Rep. 162, Q. B.

The Court of Queen's Bench has not power to direct a presentment for the salaries of the officers named in schedule 15, to the 7 & 8 Vic. c. 106, until their duties be performed. *In re Surveyors of the County of Dublin*, 8 Ir. L. Rep. 189, Q. B.

A presentment cannot be made for compensation to the owners of property for malicious injuries done thereto, the statutes awarding compensation not extending to the city of Dublin. *In re Miller*, 2 Ir. L. Rep. 306, Q. B.

II. JURORS.

A challenge does not lie to a grand juror. *Ex parte Nowlan*, 2 Ir. L. Rep. 7, Q. B.

The coroner of the county of the city of Dublin is not disqualified at common law, or by statute, from serving upon grand juries for the county of the city of Dublin. *Ib.*

Semble, the court has jurisdiction to set aside an incompetent person when called upon the grand jury panel. *Ib.*

Plea in abatement, that A., one of the grand jury who found the indictment, was not an inhabitant, or resident, or freeman, or burgess, of the city of Dublin, or possessed of, or entitled to, any lands, &c., or any rateable property. Held, that the plea not having negatived every qualification, the court would presume him qualified. *Reg. v. Duffy*, 1 Ir. Jur. 81, Com. C.

GRANT.

The grant of a ferry by the Crown is a valid grant, though given after Magna Charta. *Hemp-hill v. McKenna*, 8 Ir. L. Rep. 43, Q. B.

The right of lessees deriving under such grant is not limited, as by a direct mathematical line, from one point to another, but extends to any part of the river within the specific limits, and the lessees may change the localities of transit within those limits. *Ib.*

GUARANTEE—See INDEMNITY.

A. sued out a *fi. fa.* against B., both C. and D., who had been in the suit, bail at bar for B., induced A. to take the draft of E., (whose solvency was questionable,) upon B., and give up the execution, they giving A. a guarantee for the payment of the bill. The bill was due on the 23d of July, and was not presented till the 26th, but, subsequently, one of the guarantee's promised to have it settled. Held, that C. and D. were liable to A. upon the guarantee, notwithstanding the laches of A. *Sinclair v. Barnett*, 1 Ir. L. Rep. 46, Q. B.

Held, that when inadmissible evidence was allowed to be given, though in the opinion of the judge it could not influence the jury, the court will not give costs against a party seeking a new trial on that ground. *Ib.*

A guarantee as follows—"Cork, 31st January, 1837,—Sirs, I will be accountable to you for payment, within six months of the said order forwarded by my son, R. A. H., and also for payment, within three months, of 600 barrels of vetches, to be forwarded by the first steamer.—I am, &c., S. H. To Messrs N. and Co." In an action by N. and Co. against S. H., Held, that the consideration sufficiently appeared on the face of this guarantee. *Nash and Co. v. La Land*, 2 Ir. L. Rep. 190, Q. B.

Held, that this guarantee was not entire, and although the vetches were never forwarded, that the plaintiffs were entitled to recover the price of the seed which had been forwarded. *Ib.* [See *Adams v. Hartland*, 2 J. & S. 155.]

Declaration in assumpsit, stating that the plaintiff, at the request of A. and B., had supplied gas, to the hotel of H., to the value of £32. That A. and B. had accounted with the plaintiff of, and concerning the gas so supplied, and upon such accounting, were found to be indebted to the plaintiffs in £32, to be paid on request. That the defendant was the receiver of the hotel, and of the monies and profits arising therein, for the use of A. and B.; and in consideration that plaintiffs, at the request of defendant, would forbear, and give time to A. and B. for the payment of the said sum, for the space of six months, he, the defendant, by a certain note, or memorandum in writing, signed by him, as the receiver of the hotel, and, with the sanction of A. and B., promised the plaintiffs to pay them the £32, within the space of six months. Averment, that the plaintiffs forbore, and gave time, until the expiration of the six months; but that the defendant did not perform his promise. Plea, that the promise of defendant was a promise to answer for the debt of other persons, (A. and

B.) and contained in the said note in writing, in the declaration mentioned, and in the words and figures following—"I hereby undertake, as the receiver of the hotel of H., and with the sanction of A. and B., that the sum of £32, due to the Hibernian Gas Company, (the plaintiffs,) for gas supplied to the above concern, shall be paid within six months, from the date hereof—and, I also undertake, that the future supply of gas, to the above concern, shall be discharged by me as it may become due, until you have further notice." Held, on demurrer, that a consideration of forbearance to sue, sufficiently appeared on the face of the instrument to support the declaration. *Hibernian Gas Company v. Parry*, 4 Ir. L. Rep. 453, Ex.

The plaintiff having distrained the goods of his tenant, the defendant undertook to pay the amount of the rent, in consideration of the discontinuance of the distress; and the distress having been thereupon withdrawn, and the goods left in the hands of the tenant. Held, that the promise of the defendant was a collateral promise, and that the absence of an averment of default in the principal, in one count, and of a special request in the other, in which the promise to pay was stated to have been upon request, were fatal objections on special demurrer. *Bull v. Collier*, 4 Ir. L. Rep. 107, C. P.

Assumpsit upon a guarantee, the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would give to one E. P. credit, to the amount of £400, the defendant promised to guarantee them from any loss in their dealings with the said E. P., to the amount of £400. Averment, that the plaintiff confiding did give credit to the amount of £300, in certain dealings between them and the said E. P., but that he, the said E. P., did not pay the same. Held, on special demurrer, first, the plaintiffs were entitled to sue on the guarantee, though they had not given E. P. credit to the full amount of the £400; and secondly, that the mode of giving credit was sufficiently stated in the declaration. *Lindsay v. Parkinson*, 5 Ir. L. Rep. 124, Ex.

Action on a guarantee. The first count stated, that H. P. was sheriff of the county T., and the plaintiff his under sheriff; that Lord K. had distrained the goods of P. H. for rent, and that a Chancery Replevin had issued, directed to the said sheriff; that thereupon the plaintiff, as under sheriff, required the said P. H., with two solvent sureties, to execute the replevin bond; that P. H. having tendered certain parties as sureties, the plaintiff refused to accept of them, and that the defendant to induce him to do so, sent him the following guarantee—"Sirs, I request that you will take M. H., and P. K., as sureties with the plaintiff, in the replevin bond, in this cause, and grant a special warrant thereon, directed to T. H., and J. H., or either of them, or their assistants, and in consideration of your so doing, I hereby undertake, and guarantee, that the said sureties are severally solvent persons, and good marks for the sums for which they become bail, and accountable to you in said bond; and in case they, or either of them, should turn out not to be so, I hereby undertake to indemnify, and save you harmless, of, from, and against all losses, damages, expenses, and costs,

which can, shall, or may, arise unto you, or either of you, in consequence of taking said persons as sureties, in said replevin bond, James Barry.—To T. P. H., High Sheriff, E. L. C., the Sub-Sheriff of the County of T.” The declaration stated, that the plaintiff, relying on said undertaking, took the said parties as sureties, who executed the usual bond; and it was averred, that the said P. H. did not return the said goods, and that an assignment of the bond was made to Lord K., and that the sureties being insolvent, the plaintiff was obliged to pay to Lord K. the sum of £300, &c. There were two other counts; in the second there was an averment of the delivery of the special warrant. A verdict having been found for the plaintiff, and a judgment entered up generally, Held, that the action was rightly brought by the plaintiff alone, without the high sheriff, as a co-plaintiff. *Cambie v. Barry*, 5 Ir. L. Rep. 34, Q. B.; S. C., 6 Ir. L. Rep. 49, Ex. Ch.

Held, that the first count was bad for omitting the averment of the granting of a special warrant to the parties named in the guarantee, and the defect not being such as could be cured by verdict, that a *venire de novo* should issue. *Ib.* [*Dissentientibus*, Lefroy, B., Perrin, J., Crampton, J., and Burton, J.]

The plaintiff distrained the goods of his tenant, and, in consideration that he would withdraw the distress, the defendant undertook by parol to pay the amount of rent due; the distress was thereupon withdrawn, and the goods left in the possession of the tenant. Held, that this was a collateral undertaking to pay the debt of another, and consequently void, not being in writing. *Fennell v. Malcahy*, 8 Ir. L. Rep. 434, Ex.

Declaration in assumpsit charged that, in consideration that the plaintiff would appoint J. B. to be one of their agents, the defendant undertook, and promised the plaintiffs, that J. B. would account from time to time for all sums of money he should receive for the plaintiffs, according to the terms and regulations contained in the instructions which he might from time to time receive from them. Averment, that J. B. received £500, and did not account for the same according to the instructions received by him. Breach, that the defendant did not pay the £500, or indemnify the plaintiffs against the loss they sustained by the default of J. B. On demurrer to the declaration, Held, that the instructions given to J. B. formed part of the plaintiff's evidence, and that the counts omitting them, were properly framed. *Agricultural Cattle Insurance Company v. Cupen*, 1 Ir. Jur. 354, Q. B.

Held, also, that the words in the declaration, “although, then, and there, requested so to do,” constituted a sufficient averment, a request being made, and of the time and place at which the request was made. *Ib.*

GUARDIAN.—See INFANT.

GUARDIANS OF THE POOR.—See POOR LAW.

HABEAS CORPUS.—See REVENUE.

To obtain an attachment against a party for not obeying a writ of *habeas corpus*, if the writ be not personally served the affidavit must state that a servant or agent of the party, at the house where the person is detained to whom the writ is directed, was served. *In re Wildridge*, 1 Ir. L. Rep. 1, Q. B.

A. was arrested under a writ of *ca. sa.* for £336 out of the Court of Common Pleas, and a detainer being subsequently issued out of the Queen's Bench for a sum of £23. A *habeas corpus* issued out of the Queen's Bench to remove A. from the gaol of Carrickfergus, where he was in custody. The fact of the prisoner having been arrested upon the writ out of the Court of Common Pleas was not disclosed upon the obtaining of the writ of *habeas corpus*. The Court of Queen's Bench ordered the prisoner to be committed to the custody of the Marshal under both writs to prevent his discharge without an order from each court. *Anonymous*, 1 Ir. L. Rep. 241, Q. B.

On a motion for a conditional order for a writ of *habeas corpus* to remove children from the custody of one of the parents, and the circumstances which created the necessity for the writ, being domestic differences, which it was stated would be distressing to all parties, if made public. The court directed the affidavits to be handed in for their perusal, and did not require them to be stated at the bar. *Anonymous*, 2 Ir. L. Rep. 160 Q. B.

Return.—The return to a *habeas corpus* directed to the governor of the Richmond Penitentiary stated “that the prisoner was received into his custody under sentence of the Court of Oyer and Terminer, on the 14th of June, 1841, and that the said sentence of transportation was on the 7th of July, 1841, commuted to two years imprisonment, with one week solitary confinement in each alternate week.” Held to be a sufficient return. *Reg. v. Feeny*, 5 Ir. L. Rep. 437, Q. B.

Semble, after the return is made and filed, the court can amend it. *Ib.*

Semble, the court are not bound by the return, but will look to the original sentence. *Ib.*

Where a *habeas corpus* is issued on behalf of a prisoner confined under a criminal charge, notice should be given to the Attorney General of the day on which the prisoner will be brought up under the *habeas corpus*. *Ib.*

To a *habeas corpus* directed to the Marshal of the Four Courts Marshalsea, a return setting forth a writ of attachment from the Court of Chancery to the sheriff of the City of Dublin, commanding him to attach H. in order to answer as well touching a contempt, as such matters as should be objected against him, which writ was marked for the levying of certain monies; and also setting forth the sheriff's warrant to his special bailiff for the arrest of H., and alleging that the arrest was made in pursuance of the writ and after the delivery thereof, and after the issuing of the warrant, and before the return of the writ, and after the passing of the 5 & 6 Vic. c. 95, and also setting forth the return of the writ, and certifying that after the arrest the sheriff did in due form of law commit H. to the Four Courts Marshalsea, there to remain in safe custody until he should pay the said monies marked at the foot of

the writ, or until he should be otherwise discharged by due course of law, since which committal the marshal, in and on behalf of the sheriff, and by his command detained H. in custody under the authority of the writ. Held to be a good return though not averring that the committal was in writing. *Ex parte Higgins*, 9 Ir. L. Rep. 414, C. P.

—◆—
HABERE—See EJECTMENT.

—◆—
HAND WRITING—See EVIDENCE.

—◆—
HUSBAND AND WIFE—See ARREST.
EJECTMENT.

Proceedings by, and against.—Process against husband and wife, a separate appearance for the latter was set aside, with costs to be paid by the attorney who entered it. *Poe v. Jones*, 2 Ir. L. Rep. 379, Ex.

A motion to set aside a judgment entered on a bond and warrant of attorney executed by a married woman, refused under the circumstances of the case, the application not having been made in proper time, and the conduct of the applicant not having been such as to entitle her to relief upon motion. *Roddy v. Clements*, 2 Ir. L. Rep. 229, Ex.; S. C., 1 J. & C. 170.

A motion on behalf of the wife, for leave to enter judgment in the name of the trustees in a marriage settlement, upon a bond and warrant of the husband, passed for the amount of the wife's property, and it appeared that the trustees refused to enter judgment, that one of them had issued an attachment against the goods of the obligor, and that the sum secured on the bond would be lost; the trustees having received no specific notice of this motion, and not consenting, the court refused the application. *Campion v. Campion*, 2 Ir. L. Rep. 13, Q. B.

Judgment may be entered against husband and wife, on a bond and warrant of the wife, given before marriage. *Copperthwaite v. Tisdall*, 3 Ir. L. Rep. 139, C. P.

Right of entry for condition broken by husband seized in right of his wife. See *Orr v. Stevenson*, 5 Ir. L. Rep. 13. [Per Pennefather, B.]

In action against husband and wife for a personal tort committed by the wife, who was living apart from her husband, a joint appearance must be entered. *White v. Seaver*, 6 Ir. L. Rep. 465, Q. B.

A married woman sued as the drawer of certain bills of exchange, suffered judgment to go by default, and was taken in execution, the court, upon motion, directed her to be discharged, she having practised no deception by holding herself out as a *feme sole*, and that the plaintiff was aware of her coverture when he took the bills. *Pepper v. Kelly*, 6 Ir. L. Rep. 530, Ex.

If a husband turn his wife out of doors, he is liable for necessaries supplied for her support. The fact of her being allowed a sum for maintenance by her father is no defence to such an action, it not appearing her father was bound to give it.

Whitmore v. Gale, Bl. D. & O. 199, N. P., Q. B. [Per Blackburne, C. J.]

A notice from a husband, cautioning a party not to give credit to his wife, should expressly direct attention to the facts relied on. That he was a person of small income, and that his wife had a separate allowance. *Id.*

A husband is not liable for goods furnished to the wife—having a separate property—without his knowledge, privity, or assent. *Groves v. Whitestone*, Bl. D. & O. 169, N. P., Ex. [Per Pigot, C. B.]

The agency of the wife may be extended beyond mere household transactions, if the husband subsequently assent to them. *Id.* [See *Curwen v. Maguire*, 1 H. & J. 178.]

In an action for the recovery of necessaries supplied by the plaintiff to the defendant's wife during her separation from her husband, which was alleged to have been caused by the cruelty of her husband, or by his causeless desertion and abandonment of her. Held, that a sentence of an ecclesiastical court—in a suit by the wife for a divorce, and for alimony, grounded upon the husband's alleged cruelty, and to which the husband set up, as a defence, the adultery of the wife, dismissing the suit—was admissible in evidence. *Day v. Spread*, 4 Ir. L. Rep. 247, Q. B.

Such a suit is not *res inter alios acta*. *Id.*

Disposal of Property of Wife, 4 & 5 Wm. 4, c. 92, s. 81.—The court will not make an order dispensing with the concurrence of the husband in the disposition of the lands of the wife, unless the deed has been previously prepared, and is produced to the court at the time of the application. *In re Byrne*, 5 Ir. L. Rep. 184, C. P.

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IMPRISONMENT—See TRESPASS.

—◆—
INDICTMENT—See CRIMINAL LAW.

—◆—
INDORSEMENT—See BILL OF EXCHANGE.

—◆—
INDEMNITY.

A. being indebted to B. for rent, distrained, whereupon C. became surety that A. would pay the rent in December following, or re-deliver the goods to B. A. did not do so, and B. recovered judgment against C., on his guarantee, and compelled him to pay the amount of it by instalments. Held, that the right of C. to sue A., on his contract of indemnity, was not extinguished by the judgment against him by B. *Considine v. Considine*, 9 Ir. L. Rep. 400, Q. B.

—◆—
INFANT—See FATHER.

Money belonging to a minor having been lent on a judgment, in which the plaintiff was described as a minor, and to have appeared by attorney, the court would not permit the minor, on receiving of the amount, to execute a power of attorney, to satisfy it upon the roll by her father, as her guardian or next friend. *M'Cullagh v. Fitzpatrick*, 5 Ir. L. Rep. 186, C. P.

A judgment entered on a bond and warrant of attorney executed by an infant, in a penal sum to secure a lesser sum with interest, will be set aside. *Macnamara v. Browne*, 5 Ir. L. Rep. 460, Q. B.

Semble, aliter, if the infant, at the time of the execution of the bond, hold himself out as a person capable of contracting. *Ib.*

A parliamentary appearance, entered in the name of a defendant, who was an infant, will be set aside for irregularity. *Scott v. Magee*, 5 Ir. L. Rep. 484, Q. B.

Where a writ had been issued by an infant in the name of her next friend, and a parliamentary appearance entered thereon, and a declaration filed, the proceedings were set aside; leave of the court not having been obtained, to sue by *prochein amie*, at the time of issuing the writ, or entering the appearance. *Byrne v. Walsh*, 5 Ir. L. Rep. 217, Q. B.

In an action by an infant suing by his next friend, the omission of the words, "admitted by leave of the court for that purpose," Held bad, on special demurrer. *Kilikelly v. Kelly*, 5 Ir. L. Rep. 30, Q. B.

Lands were devised to an infant, who, with his mother, continued in possession of the premises from the time of the testator's death. The trustees, nominated in the will, brought an ejectment against the mother, laying demises in their own name, and that of the minor, the court, under the circumstances, set aside the demise laid in the minor's name, and gave him liberty to take defence to the ejectment by his mother and guardian. *Foley v. Foley*, 6 Ir. L. Rep. 235, Q. B.

An assignee is liable on a covenant for non-payment of rent, though at the time of the rent accruing due he was an infant, if he continue in the enjoyment of the land after he came of age. A declaration averring, that the defendant continued in possession until the action was brought, to which declaration infancy was pleaded, sufficiently implies that the assignee entered after assignment. *Mahon v. O'Farrell*, 10 Ir. L. Rep. 527, Q. B.

Where the attorney took defence to an action against an infant, before a guardian had been appointed for such infant, the court will hold him liable for the costs incurred by the opposite party in setting aside the defence. *Walker v. Dwyer*, 4 Ir. L. Rep. 364, Q. B.

Contracts by.—Debt for railway calls having been brought against an infant shareholder, he pleaded infancy at the time "of the making of the contract in the declaration mentioned." Held, on special demurrer, that inasmuch as his individual liability might, in one particular case, have arisen independently of contract, the plea was in its present form no answer to the action. *Midland G. W. R. v. Quin*, 1 Ir. Jur. 260, Q. B.

Quære, whether the companies consolidation clauses Act, (8 & 9 Vic. c. 16, ss. 8, 18, 19, 21, 79,) affect the legal status of infant shareholders. *Ib.*

Evidence.—Admissions, and letters by an infant, are receivable in evidence, on the part of the plaintiff, in an action against the infant for necessities furnished during infancy. *O'Neil v. Read*, 7 Ir. L. Rep. 434, C. P.

INFERIOR COURT.—See CERTIORARI. QUARTER SESSIONS. CIVIL BILL. MAGISTRATES.

Quære, can an order under the 3 & 4 Vic. c. 105, issue without a certiorari. *McDonagh v. Hanley*, 6 Ir. L. Rep. 155, Q. B.

INFORMATION.—See CRIMINAL LAW. MAGISTRATES. REVENUE.

INJURIES TO PROPERTY.—See CRIMINAL LAW.

INQUIRY. (WRIT OF.)—See COSTS.

The importance of the facts is not of itself sufficient reason for having a writ of inquiry damages sped before a judge instead of the sheriff, when the venue is laid in Dublin. And the plaintiff declining to accede to the suggestion of the court—that the inquiry should be taken before a judge of assize—the motion was refused with costs. *Naghten v. Harrison*, 3 Ir. L. Rep. 286, C. P.

Judgment was entered on a parliamentary appearance, and a writ of inquiry sped, the notice of which was irregular, being entitled in the wrong court, the writ of inquiry was set aside without costs, and the defendant had leave to plead, on payment of the costs of entering the parliamentary appearance. *Stretch v. Hughes*, 3 Ir. L. Rep. 366, C. P.

A writ of inquiry was directed to be sped before a judge at Nisi Prius, the writ was returnable upon the 27th of November, and was not executed till the 4th of December, but the sittings at Nisi Prius commenced on the 26th of November. Held, that the proceedings were regular, and that the verdict should not be disturbed, upon the ground that the writ was out of return before it was executed. *Browne v. Brady*, 4 Ir. L. Rep. 245, Q. B.

A motion for liberty to speed a writ of inquiry, before a judge, should be made upon notice. *O'Connell v. O'Callaghan*, 10 Ir. L. Rep. 112, Ex.

INQUISITION.—See EVIDENCE.

INSOLVENCY.—See INSOLVENT.

INSOLVENT.—See ARREST. CHARGING ORDER. JUDGMENT, (AS IN CASE OF NON-SUIT.) SEQUESTRATION. JUDGMENT, (ASSIGNMENT OF.)

Actions by.—An action of trespass, for breaking and entering plaintiff's house, and seizing his furniture, &c., may be maintained by a person who subsequently to such trespass, but, before the commencement of the action, has become insolvent, and executed the usual assignment to the provisional assignee, as the plaintiff is entitled to recover compensation for the injury sustained, during the interval between the committing of the trespass and the execution of the assignment, and the right of action to that extent does not pass, under the assignment, to the provisional assignee. *Aspenall v. Arrott*, 1 Ir. L. Rep. 261, Ex.; S. C., 1 J. & C. 145.

In Easter Term 1840, the plaintiff sued the defendant in *assumpsit* upon a special contract. Plea that after the filing of the declaration, the plaintiff being a prisoner filed his petition, as an insolvent debtor, praying to be discharged pursuant to the statutes for the relief of insolvent debtors, and conveyed and assigned all his interest in his real and personal property to the provisional assignee, that said petition was not dismissed, and that said indenture was in full force and effect. Replication, that after he was arrested and executed the said assignment, and before the said plea was filed, he settled the debt for which he had been arrested and imprisoned with the consent of his detaining creditor, and did not obtain his discharge from prison by virtue of any order or adjudication of said court, whereby he jurisdiction of the said court over the said matter became determined, and the said assignment became inoperative and void. Held upon general demurrer that this replication was bad, the right to sue being vested in the provisional assignee. *Woods v. Power*, 4 Ir. L. Rep. 163, Q. B.

A warrant of attorney was executed by an insolvent, pursuant to the 1 & 2 Geo. 4 c. 59 s. 28 authorizing the entry of a judgment against himself. The court allowed judgment to be entered under an order of the Insolvent Court, though more than twenty years have elapsed since the warrant had been executed. *Campbell v. Regan*, 8 Ir. L. Rep. 191, Q. B.

Actions by and against the assignees.—The provisions of the 3 Geo. 4 c. 124, s. 16 which vest the estate of the insolvent in a new assignee, by relation to the time of the first assignment are not contained in the 1 & 2 Vic. c. 107. *McKeon v. Smith*, 5 Ir. L. Rep. 231, C. P.

A general avowry by an assignee of an insolvent for rent which had accrued due to a former assignee who had died, is bad. *Id.*

Seemingly, a right of entry for condition broken passes by the assignment to the provisional assignee of the heir of the grantor who had become insolvent. *Orr v. Stevenson*, 5 Ir. L. Rep. 2, Ex. Ch.

The assignment of a leasehold interest to the assignee of an insolvent is evidence of acceptance till the contrary be proved. *Jack v. Gannon*, Bl. D. & O. 157, N. P. [Per Pigot, C. B.]

The sheriff levied under an execution on a judgment, on bond and warrant, the warrant not having been filed within twenty-one days pursuant to the provisions of the 3 & 4 Vic. c. 105 s. 13, and paid over the amount levied to the assignees of the debtor, who had filed his petition in the Insolvent Court. Held, that though this petition was afterwards dismissed on the application of the insolvent, such dismissal did not divest the right of the assignee so as to give a right to the execution creditor to recover the amount of the levy in an action for money, had and received against the sheriff. *Madden v. Ball*, 3 Ir. L. Rep. 104, C. P.

Title of assignee under vesting order.—The sheriff seized, on the 23rd of April, under a writ of *fi. fa.* founded on a judgment, on a bond and warrant of attorney. A. B. the insolvent was arrested at his own request, at the suit of another creditor before his sale, which took place on the 23rd of May. On the 15th of June he presented his schedule to the

Insolvent Court; on the following day the order was made vesting his property in the plaintiffs. In an action of trover against the sheriff by the assignee. Held, that the sheriff was not liable under the 28 section of the 3 & 4 Vic. c. 107, and that the vesting order had no relation to the date of the arrest. *Lindsay v. Going* 1 Ir. Jur. 278, Ex. Ch.

INTEREST—See JUDGMENT (REVIVAL OF.) EVIDENCE.

INTERPLEADER.

Practice.—A sub-sheriff having made a levy under a writ of *fi. fa.* was allowed under the 9 & 10 Vic. c. 64, to lodge in the court the monies levied, deducting therefrom the costs of the motion, he having been served with notices by claimants calling upon him on pain of personal responsibility not to pay over to the plaintiff those monies. *Burke v. Darcy*, 9 Ir. L. Rep. 287, C. P.

An officer of an inferior court, not in a position to file a bill before the passing of the 9 & 10 Vic. c. 64, cannot obtain an order for parties to interplead under its provisions. *Moylan v. Rogers*, 10 Ir. L. Rep. 266, C. P., S. C. Bl. D. & O. 244.

The plaintiff must have notice of a motion by the sheriff for a rule to interplead. — v. — Bl. D. & O. 264, Ex.

The sheriff is bound to apply for an order under the Interpleader Act, at the earliest possible opportunity after seizure and notice of claim. *Wrisson v. Purcell*, Bl. D. & O. 265, Ex.

The sheriff must come to the court as early as possible, and cannot make a supplemental affidavit to account for his delay. *Wrigby v. Bergin*, Bl. D. & O. 284, Ex.

When a party by his own act has been placed in a position to be sued, he cannot call on the court for relief under the Interpleader Act, 9 & 10 Vic. c. 64. *Horner v. Wilcocks*, 1 Ir. Jur. 136, Q. B.

What a sufficient claim.—The mere fact of claims being made to a levy in the hands of the sheriff, does not entitle him to the interference of the court within the provisions of the 9 & 10 Vic. c. 84 s. 6. *Mahon v. Moyna*, Bl. D. & O. 98, Ex.

Sheriff's fees and costs.—In the case of a disputed claim to goods seized under a *fi. fa.* the sheriff is entitled to his poundage and expenses of keeping the goods, but is not entitled to the costs of an interpleader motion under the 9 & 10 Vic. c. 64. *Marquis of Lansdowne v. Bradshaw*, Bl. D. & O. 173, Q. B.

The sheriff is not entitled to the costs of a rule to interplead although the claimant abandons his claim. *Ball v. Bruen*, Bl. D. & O. 283, Ex.

The court will not allow the sheriff the costs of an application under the Interpleader Act, unless there has been gross neglect on the part of the other parties, but when an execution creditor waives in court his claim upon the goods seized, being already apprized by affidavit of the justice of the other party's demand, the court will allow the sheriff and the claimant the costs of their attendance on that day, against the execution creditor. *Scully v. Figgis*, 1 Ir. Jur. 16, Ex.

When the sheriff has used due diligence, the court will direct the costs of the rule to interplead, and of attendance on the motion to be paid by the party who shall fail on the issue. *Fitzgerald v. Coates*, 1 Ir. Jur. 64, Ex.

Where after the sheriff has obtained the common interpleader rule, the claimant and execution creditor enter a compromise whereby the former abandons a portion of his claim, the claimant was directed to pay the sheriff all the costs incurred. *Luscombe v. Blake*, 1 Ir. Jur. 248, Ex.

Costs of issue.—Where a sheriff made a seizure of sheep under a *fi. fa.*, and an adverse claim being set up, applied for relief under the Interpleader Act, the court directed an issue, and directed the sheriff to retain the sheep until the determination of the trial. A verdict having passed for the claimant, he brought an action against the sheriff for injury alleged to be sustained by the seizure of the sheep, the court stayed this action and referred it to the Master, to ascertain whether any deterioration was caused to the sheep by the neglect of the sheriff; to take an account of the sheriff's expenses, and to strike a ballance between the charges of the sheriff and such loss. The court directed the costs of the issue to be paid to the claimant by the execution creditor. *Butler v. Lloyd*, 1 Ir. Jur. 37, Q. B.

INTOXICATION—See CRIMINAL LAW.

JUDGE—See JURISDICTION.

JUDGMENT—See DEBT. SCIRE FACIAS. LIMITATIONS (STATUTE OF.)

On bond and warrant.—See WARRANT.

Of judgments generally.—See PRACTICE. CRIMINAL LAW.

JURAT—See AFFIDAVIT.

JURISDICTION (OF COURTS)—See GRAND JURY. MAGISTRATES. CIVIL BILL (COURT.)

A judge in chamber has no jurisdiction to set aside a demurrer, though it should appear frivolous, and merely filed for the purpose of delay. *Scully v. O'Brien*, 1 Ir. L. Rep. 379, Q. B. [See *Smee-ton v. Collier*, 1 Ex. Rep. 457; 5 Dow. & L. 184; 17 L. Jou. N. S. 57, C. P.]

The Court of Queen's bench has jurisdiction to set aside an incompetent person when called upon a grand jury panel. *Ex parte Nowlan*, 2 Ir. L. Rep. 7.

Semble, that the Court of Common Pleas has jurisdiction to entertain writs of error from inferior courts. *Harkin v. Montgomery*, 3 Ir. L. Rep. 471, C. P.

When the judges differ in opinion upon cases reserved, the opinion of the majority is not conclusively binding on every judge in all future cases. *In re Larkin*, 4 Ir. L. Rep. 46, Ex.

The law courts, and Court of Exchequer Chamber in Ireland, have no jurisdiction from the 28 Geo. 3, c. 31, s. 1, and the 4 Geo. 3, c. 39, Ir., to

pronounce any judgment, or order, they would not have pronounced by common law before the passing of these statutes; and, therefore, the Exchequer Chamber has no power to select any particular portion of the evidence set forth in the bill of exceptions, not being the subject matter of an exception taken at the trial, and to affirm, or reverse, the judgment of the court below upon arguments built upon such portion of the evidence alone. *Lord Trimbleston v. Kemmis*, 5 Ir. L. Rep. 380, Dow. Proc.

Quæra, can the court, under the provisions of 28 Geo. 3, c. 31, s. 1, direct judgment to be entered up, for the party taking a bill of exceptions, without awarding a *venire de novo*. *Orr v. Stuenkel*, 5 Ir. L. Rep. 2, Ex. Ch.

The origin of the jurisdiction of the Court of Exchequer was the fiction of the *quo minus*. The 43 Geo. 3, c. 53, not only affects the mode of bringing parties before the court, it does more, it admits its jurisdiction to dispose of cases between subject and subject; the Legislature in effect has said that the fiction is no longer necessary. *Keech v. Murray*, 6 Ir. L. Rep. 237, Ex. [Per Penn-father, B.]

If the character of either plaintiff or defendant sufficiently appear on the face of the declaration, to found a jurisdiction as to him, that is sufficient to give the court jurisdiction in the action. *Keech v. Wright*, 9 Ir. L. Rep. 261, Ex.

The court will not summarily decide, upon motion, a question which will hereafter present itself for adjudication in an action pending between the parties to the motion, and founded upon the facts which have occasioned it. *Molloy v. —*, 10 Ir. L. Rep. 14, C. P.

The court above will review an order made by a judge in chamber, but the motion must be to vary or set aside the order granted by the judge. *Cater v. Flattery*, 8 Ir. L. Rep. 117, Q. B.

Jurisdiction over their Offices.—The court has not jurisdiction to pronounce any rule on an application made by a party who had held, and had been dismissed by the Chief Justice from the office of crier of the court, to be restored to the emoluments and duties of said office, alleging he had been illegally and improperly dismissed therefrom. *In re Kennedy*, 7 Ir. L. Rep. 217, C. P.

When an attorney obtains, from the opposite party, being an illiterate person, and under circumstances suspicious, though not actually fraudulent, a document purporting to be a disclaimer of his demand, and of his having authorized his attorney to bring the action, the court has a summary jurisdiction over its officer to order it to be given up. *Tobin v. Gray*, Bl. D. & O. 103, Ex.

An attorney brought actions in the names of several committee men of a railway company; judgments of *non pros* were entered by the defendants; before the actions were commenced one of the committee men had directed his name to be withdrawn from the committee. Held, that he was entitled to an indemnity from the attorney against the costs of these judgments. *Mansergh Pet. Kelly, Resp.*, Bl. D. & O. 175, Q. B.

JURY. (COMMON AND SPECIAL).—See GRAND JURY. CRIMINAL LAW.

**I. COMMON JURY.
II. SPECIAL JURY.**

When to be Summoned.—Challenge by the defendant to the array, because the jurors in this case, or any of them, were not summoned to serve upon the said jury six days before the day named; the plaintiff replied, that there was another distringas lodged with the sheriff, and that the jurors were summoned thereon six days, &c., and that they were the same jurors, named in the distringas, lodged in this case, and that they were in attendance ready to be sworn. Held, on demurrer to this replication, that the jury were summoned in sufficient time. *Keogh v. Walker*, 2 Ir. L. Rep. 210, C. P.

The defendant challenged the array, because six days before the first day of the *Nisi Prius* sittings the jurors empannelled were not, nor was any of them, nor any jury of the county of the city, &c., summoned to serve upon the jury for the trial of the issue in that cause, by virtue of any writ of *venire facias*, *distringas*, &c. Held, on demurrer, that the challenge was bad. *Watters v. Hughes*, 2 Ir. L. Rep. 362, Ex.

An issue being joined on a challenge to the array, on the ground that the jurors were not summoned six clear days before the date of the trial, Held, that the omission of a few jurors would not vitiate the panel. *Taylor v. Gibney*, Bl. D. & O. 85.

Held, that triers are not to presume that all the jurors who did not appear in court were summoned in time. *Ib.*

A challenge to the array will not be allowed where the plaintiff is not in default. *Hartigan v. McCarthy*, Bl. D. & O. 86, note.

The question decided in *Gillespie v. Cumming*, was only as to the default of the plaintiff. *Ib.*

Costs of Jury.—See COSTS.

II. SPECIAL JURY.

The cause had been tried by a special jury, and, upon a bill of exceptions having been taken, a *venire de novo* was awarded. The defendant brought down the cause by proviso. The distringas was in the common form, except that the words "proviso," were written under the officers name, and it was objected at the trial, first, that the distringas was informal and irregular; and, secondly, that the special jury, struck upon the first trial, was the proper jury to try the case, and not the common jury by which it had now been tried. Held, that the cause had been properly tried. *Smith v. Nangle*, 2 Ir. L. Rep. 296, Q. B.

The form of a rule for a special jury when obtained by defendant after notice of trial served. *Woods v. Sandford*, 2 Ir. L. Rep. 380, Ex.

A town councillor of the borough of Dublin is exempt, and disqualified from serving on a special jury summoned within the borough; and one of the special jurors having been challenged at the trial, on the ground of being a member of the

town council of the borough of Dublin, the opposite party pleaded, that that jury was a special jury, "and that at the time of the striking of the jury aforesaid, and the arraying of the said panel, the said juror was a town councillor of the borough of Dublin, and that the same was well known to the said defendant at the time of the striking of the said jury, and arraying of said panel." Held, that the challenge was good, and the counter-plea no answer. *O'Connell v. Mansfield*, 9 Ir. L. Rep. 179, Ex. Ch. [Richards, B., *dissentiente*.]

Under the 3 & 4 Wm. 4, c. 91, it is the duty of the Recorder of Dublin annually to revise the lists of the jurors of the county of that city, and to cause a general list of jurors to be made out, and delivered to the clerk of the peace of the said city, for the purposes of the ensuing year. On motion for a new trial, on the ground that these general lists, from which were framed the juror's book, and the special jury list, were fraudulently dealt with, for the purpose of prejudicing the traversers in their defence. Held, that this was not a proper ground for a motion for a new trial. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.; *S. C.* *Armstrong and Trevor*, 11 Cl. & Fin. 155, Dom. Proc.

A town councillor of the borough of Dublin is exempt from serving on any special jury summoned in trials in the superior courts, and the objection may be taken advantage of either before the officer at striking of the special jury, or by a challenge to the polls, when the juror comes to be sworn. *Long v. Barrett*, 7 Ir. L. Rep. 439, C. P.; *S. C.*, 8 Ir. L. Rep. 331, Ex. Ch.

Sed quære, whether, if the objection be not taken before the officer, it can be taken advantage by way of challenge. *Ib.*, 8 Ir. L. Rep. 331, Ex. Ch.

Costs of Special Jury.—See COSTS.

JUSTICE (OF THE PEACE).—See MAGISTRATE.

JUSTIFICATION, (PLEA OF).—See PLEADING. TRESPASS.

LANDLORD AND TENANT.—See DEED EJECTMENT. COVENANT. REPLEVIN. TRESPASS.

Use and Occupation.—See ASSUMPSIT.

Notice to Quit.—See EJECTMENT.

Demise.—See EJECTMENT.

Reversion.—See EJECTMENT.

Tenancy at Will.—A tenant holding under a lease, containing a clause of forfeiture, omitted to perform the condition, but was allowed to remain thirteen years in possession after the forfeiture. Held, that the landlord having allowed a reasonable time to elapse after the forfeiture became complete, the tenant became at all events a tenant at will, which tenancy must be determined before the bringing of an ejectment. *Johnson v. Russell*, 4 Ir. L. Rep. 170, Q. B.

Leases.]—A lease to several, in the granting part, gave separate portions to the respective lessees at separate rents; but the *habendum* and covenants in the lease were joint. Held, that the lease was joint. *Kennedy v. Hayes*, 2 Ir. L. Rep. 186, Q. B.

In an action for the disturbance of a fishery, the plaintiff, in proof of his title, proved the execution of a lease, of the *locus in quo* to him, by a corporation, which lease, to be valid, required the consent of certain parties thereto, and recited that such consent had been obtained. Held, that such was sufficient proof of its validity, without actual proof of such consent, which the jury might presume, evidence to the contrary not having been given, and the *onus probandi* lying on the party who asserted the invalidity of the instrument. *Gabbett v. Clancy*, 8 Ir. L. Rep. 299, Q. B.

Over-holding Tenant.]—A tenant over-holding, after the expiration of a notice to quit by the landlord, is not liable to a distress for rent which became due subsequently, unless there has been an agreement for a new tenancy, or a renewal of the former one. *Daly v. Colbert*, 3 Ir. L. Rep. 355, C. P.

Rent.]—*See* DEBT. COVENANT. USE AND OCCUPATION. STATUTE OF LIMITATIONS.

A. being possessed of certain premises for two terms of years, under separate leases, at the yearly rent of £12, and £16 respectively, assigned the said premises to B., "subject to the payment of the yearly rent of £44, and to the performance of the covenants" in the original leases. A. subsequently by deed reciting, that he was entitled to a profit rent of £16 per annum out of the premises in question, sold, and conveyed his interest thereon to C. Held, that there was a sufficient reservation of rent on the assignment from A. to B., and that C., as the assignee of the former, was entitled to maintain an action of debt against the latter, for the recovery of the arrears of the rent. *Clarke v. Coughlan*, 3 Ir. L. Rep. 427, Ex.

Rent may be conveyed, severed from the reversion, so as to give the grantor an action of debt for the arrears. *Ib.*

Rent arising from the sale of the profit of the land, there being no tenancy, is not apportionable between the executors of the tenant for life and the remainder man. *Dease v. O'Reilly*, 8 Ir. L. Rep. 52, Q. B.

Double Rent.]—In debt for double rent, under the 15 Geo. 2, c. 8, s. 9, Ir., for not giving up possession pursuant to the tenant's notice to quit, the declaration must aver the notice to have been in writing. *Farrel v. Donnelly*, 4 Ir. L. Rep. 476, Ex.

Surrender.]—L., lessee, *pur autre vie*, assented to a new letting, by the landlord, of a part of the devised premises to M., who entered into possession. Held, that this was a valid surrender by act and operation of law, within the Statute of Frauds, (7 Wm. 3, c. 12, Ir.) of the interest of L., in the part demised to M. *Lynch v. Lynch*, 6 Ir. L. Rep. 131, Ex.

The doctrine of surrender by act and operation

of law, as laid down in *Thomas v. Cook*, (2 B. & Al. 119,) in the case of a chattel, recognised and applied to a freehold. *Ib.*

Contracts of tenancy.]—A. being possessed of certain premises under a lease for thirty-one years still unexpired, the reversion in fee of which belonged to B. did by parol agreement on the 15th of March, 1837, permit and suffer B. to take possession of, and from thenceforth to occupy and use for the purpose of planting trees, a certain portion of the said demised premises upon the terms of the yearly rent reserved by the lease, being reduced by a certain sum agreed upon, and which said reduced yearly rent was for some time paid by A. to B. who gave receipts for the same. Held, overruling the judgment of the Court of Queen's Bench, (5 Ir. L. Rep. 287,) that this parol demise did not amount to a re-demise. *Delap v. Leonard*, 6 Ir. L. Rep. 473, Ex. Ch.

Defendant by parol agreement with the plaintiff took a portion of his land for grazing, the plaintiff undertaking to watch the cattle of the defendant, and reserving to himself the grazing of a horse. Held, that this was a mere contract for agistment, and the possession of the land did not thereby pass to the defendant. *Mulligan v. Adams*, 8 Ir. L. Rep. 132, Q. B.

Land was prepared and tilled by A. a tenant for life, and allotted by him, at a certain rate per acre, in small portions to his labourers for the purpose of planting potatoes, the labour being done at his expense; the potatoes were planted by the labourers and above ground when A. died, and the remainder man prevented the labourers from carrying off the crop until they had paid him the rate so agreed upon. Held, that the contract created by such holding was not a demise of the land, but a sale of the profit derivable therefrom. *Dease v. O'Reilly*, 8 Ir. L. Rep. 52.

LANDS' CLAUSES CONSOLIDATION ACT—*See* PUBLIC COMPANY.

LEASE—*See* LANDLORD AND TENANT.

LETTERS TESTAMENTARY—*See* ADMINISTRATION. PLEADING. SCIRE FACIAS.

LEVARI—*See* SEQUESTRATOR.

LIBEL—*See* CASE.

LICENSE—*See* REVENUE.

LIEN—*See* ATTORNEY.

LIMITATIONS (STATUTES OF)—*See* PRACTICE (JUDGMENT.) SCIRE FACIAS.

Process to save.]—*See* AMENDMENT.

Real actions.]—In replevin the plaintiff declared

on a taking on the 9th of August, 1838, and the defendant avowed for five years arrears of rent, next before and ending on the 25th of March, 1836, due to the defendant by virtue of a demise theretofore made. To this avowry the plaintiff pleaded, amongst other pleas a plea of the 3 & 4 Wm. 4 c. 27 s. 42, to the whole amount of the arrears; the defendant demurred that the plea of the statute should have been confined to the period of the five years which were beyond the six. Demurrer overruled. *Wilson v. Jackson*, 2 Ir. L. Rep. 1, Q. B.

The 3 & 4 Wm. 4 c. 27, applies to conventional rents between landlord and tenant. *Ib.*

Quere, are arrears of rent reserved by indenture within the 42nd section of the 3 & 4 Wm. 4 c. 27. *Armstrong v. Lloyd*, 2 Ir. L. Rep. 70. C. P.

The 3 & 4 Wm. 4 c. 27 does not apply to claims for tithe composition as between the tithe claimant, and the owner of the land, but only to estates in tithe. The withholding tithe composition by the occupier of the land, is not the adverse possession intended by the 15th sect. of the 3 & 4 Wm. 4 c. 27. *Lord Shannon v. Hudder*, 2 Ir. L. Rep. 223.

If no rent be paid under an existing lease, containing an express clause of re-entry for the non-payment of the same, for upwards of 20 years, the landlord is barred by the 3 & 4 W. 4, c. 27, from recovering in an ejectment brought for the non-payment of the rent. *Mannion v. Bingham*, 3 Ir. L. Rep. 456, C. P.

Where an additional rent in the nature of a penal rent, was reserved by indenture of demise between landlord and tenant. Held, that such rent was not within the second section of the statute of limitations (3 & 4 Wm. 4 c. 27.) *Daly v. Bloomfield*, 5 Ir. L. Rep. 65, Q. B.

Semble, no rent reserved upon an indenture of demise between landlord and tenant is within that section. *Ib.*

An ejectment for non-payment of rent is maintainable during the continuance of the lease, though more than twenty years have elapsed since the last payment. *Crosbie v. Sugrue*, 9 Ir. L. Rep. 17, Q. B.

The 3 & 4 W. 4, c. 27, s. 2, does not apply to rent received on a demise. *Ib.*

Ejectment on the title. The plaintiff produced and proved a lease of the premises, bearing date 769, and made by E. D. W. to J. A. "for and during the term of sixty-six years, provided the said E. D. W.'s lasted so long," but gave no evidence of the existence of the interest of E. D. W. in the premises. There was some evidence of a verbal negotiation between the defendant and the plaintiff for a new lease between 1835 and 1838 in which latter year the defendant got into possession. Held that notwithstanding proof of the death of the said E. D. W. in 1821, the jury were properly directed to find verdict for the plaintiff, and that as the lease must be taken to have expired in 1834 there was no ground for the operation of the statute of Limitations. *Wilson v. Hendren*, 7 Ir. L. Rep. 429. C. P.

If mines be excepted to the grantor in a lease his right and title is not barred or extinguished if he omit to work them for twenty years, such right remains in the grantor as if he had never executed the rent. *McDonnell v. McKinty*, 10 Ir. L. Rep. 514, Q. B.

Held, that an omission to work quarries granted

was not a discontinuance within the 3 & 4 W. 4, c. 27, s. 3. *Ib.*

Held, that a use and possession of part of these quarries by the grantee of the lands would not justify a presumption of the possession of the whole so as to vest the title of the grantor. *Ib.*

Judgment.—A judgment of Trinity Term, 1817, against A. who since died, in 1831 a *scire facias* issued, but no further proceedings were had thereon; in 1835 the judgment was re-docketed. The court gave liberty to issue a *scire facias* to revive the judgment against the heir and terre-tenants of the conuzor. *Kelly v. Croghan*, 2 Ir. L. Rep. 88, C. P.

Scire facias by the executors of the conusee of a judgment more than twenty years old at the issuing of the writ of *scire facias*. Plea, the statute of Limitations, (3 & 4 W. 4, c. 27, s. 40.) Replication, a judgment of revivor recovered by the plaintiff within twenty years. Held, that the plea was a sufficient answer to the claim, and that the replication was bad being a departure from the case made in the *scire facias*. *Farran v. Beresford*, 5 Ir. L. Rep. 487; 10 Cl. & Fin. 333, Dom. Proc. overruling the judgments of the Courts of Queen's Bench and Exchequer Chamber. 2 Ir. L. Rep. 110, Ex. Ch.; S.C. 2 J. & S. 97.

A new right accrued to the executors by the judgment of revivor. *Ib.*

Semble, a judgment of revivor by the executors of the conusee is that which secures the money within the meaning of the 3 & 4 Wm. 4, c. 27, s. 40, and the time runs from the entry of that judgment. *Ib.*

Semble, the 8 Geo. 1, is repealed, as far as judgments are concerned by the 3 & 4 Wm. 4, c. 27, s. 40. *Ib.* [The 8 Geo. 1, is repealed by the 7 & 8 Vic. c. 90, registration of Judgments Act.]

Application for a *scire facias* to revive a judgment on the 23d November, 1840, on an allegation of payment of interest on the 23d of November, 1820, a similar application having been previously refused in consequence of an informality. Held, to be in time to save the bar of the Statute of Limitations. *Kent v. Lawrence*, 3 Ir. L. Rep. 61, C. P.

Scire facias, to revive a judgment against the heir and terre-tenants of the original conuzor. Plea, Statute of Limitations. Replication, a revival of the same judgment, against the personal representative of the original conuzor, within twenty years from the issuing of the *scire facias*. Held, sufficient. *Martin v. McCausland*, 3 Ir. L. Rep. 113, C. P.

A payment of interest, by the personal representative of the original conuzor, within 20 years, is sufficient to keep the judgment alive against the lands in the hands of his heir and terre-tenants. *Ib.*

Scire facias, against heir and terre-tenants, tested on the 25th of November, 1827, and directed to the sheriff of T., reciting a judgment of Michaelmas Term, 1806, by O., against W.; that O. died, and appointed two executors, who obtained probate, and assigned the judgment to the plaintiff, and that W. had died seized. Plea, by H. W., the heir of the conuzor, the Statute of Limitations. Replication, that in Easter Term, 1819, another writ of *scire*

facias, issued by the executors of O., for the revival of the same judgment, that the sheriff returned that he had warned R. W. &c., and that in Michaelmas Term, 1819, judgment was had in this *scire facias*. The replication contained no averment that R. W. was the heir of the conusor, nor did it connect him in any way with H. W., the present defendant. Rejoinder, *nul tiel* record. Held, on motion, in arrest of judgment, that a judgment against the heir at law, is of the same effect as a judgment against the conusor himself, and that the statute commenced to run from the judgment of 1819 only. *White v. White*, 3 Ir. L. Rep. 118, Ex.

The court allowed the *scire facias* to revive the judgment to issue, there being a recital of a judgment in a deed of mortgage, executed by the conusor to the conusee, within the last twenty years, for the purpose of securing the judgment along with other debts, and proceedings had been taken for the foreclosure of the said mortgage, but had been discontinued. *Lanigan v. Fogarty*, 3 Ir. L. Rep. 185, C. P.

Quere, if such a recital in a mortgage be an acknowledgment in writing, within the meaning of the 3 & 4 Wm. 4, c. 27, s. 40. *Ib.*

The court allowed a *scire facias* to revive a judgment against the original conusor, where there had been neither payment, nor acknowledgment, nor any proceeding on the judgment within the last twenty years, beyond an order for liberty to issue a *scire facias* to revive it. *Lynch v. Bourke*, 3 Ir. L. Rep. 286, C. P.

The conusor of a judgment, obtained in 1814, became insolvent; liberty to issue a *scire facias*, to revive the judgment, was granted on an application, grounded on admissions of the debt contained in the insolvent's schedule, filed in 1818, and in the answer of his assignee, to a bill filed in 1826 by the conusee, to raise the amount of the judgment. *Neligan v. Gunn*, 3 Ir. L. Rep. 354, Ex.

Debt for the recovery of a judgment of 1812. The action was commenced, and issue joined, in 1830, since which, no proceedings were taken, and the judgment was now, (1842,) barred by the 3 & 4 Wm. 4, c. 27, s. 40. The court allowed the plaintiff to proceed in the said action against the defendant, giving a terms notice, on an affidavit by the plaintiff, that the proceedings had been suspended in consequence of the embarrassed state of the defendant's circumstances. *Starkie v. English*, 5 Ir. L. Rep. 419, C. P.

A *scire facias* was permitted to be issued to revive a judgment more than 20 years old, recovered against a personal representative, *de bonis testatoris*, though there had been no payment of principal, or interest, or acknowledgment in writing, within 20 years, and nothing to keep it alive except the continuance of a Chancery suit. *Gower v. Monks*, 6 Ir. L. Rep. 343, C. P.

The court allowed a *scire facias* to issue to revive a judgment more than twenty years old, and no revivor or acknowledgment in writing, but the affidavit stated, that "about fifteen years" since the plaintiff had been allowed to retain, on account of interest on the judgment, a sum of money payable to the defendant. *Hunt v. Hunt*, 3 Ir. L. Rep. 375, C. P.

A plea of the Statute of Limitations, (3 & 4 Wm. 4, c. 27, s. 40), is no answer to a *scire facias*, in which a judgment obtained more than twenty years before the issuing of the *scire facias*, and an award of execution on the same, to the administrator of the conusee, against the conusor, within the 20 years, are stated. *Conlan v. Bodkin*, 7 Ir. L. Rep. 467, C. P.

A judgment was obtained in 1813, and revived by *scire facias*, at the suit of the executor of the conusee, against the heir and terre-tenants of the conusor, in 1829. A bill was filed in 1833 in the Court of Exchequer in Ireland, against the representatives of the real and personal estate of the debtor, praying for an account, and payment of the principal and interest due on the judgment, out of the debtor's personal or real estate. Held, that a plea of the Statute of Limitations, (3 & 4 Wm. 4, c. 27, s. 40,) by a defendant claiming a part of the real estate, under a settlement bearing date subsequent to the original judgment, but prior to the judgment of revivor, was no bar to the suit. *Farrell v. Gleeson*, 7 Ir. L. Rep. 478, Dom. Proc.

To a *scire facias* in 1846, to revive a judgment recovered in 1811 by W. against L., which *scire facias* stated, the recovery, in 1827, of a judgment in an action of debt, by the executors of W. against L., for the amount of the judgment debt of 1811, and of another judgment debt due from L. to W., and contained an averment, that, upon the recovery of the judgment in 1827, a present right to receive the amount of the judgment of 1811 accrued to the executors of W. Held, that a plea of the Statute of Limitations, (3 & 4 Wm. 4, c. 27, s. 40,) was a valid defence. *Waters v. Lidwell*, 5 Ir. L. Rep. 362, C. P.

A judgment in an action of debt upon a judgment, has not, upon the latter, the same effect, as a judgment of revivor by *scire facias*. *Ib.*

Personal actions.—A., in 1833, being indebted to B., distrained, whereupon C. became surety that A. would pay the rent in December following, or re-deliver the goods to B. A. did not do so, and B. recovered judgment against C. and compelled C. to pay the debt by instalments. Held, that to an action by C. against A. for a breach of this special agreement of indemnity, and also for money paid to his use, A. could not plead the statute of limitations—the payments on foot of the judgment recovered by B. having been made within six years before the commencement of the action. *Considine v. Considine*, 9 Ir. L. Rep. 400, Q. B.

Bond—Plea of Payment.—To debt on a bond dated in 1806, the defendant pleaded *soluit post diem*, and at the trial, the plaintiff having failed to prove that any suit had been commenced or prosecuted for the recovery of said debt, or any payment of principal or interest, or other satisfaction made on account of said bond, within twenty years before the commencement of the suit. Held that the judge ought not to have left the question of payment to the jury, but to have directed a verdict for the defendant. *Kemmis v. Macklin*, 8 Ir. L. Rep. 401, C. P.

Acknowledgments to Bar.—A. and B. were de-

defendants in certain suits in which a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others he reported B. a creditor by judgment affecting them for a certain sum. Held, that this was not such an acknowledgment in writing, by the agent of A. to B. as would take the case out of the statute of limitations. *Hill v. Stawell*, 2 Ir. L. Rep. 302, Q. B.

The plaintiff, an attorney, furnished the defendant with a bill of costs, and wrote a letter stating that he was aware that some of the matters were beyond six years, but that he took it for granted that the defendant would not take advantage of the statute of limitations against him. The defendant in answer wrote, "P. will attend for me to tax your costs, which will be best for both parties, as one will know what to pay, the other what to receive." Held that this was a sufficient acknowledgment to take the demand out of the bar of the statute 9 Geo. 4, c. 14, s. 1. *Murphy v. Meredith*, 5 Ir. L. Rep. 120, Ex.

Held, that this was not a conditional acknowledgment, or agreement to pay on taxation, and that it was not therefore necessary that the costs should have been taxed before the action brought. *Ib.*

A *sci. fa.* was issued in 1839, to revive against the consor a judgment of 1807. In 1827 a schedule was filed by the consor in the court for the relief of Insolvent Debtors, containing an admission of the judgment debt, but no payment or satisfaction had been made upon account, nor any proceeding taken for the recovery thereof, within twenty years next before the issuing of the writ. Held that an acknowledgment in writing within the 40th section of the 3 & 4 W. 4, c. 27, was not sufficient to set up or give validity to the judgment which had been barred in 1833, (at the time of the passing of that act), by the operation of the 8 Geo. 1, c. 4. *Morrogh v. Power*, 5 Ir. L. Rep. 494, Ex.

Semble, that an admission of the debt in the schedule of an insolvent is a sufficient acknowledgment to prevent a judgment being barred by the 3 & 4 W. 4, c. 27, s. 40. *Ib.*

Scire facias to revive a judgment against the heir and terre-tenants of the consor. The judgment was of 1814; the consor was insolvent in 1819. An acknowledgment by the insertion of the judgment in his schedule, within twenty years, was held to be a sufficient acknowledgment to warrant the issuing of the writ. *McCarthy v. O'Brien*, 2 Ir. L. Rep. 67, Q. B.

Scire facias. Plea, statute of Limitations. Replication, an acknowledgment in writing setting forth a schedule filed by the defendant in the Insolvent Court, in which he admitted himself to be indebted to the consignee of the judgment in three bonds, out which were different in amount and date from that on which the judgment was entered, and the defendant rejoined that there was no acknowledgment. Held, that parol evidence was admissible to show that one of the bonds mentioned in the schedule was identical with the bond on which the judgment had been entered. *Hanan v. Power*, 8 Ir. L. Rep. 505, Q. B. [Perrin, J. dissentiente.]

Scire facias. Plea, statute of Limitations, (3 & 4 W. 4, c. 27.) Replication, that the defendant by

his schedule filed in the Insolvent Court acknowledged the right of the plaintiff to the damages, &c. Rejoinder, that he did not within twenty years before the issuing of the *scire facias* acknowledge to the plaintiff his right to the said damages, &c. *mode et forma*. At the trial it appeared that the debt acknowledged in the schedule was one due upon a promissory note, but the amount was the same as in the *scire facias*, and evidence was given that they were one and the same debt. Held, that upon the issue as joined the plaintiff was entitled to recover. *Dugdale v. Vise*, 5 Ir. L. Rep. 568, Q. B.

Semble, an insolvent's schedule is a sufficient acknowledgment of a debt within the statute. *Ib.*

This statute has a retrospective operation, and an acknowledgment made before its enactment is sufficient to take a case out of the bar created thereby. *Ib.*

Assumpsit against the administrator of J. S. for wages due and money lent. It was proved that J. S. had, shortly before his death, and within six years of action brought, stated to a third party that he owed the plaintiff nearly £60 for wages and money lent, and that the money lent was £34. Held, that this statement was not sufficient to take it out of the statute of Limitations, (9 Geo. 4, c. 14, s. 1.) *Lusk v. Auld*, 10 Ir. L. Rep. 452, Ex.

A proposal for a lease unaccepted or signed by an agent is not a sufficient acknowledgment of title to take the case out of the statute of Limitations. *Corporation of Dublin v. Judge*, Bl. D. & O. 162, N. P. [Per Lefroy, B.]

An acknowledgment in writing by the mortgagor of the payment of interest on a mortgage and not signed by him. Held, sufficient within the 40th section of the 3 & 4 W. 4, c. 27, to take the case out of that statute. *In re Commissioners of Wide Streets, Cork*, 1 Ir. Jur. 9, Rolls.

An acknowledgment, by one maker of a joint and several promissory note, that interest had been paid thereon, and indorsed on the note, Held not to be evidence against his co-contractor, either as an acknowledgment of the fact of payment, or, after the indorser's death, as an entry made by a deceased person against his interest. *Murtagh v. Crawford*, 1 Ir. Jur. 14, Ex.

A statement in the schedule of an insolvent debtor in the year 1828, that she had been "defeated," in 1824, in a former ejectment brought on the demises of three lessors of the plaintiff, one only of whom was a lessor in the present action. Held that this was no acknowledgment of title, within the 14th section of the 3 & 4 W. 4, c. 27, in any one of the said lessors. *Hobson v. Burns*, 1 Ir. Jur. 227, Q. B.

Held that such statement did not amount to more than a mere narrative of a past transaction, and was not an acknowledgment within the 14th section (3 & 4 W. 4, c. 27.) *Ib.*

Quære, whether a statement by an insolvent in his schedule is, under any circumstances, a sufficient acknowledgment within the 14th section. *Ib.* [See *Barrett v. Birmingham*, Flan. & Kel. 556.]

Adverse possession.]—A possession without payment of rent, or an acknowledgment in writing for more than twenty years, was held to be a sufficient bar to an ejectment for the recovery of the lands—

the possession being adverse at the time of the passing of the 3 & 4 W. 4, c. 27, though it had not been so during the entire 20 years. *O'Sullivan v. M'Sweeney*, 2 Ir. L. Rep. 89, Ex.

A., the owner in fee of certain lands, put B. with whom he lived in illicit intercourse, into possession of a portion thereof, and permitted her to continue in possession of same for a period of more than twenty years. Held that A. and the persons deriving under him, were barred by the operation of the 3 & 4, W. 4, c. 27, and could not maintain an ejectment for the recovery of these lands. *De Montmorency v. Walsh*, 4 Ir. L. Rep. 254, Q. B.

It is not at all necessary that the possession to confer title should be adverse; that statute has put an end to the doctrine of adverse possession, except in respect of cases coming within the 15th section. *Ib.* [Per Burton, J.]

In 1791, A. was put into possession of premises by B. as care-taker. In 1804 A. wrote a letter to B. acknowledging his title, and proposing to become his tenant, and in 1811, after the death of B., wrote to his devisee, proposing to become the purchaser of the premises. A. died in 1832, since which period C. his son, kept possession. Neither A. nor C. ever paid rent for the premises. In 1841 an ejectment was brought by D., the devisee of B. against C. Held that the right of D. was barred by the 3 & 4 W. 4, c. 27, there being no evidence of a holding as care-taker, since 1811. *Ellis v. Crawford*, 5 Ir. L. Rep. 402, Ex.

Held, that though the possession of C. may not have been adverse at the time of the passing of the Act, yet that the ejectment ought to have been brought within five years after, pursuant to the saving in the 15th section. *Ib.*

A landlord built a school-house upon a portion of his property, and appointed a schoolmaster who was paid an annual stipend by the landlord, and was also paid by subscription, and by the scholars, and the schoolmaster was permitted to occupy those premises for the purpose of a school. Held that such occupation for upwards of twenty years did not give the schoolmaster an adverse right under the 3 & 4 W. 4, c. 27. *Moore v. Doherty*, 5 Ir. L. Rep. 449, Q. B.

T. B. tenant for life of freehold estate under the limitations of a will, levied a fine with proclamations to the use of himself in fee, and devised the lands to H. J. B. for life, with remainder to H. B. in fee. H. J. B. having survived the testator T. B. for upwards of twenty years, died, having devised the same property to trustees in fee for the benefit of his widow and children. In an ejectment brought by H. B. for the recovery of the lands, Held, that whatever might be the legal effect of the fine, H. J. B. having assumed to take under the will of T. B. and his life-estate being solely referrible thereto, his possession could not be considered an adverse one, within the 3 & 4 W. 4, c. 27. *Brownrigg v. Cruikshank*, 1 Ir. Jur. 212, Q. B.

Pleading.—A plea of the statute of limitations should negative the exceptions contained in that statute. *Molony v. O'Brien*, 5 Ir. L. Rep. 577, Ex.

Therefore, where a plea to a *scire facias* to revive a judgment, founded on the above section, omitted

to negative a payment of interest, within twenty years next preceding the issuing of the writ. Held, on demurrer, that the plea was bad. *Ib.*

As to pleading continuances, under the 3 & 4 Vic. c. 105, s. 7, see *Brennan v. Monahan*, 7 Ir. L. Rep. 545, Ex.

Scire facias to revive a judgment. Plea, the Statute of Limitations, (3 & 4 Wm. 4, c. 27, s. 40,) averment, "That no part of the principal money secured by the said judgment, or any interest thereon, was paid at any time within twenty years." Replication, the payment of a sum of money "as for, and so much of the interest which had accrued due and payable upon or on account of the said judgment." Held on demurrer that this replication was insufficient. *Kealy v. Bodkin*, 9 Ir. L. Rep. 383, C.P. [Ball, J. *dissentiente*.]

Pleas, framed for the purpose of taking advantage of the 6 & 7 Vic. c. 54, and 7 & 8 Vic. c. 27, limiting, after the 1st of January, 1845, the bringing of actions relating to presentations, concluded by denying that this suit had been commenced, or that any original writ had been issued in this action at any time on or before the 1st of January, 1845, in manner and form as the plaintiff alleged. The only allusion in the declaration to the original writ, was the statement that the defendant had been summoned to answer, &c. Held upon special demurrer to those pleas, for having traversed that which was not alleged in the declaration, that they were good. *Marquis of Ormonde v. Bishop of Cabel*, 10 Ir. L. Rep. 577, C. P.

LANDS CONSOLIDATION ACT—*See* PUBLIC COMPANY.

Notice to treat.—By a local Act power was vested in the Council of the Borough of W. to purchase certain properties in a schedule to the Act specified, and to complete the same within five years, and the Lands Clauses Consolidation Act, 1845, was incorporated with said local Act. The council of the borough served a notice on the lessees of said properties, requiring the particulars of their title, and the amount of compensation they sought. Held that the relation of vendor and purchaser was thereby created, and that the council were bound within a reasonable time to complete such purchase. *Reg. v. the Borough of Belfast*, 10 Ir. L. Rep. 40, Q. B.

LODGMENT OF MONEY IN COURT—*See* MONEY.

LORD MAYOR—*See* REGISTRY.

LUNATIC—*See* PROCESS (SERVICE).

MAGISTRATES AND JUSTICES OF THE PEACE.

Jurisdiction.—The divisional justices of the Head Office of Police have jurisdiction, under the

7 & 8 Geo. 4, c. 53, to hear and determine, at all times, offences committed in the County of Dublin against the excise laws. *Reg. v. Pickering*, 1 Ir. L. Rep. 294, Q. B. [Perrin, J. *dubitante*.]

Justices of the peace for a county at large, have no criminal jurisdiction under the 3 & 4 Vic. c. 108, s. 173, within a county of a city. *Reg. v. Byrne*, 8 Ir. L. Rep. 513, Q. B.

Actions against.—A. was arrested by a magistrate on suspicion of felony and sent for identification in the custody of a policeman to the house of a person who could not leave his bed, and with orders that in the event of his being identified he was to be taken from thence to goal. The prisoner having been identified, and in accordance with the foregoing orders committed to goal, and afterwards acquitted at the trial. Held, that in an action against the magistrate, the jury were rightly charged that the conduct of the magistrate was illegal. Held, that the *bona fides* of the magistrate was no defence. *Annette v. Osborne*, 2 Ir. L. Rep. 317, Q. B.

A portrieve of a town is not entitled to a month's notice before action brought under the 43 Geo. 3, c. 143, s. 1, not being included in the word "justices of the peace," or "governor," or "deputy governor" of any county or place in Ireland. *Kelly v. Collis*, 1 Ir. L. Rep. 67, Q. B.

In an action against a magistrate the court will not set aside a special plea of justification filed in addition to the general issue, though all the special matter could be given in evidence under the general issue. *Stewart v. Lynar*, 1 Ir. L. Rep. 193, C. P.

A notice of action under the provisions of the 43 Geo. 3, c. 143, must follow accurately its provisions. Where a notice omitted to specify the place where the transactions complained of occurred, the plaintiff was non-suited. *Kane v. Lloyd*, 1 Ir. Jur. 208, C. C. [Per Moore, J. and Lefroy, B.]

Where a justice of the peace who had authority to require a pedlar to produce his license, and seize his goods if he refused, and upon a conviction for not having a license, might commit him—illegally arrested the pedlar, and seized his goods for refusal to produce it, and committed him to prison before conviction. Held, that the direction to the jury that if they believed the defendant at the time of such arrest was acting *bona fide* in his magisterial capacity under the 55 Geo. 3, c. 19, which limits the bringing of such actions to three months, they should find for the defendant, four months having elapsed before the writ issued, was a proper direction. *O'Reilly v. Lawton*, 3 Ir. L. Rep. 290, Q. B.

Held that justices of the peace are included in the words "any person or persons," in the 97th section of the 55 Geo. 3, c. 19, notwithstanding the general provision in the 43 Geo. 3, c. 143, s. 7, for their protection. *Ib.*

Held that the provision in the 55 Geo. 3, c. 19, is not repealed by the subsequent enactments upon the subject matter of that statute. *Ib.*

Seemle, that where the notice of action against a justice of the peace, describes the plaintiff as of the city of Cork, and the evidence is that he is a Dublin man, the variance is fatal. *Ib.*

The court will not grant a mandamus against a magistrate, unless it appear that there was some

mistake in point of law in his decision. *Reg. v. Singleton*, 8 Ir. L. Rep. 21, Q. B.

The recorder of Dublin is one of the board of magistrates of the county of the city of Dublin, within the meaning of the 49 Geo. 3, c. 20, s. 3, and therefore ought to have been convened or summoned by the lord mayor, to attend an election held on the 21st of February, 1839, for the treasurership of the county of the city of Dublin, and not having been convened or summoned as aforesaid, and having attended at the said election. Held, that the said election was void. [*Dissentientibus*, Lefroy, B., Richards, B., Crampton, J., and Burton, J.] *Darley in Error v. Smyth*, 10 Ir. L. Rep. 376, Exr Ch.

Held also that neither the divisional justices, appointed under the 48 Geo. 3, c. 140, the 5 Geo. 4, c. 102, and the 1 Vic. c. 25; nor the constabulary justices appointed under the 6 & 7 W. 4, c. 18, were entitled to vote at said election. *Ib.*

Held also, that one of the divisional justices of the Castle division, who had been appointed previous to the 1 Vic. c. 25, and sworn in as a justice of the peace for the county of the city of Dublin, was not entitled to vote at said election. *Ib.*

Held also, that the provision in the 49th Geo. 3, c. 20, s. 3, that the lord mayor should "within twenty-one days after the vacancy of the office, convene the board of magistrates," &c. to meet and hold the election for the treasurership, was directory, not mandatory; and that therefore the omission to summon the said board within the twenty-one days, did not void the election. *Ib.*

Held also, that an action of assumpsit for money had and received by the defendant for the use of the plaintiff, was a proper form of action to try the right to said office. *Ib.*

Held also, that the special verdict for finding that the defendant did receive for salary and fees for the execution of the duties of said office, £3011 9s. 4d., and finding a verdict for the plaintiff, with damages, the said sum was correct. *Ib.* [*Dissentientibus* Jackson, J., Balh, J., Perrin, J. *Dubitante*, Pennefather, B.]

Changing venue.—See PRACTICE (VENUE.)

MAINTENANCE—See INFANT. FATHER.

MALICE—See ARREST. CASE.

MALICIOUS INJURIES.

The statutes awarding compensation for malicious injuries for property, do not extend to the county of the city of Dublin. *In re Miller and Dowell*, 2 Ir. L. Rep. 306, Q. B.

Seemle, those Acts do not extend to any cities or towns which are counties in themselves. *Ib.*

The notice required in the case of a malicious burning by the 19 & 20 Geo. 3, c. 37, s. 3, to be served in six days, is sufficient, if served six days from the time the injury was completed. *In re John Elliott*, 9 Ir. L. Rep. 100, Q. B.

MALICIOUS PROSECUTION—See CASE.

MANDAMUS—See POOR LAWS. PUBLIC COMPANY.

Generally.—The court will not grant a mandamus against a magistrate, unless it appear that there was some mistake in his decision in point of law. *Reg. v. Singleton*, 8 Ir. L. Rep. 21, Q. B.

The court will not make absolute a conditional order for a mandamus to compel magistrates "to receive and take informations, touching a forcible entry, and do then according to law, when they have already taken informations, and, on the examination of witnesses, have dismissed the case, as not within their jurisdiction. *Reg. v. Gresson*, 8 Ir. L. Rep. 13, Q. B.

A mandamus will be granted to enforce the empanelling of a jury by the Commissioners of the Limerick Bridge, for the purpose of awarding compensation to a person who had been deprived of his emoluments and fees as water-bailiff, under the provisions of the 4 & 5 Wm. 4, c. 84, notwithstanding, that three years have elapsed since the passing of the Act. *Reg. v. Limerick Bridge Commissioners*, 3 Ir. L. Rep. 15, Q. B.

The court will not grant a mandamus to compel a county surveyor to certify for the performance of a contract, although he obstinately refuses so to do, the proper course of proceeding is to apply to the judge at the assizes, who will refuse the surveyor's salary if it appear that he acts improperly. *Anonymous*, 3 Ir. L. Rep. 444, Q. B.

In an appeal, under the Statute 7 & 8 Geo. 4, c. 58, the notice of appeal must state on the face of it, that the person bringing the appeal is aggrieved by the judgment. *Reg. v. Recorder of Dublin*, 6 Ir. L. Rep. 440, Q. B.

In cases of doubt or difficulty the court will not grant a peremptory mandamus. *Reg. at the prosecution of the Treasurer of the City of Dublin v. The Parish of St. Nicholas*, 10 Ir. L. Rep. 118, Q. B.

The court will not grant a mandamus to compel the treasurer of a fever hospital to appoint a qualified apothecary in the place of a person who was elected, although the latter be not duly qualified as an apothecary, under the 31 Geo. 3, c. 34. *Reg. v. Treasurer of Michelstown Fever Hospital*, 1 Ir. L. Rep. 7, Q. B.

On a mandamus to the treasurer and secretary of a dispensary, to remove the names of two gentlemen who had been elected as medical superintendents, and to enter the name of a third candidate who was not elected, due notice of the objection not having been given to the voters. Held, that it is not necessary that a candidate should have his diploma at the time of the election, if he has passed his final examination for it. Held, also, that although a bye-law requires a superintendent to be properly qualified, by corresponding testimonials, to act as physician, surgeon, and man-midwife, it is not necessary to have a distinct diploma in midwifery, if the general diploma in surgery qualifies the holder to practice in that department. *Reg. v. Fairtlough and Halloran*, 1 Ir. L. Rep. 76, Q. B.

Conditional orders had been obtained for two writs of mandamus to compel the minister and churchwardens of two parishes in the city of Dublin,

to applot upon the inhabitants, under the 39 Geo. 3, c. 56, and it appeared that these two parishes were united into one by Act of Parliament, the court refused to make them absolute, although it had been the immemorial usage to applot in the usual way. *Reg. v. Minister and Churchwardens of St. Catherine's*, 1 Ir. L. Rep. 70, Q. B.

A mandamus will be granted to compel magistrates to hear a second information for the breach of the excise laws, though they have already dismissed one for the same offence, upon a technical objection. *Commissioners of Excise v. Thompson*, 1 Ir. L. Rep. 5, Q. B.

When a proprietor in the Grand Canal Company applies for a mandamus to compel the directors to allow him to inspect the books and proceedings of the company, under the provisions of the 11 & 12 Geo. 3, c. 31, s. 15, he must shew, that in his application to the directors, that he stated the object for which he required the information he desired to obtain, and that the application was a reasonable one, and that the refusal of the directors was unreasonable. *Reg. v. The Grand Canal Company*, 1 Ir. L. Rep. 337, Q. B.

A. and B. were candidates for the office of treasurer of the public monies of the city of Dublin, and A. having been elected, B. brought information in the nature of a *quo warranto* against him, and obtained judgment of ouster against him, and was subsequently admitted into said office by virtue of a writ of mandamus. C., a third party, then filed an information against B., for usurpation of said office, upon the ground that B's election was void, some of the electors, who were within summons, not having been summoned to the meeting at which he was elected, and not having attended said meeting, and judgment of ouster was pronounced by this court against B. upon this information. B. brought a writ of error to reverse this judgment, and C. applied to this court for a mandamus to the public officer to hold a new election, upon the ground, that there was then no rightful treasurer in the office, the former election being void upon the conceded facts in the case. Held, that although this mandamus was not an actual execution of the judgment of ouster against B., it was a proceeding consequential upon that judgment, and operating to put it into effect; and, upon that ground, that between the parties to that judgment, it would operate as a *supra sedes*; and between third parties it was good ground for staying proceedings; and, therefore, the cause shewn against the conditional order for the mandamus was allowed. *The Queen v. The Lord Mayor of the City of Dublin*, 4 Ir. L. Rep. 147, Q. B.

Where a statute directed that at a meeting to be held under such act, for, amongst other purposes, electing commissioners, and "declared, that every person who shall reside within the city, &c., and who shall have been assessed or charged by the last rate made at vestry, in the parish wherein such person shall dwell, for, or in respect of a dwelling house, or other tenement of the computed annual value, according to the said rate of £20 or more, shall be eligible to be elected commissioners for the purposes of this Act;" and it appeared at

said meeting, that the houses of the parishioners had not been rated at vestry for upwards of fifty years, the only assessment in said parish being a certain annual sum charged per acre upon lands, without reference to the actual annual value thereof, and no annual value whatever appearing to be laid on houses; but evidence was given to prove that the houses of those who claimed to be eligible to be elected commissioners were of the annual value of £90, and upwards. Held, that the Statute contemplated the existence of a subsisting vestry-rate in the localities in which it was to be brought into operation, and made that rating the sole test of the qualification of those who were to vote, and those who were eligible to be elected under the Statute, and, therefore, a mandamus was refused to compel the president of such meeting to declare those persons duly elected. *Commissioners under this Act, Regina v. Ruston*, 3 Ir. L. Rep. 478, Q. B.

Where it appeared that A. had been for nearly twenty years an annual subscriber to a dispensary, and had given general directions to his agent, who was also the treasurer of the dispensary, to pay his subscription every year, and the latter had long acted upon these directions, but omitted to pay A's subscription, which fell due upon the 1st of June, 1839, and when A. discovered this in April, 1840, he had it paid, and then also paid his subscription for 1840 in advance; it also appeared that he continued to act as an existing member of the institution during these years, and under the bye laws, was liable for these subscriptions. Held, that he was qualified to vote for a medical attendant in October, 1840, and that he had substantially complied with the terms of the Statute, (3 & 4 Wm. 4, c. 92,) which requires that a person to be entitled to vote "shall have paid his subscription to the treasurer of such dispensary at least one year complete, before any such election shall take place." *Reg. v. Shekelton*, 3 Ir. L. Rep. 492, Q. B.

Quære, is a payment by a subscriber at any time in the current year, for that year, and also in advance for the ensuing year, a sufficient payment to enable the subscriber to vote in the course of the second year, although a year complete has not elapsed since the time of payment of the subscriptions. *Ib.*

This court will grant a mandamus to compel the visitors of Trinity College, Dublin, to proceed to hear and determine the appeal of a party who complains of an undue election of a scholar in said College. *The Queen at the prosecution of Heron v. The Visitors of Trinity College, Dublin*, 9 Ir. L. Rep. 41, Q. B.

Where on the face of a return to a mandamus, the law and facts are mixed, the court will, before argument on the law, reserve liberty for the prosecutor to file a traverse if necessary. *The Queen at the prosecution of Carpenter v. The Corporation of Dublin*, 9 Ir. L. Rep. 65, Q. B.

Return.—The Statute 47 Geo. 3, c. 109, vests the property in the streets of the city of Dublin in commissioners, and enacts that no person shall open those streets for any purpose whatsoever, without having obtained the consent of the commissioners. A mandamus having issued directed to

those commissioners, calling on them to grant a license to open certain streets for certain purposes therein stated, subject to certain terms and conditions; to which mandamus the commissioners made a return, stating that they, in the due exercise of the discretion vested in them by this Act, and in good conscience, did determine that it was not consistent with their duty, as such commissioners, or for the benefit of the inhabitants within their jurisdiction, that a license should be granted as prayed for; and that they therefore declined to grant it. Held, a sufficient return. *The Queen at the prosecution of the Alliance Gas Company v. The Paving and Lighting Commissioners*, 9 Ir. L. Rep. 448, Q. B.

Held, also, where a discretion was vested in those commissioners, this court had no power to issue a mandamus to control that discretion. *Ib.*

The remedy by mandamus is only to compel the performance of an abstract duty, and where fraud has been practised in reference to a contract, such a remedy is not applicable.

Where, on an application for a mandamus, a question of doubt or difficulty be raised, the court will not decide the question, but will allow the mandamus to issue, for the purpose of having a return made thereto. *Ib.*

Where a mandamus directed to Poor Law Guardians, commanding them to appoint collectors of poor rates, and to issue their warrants to the persons so appointed, the guardians made a return, stating that they had appointed collectors, all of whom, save one, had entered into securities as required by the Poor Law Act; that one of the collectors had not duly perfected his securities, and that the guardians had passed a resolution not to issue their warrants until all the collectors had been duly appointed, and had perfected their securities. Held, that the return was insufficient, and offered no reasonable excuse for the guardians not doing their duty. *The Queen v. The Guardians of the Tuam Union*, 9 Ir. L. Rep. 320, Q. B.

Costs.—The question as to whether the 9 Anne, c. 20, amended by the 1 Wm. 4, c. 21, apply to Ireland, was fully argued in the case of *The Queen at the prosecution of Moss v. The Corporation of Dublin*, in last Hilary Term, and on the 23th of April following. Blackburne, C. J., observed, that the court were of opinion these acts did not extend to this country. Subsequently thereto, the 6 & 7 Vic., c. 67, passed, and by its enactments the court are empowered to award costs in mandamus cases. *The Queen v. The Guardians of the Tuam Union*, 9 Ir. L. Rep. 321, Q. B.

An order directed that a Board of Guardians should be individually liable for costs, and a rule nisi for an attachment having issued to enforce that order, such rule must be served on all the members of the board. *Ib.*

Where plaintiff obtained a mandamus to compel a railway company to issue their warrant to a sheriff, to summon a jury, to assess the amount of compensation to which he was entitled, and the jury afterwards awarded him a less sum than the company had previously offered, Held, that he was not entitled to the costs of the mandamus. *O'Donnell*

v. *Waterford and Limerick Railway Company*, 1 Ir. Jur. 128, Q. B.

MARRIAGE—*See* CRIMINAL LAW. (BIGAMY.)
HUSBAND AND WIFE. ROMAN CATHOLIC.

Quære, can Presbyterian Ministers solemnize a marriage binding in law, where both, or either of the parties, are not members of the Presbyterian Church. *Reg. v. Mills*, 4 Ir. L. Rep. 495, Q. B.

A marriage celebrated by a Roman Catholic priest between two Protestants, is illegal, and renders the person celebrating it liable to be indicted for felony. *Reg. v. Taggart*, 9 Ir. L. Rep. 395.

The 7 & 8 Vic., c. 81, leaves untouched the rights of the Roman Catholic Clergy, where the marriage would have been previously legal, and the exemption, in that Act, from penalties, is only in relation to marriages that may now be lawfully celebrated. *Ib.*

Marriage Settlement.—*See* WARRANT.

MARSHAL, (CITY.)—*See* TRESPASS.

The City Marshal is not an officer, within the meaning of the 3 & 4 Vic., c. 108, s. 204, and, therefore, is not entitled to a month's notice before action brought. *Smith v. Holbrooke*, 9 Ir. L. Rep. 155, Q. B.

MARSHAL (OF THE MARSHALSEA)—*See* ARREST.

MEDICAL OFFICER.—*See* GRAND JURY.
MANDAMUS.

MEMBERS OF PARLIAMENT—*See* PEERS
AND MEMBERS OF PARLIAMENT.

MERITS, (AFFIDAVIT OF)—*See* PRACTICE.
(MOTION.)

MESNE PROFITS—*See* TRESPASS.

MINISTERS MONEY—*See* MANDAMUS.
RATES.

MISDEMEANOUR—*See* CRIMINAL LAW.
CERTIORARI.

MISDIRECTION—*See* PRACTICE. (NEW TRIAL.)

MONEY, (LODGMET AND DRAWING OF MONEY IN COURT)—*See* EJECTMENT.
RAILWAY COMPANY (PURCHASE MONEY.) SHE-RIFF. TENDER.

Where a lien is claimed by an English attorney, on a sum of money lodged in court to the credit of the cause by the Irish agent employed by him, to

abide the event of a dispute between one of the plaintiffs and the English attorney, the court will order it to be referred to the officer to inquire as to the rights of the parties thereto. *Ansell v. Stewart*, 3 Ir. L. Rep. 11, Q. B.

Money may be lodged in court in satisfaction of an action of trespass for an illegal distress under the provisions of the 3 & 4 Vic. 4, c. 105. s. 46. *Young v. Robinson*, 4 Ir. L. Rep. 13, C. P.

As to the practice of lodging money in court, *see Mallets v. Doolan*, 4 Ir. L. Rep. 436, Ex.

Where a defendant paid money into court, and the plaintiff, after taking the money out, proceeded to trial, and a verdict was had for the defendant. Held, that the plaintiff had disentitled himself to the costs which he incurred up to the time of the payment into court by the plaintiff. *Kershaw v. Lindsay*, 1 Ir. Jur. 81, Q. B.

In an action of *indebitatus assumpsit* the copy of the process served upon the defendant had not been endorsed with the amount claimed for debt and costs pursuant to the 52nd G. R. the defendant was permitted, after appearance entered and declaration filed, to lodge in court in discharge of the action—as of the day of the appearance—the sum admitted to be due, and the plaintiff's attorney was ordered to pay the costs of the motion. *Cluff v. Quinn*, 5 Ir. L. Rep. 169, Ex.

Payment of Money out of Court.—Where money is lodged in court by a sheriff until the conflicting claims of two parties are decided, the party found to be entitled may, when inconvenient to himself to attend, obtain an order for his attorney duly authorized to accept the transfer. *Desmond v. Desmond*, 2 Ir. L. Rep. 160, Q. B.

A notice of motion to draw money out of court, lodged on a plea of tender where the action has not been discontinued, is regular, and when the opposite party would not sign a consent and appeared on the motion it was granted with costs. *Chadwick v. Daly*, 5 Ir. L. Rep. 176, C. P.

Lodging Money in lieu of Bail.—*See* BAIL.

MORTGAGE—*See* DEED. EJECTMENT.
ELEGIT. STAMPS.

MOTION—*See* PRACTICE.

MUNICIPAL CORPORATION—*See* CORPORATION.

MURDER—*See* INDICTMENT.

MUTINY (ACT)—*See* ARREST. (PRIVILEGE FROM.)

NEWSPAPER—*See* CRIMINAL LAW. EVIDENCE.
LIBEL. PRACTICE (SERVICE OF PROCESS).

NEW TRIAL—*See* PRACTICE.

NON-PROS.—*See* PRACTICE.NON-SUIT.—*See* PRACTICE, (JUDGMENT AS IN CASE OF.)NOTICE OF MOTION.—*See* PRACTICE (MOTION.)NOTICE TO QUIT.—*See* EJECTMENT.NOTICE TO TREAT.—*See* PUBLIC COMPANY.NOTICE OF TRIAL.—*See* PRACTICE.NUISANCE.—*See* CRIMINAL LAW.NUL TIEL RECORD.—*See* SCIRE FACIAS.OFFENCES.—*See* CRIMINAL LAW.OFFICERS (OF THE COURT).—*See* ARREST.

Jurisdiction of the Court over.—Where an attorney obtains from the opposite party, being an illiterate person, and, under circumstances suspicious, though not actually fraudulent, a document purporting to be a disclaimer of his demand, and of his having authorised his attorney to bring the action, the court has a summary jurisdiction over its officers to order it to be given up. *Tobin v. Gray*, Bl. D. & O. 103, Ex.

The court has no jurisdiction to pronounce any rule on an application—made by a party who had held, and had been dismissed by the Chief Justice, from the office of crier of the court—to be restored to the emoluments and duties of said office, alleging that he had been illegally and improperly dismissed therefrom. *In re Kennedy*, 7 Ir. L. Rep. 217, C. P.

The court does not possess a jurisdiction to entertain such an application in the case of any officer. *Id.* [Torrens, J., *dissentiente*.]

There is an inherent jurisdiction in this court over its own officers, to direct the reference which the defendant applies for (to have the costs taxed for the amount of which the action was brought) upon his offering fair terms, with this single qualification, that the bill of costs contains at least one taxable item. The rule is substantially laid down as it at present exists, in *Hullock on Costs*, 504. *Bastable v. Reardon*, 4 Ir. L. Rep. 167. [Per Pennefather, C. J.] *See* Acc. — *v. Massey*, Bl. D. & O. 150, Ex.

ORDER.—*See* AMENDMENT.

OYER.

In an action of covenant, the tender of a copy of the deed for Oyer is not sufficient, and proceedings will be stayed till the original be produced. *Sterne v. Mooney*, Bl. D. & O. 235, Ex.

In an action against a clerk of a joint-stock banking company, upon his bond to the trustees of the company for the faithful discharge of his duties, the court refused to compel oyer of the deed of settlement of the company, which recited the bond. *Stanhope v. Quill*, 2 Ir. L. Rep. 68, C. P.

The rule for oyer does not stop the entry of the rule for judgment, though it stops the entry of the judgment itself. *Fitzpatrick v. Wilson*, 1 Ir. L. Rep. 238, Ex.

PARLIAMENT.

Peers of.—A motion to set aside proceedings taken against a peer, during the sitting of Parliament, will not be entertained. *Smyth v. Earl of Charleville*, 8 Ir. L. Rep. 33, Q. B.

Held, upon demurrer to a plea in abatement, that a peer may be sued by bill without original writ. *Id.*

Members of.—Proceedings by distringas against a member of Parliament to compel an appearance, and obtain payment of the plaintiff's demand. *Callanan v. Callaghan*, 8 Ir. L. Rep. 85, Ex.

PARLIAMENTARY APPEARANCE.—*See* PRACTICE.PARTICULARS OF DEMAND.—*See* PRACTICE.PARTNERS.—*See* PUBLIC COMPANY (RAILWAY.)

PARTNERSHIP.

Assumpsit for goods sold and delivered. Plea, that the defendants were in partnership with A; that the cause of action arose out of that partnership, and was a debt jointly due by them with A.; that the plaintiffs had sued A. singly and recovered a judgment against him for that joint debt. Replication, that the defendants and A. concealed from them they were in partnership, and that it was in consequence of the concealment of that partnership by the defendants they had not sued the defendants jointly with A. On special demurrer the replication was held to be bad. *Nesbitt v. Howe*, 8 Ir. L. Rep. 273, Ex.

A declaration in assumpsit by an indorsee against the acceptor of a bill of exchange, commenced—“Samuel Lindsay and Company, being a co-partnership entered into pursuant to the statute in that case made and provided, the plaintiffs in this suit, debtors, &c.,” proceeding in the ordinary form, and averring in the conclusion a promise to “the said co-partnership, the plaintiffs,” and a breach “to the damage of the said co-partnership, the plaintiffs.” Held on special demurrer to be bad, as not disclosing any title in the plaintiffs to sue in the name of Samuel Lindsay and Company. *Lindsay v. Loughhead*, 10 Ir. L. Rep. 2:6, Ex.

PAYMENT.—*See* DEBT. SCIRE FACIAS. STATUTE OF LIMITATIONS. MONEY (LODGMENT AND PAYMENT OUT OF COURT.)

PLEADING.

Setting aside Pleadings.—See PRACTICE.

Generally.—I think, and my Lord Chief Justice agrees with me, that as the course of precedents is settled and uniform, it ought to be supported, and a departure from form should be allowed as a special demurrer, until an alteration be made by statute, or by a general rule of all the courts. *Killikelly v. Kelly*, 5 Ir. L. Rep. 33, Q. B. [See also acc. *Apothecaries Hall v. Calvert*, 6 Ir. L. Rep. 194, Q. B.; *Knos v. Irwin*, 6 Ir. L. Rep. 258, Ex.]

In an action by an infant suing by his next friend the omission of the words "admitted by leave of the Court for that purpose," Held to be bad upon special demurrer. *Ib.*

The declaration suggested that the plaintiff was a debtor to the Queen, but did not contain the *quo minus* clause. Held good on special demurrer. *Keogh v. Murray*, 6 Ir. L. Rep. 237, Ex.

The declaration omitted the *debitus* and *quo minus* clauses. Held, that as the court might have jurisdiction by reason of the character or person of the defendant, the demurrer should be overruled. *Knos v. Irwin*, 6 Ir. L. Rep. 250, Ex.

Seem, such a demurrer is a plea to the jurisdiction, and cannot be pleaded by attorney. *Ib.*

The omission of the statement of a venue to a traversable allegation in a declaration is aided by the venue in the margin. *Barden v. Magennis*, 6 Ir. L. Rep. 345, C. P.

The omission of the *ad damnum* clause from the conclusion of a declaration is a cause of special demurrer. *O'Connor v. Deehan*, 9 Ir. L. Rep. 506, Ex.

A declaration concluding "to the damage of the plaintiff in *one hundred*" omitting the word "pounds." Held to be bad on special demurrer. *Parson v. Martin*, 9 Ir. L. Rep. 508, Ex.

In the *indebitatus* counts time, though not laid under a *videlicet*, is immaterial. *Southey v. Mugan*, 10 Ir. L. Rep. 250, C. P.

The omission of the *quo minus* clause is not a ground of special demurrer. *Allen v. Linahan*, 9 Ir. L. Rep. 291, Ex.

Venue.—The omission of the statement of a venue to a traversable allegation in a declaration is aided by the venue in the margin. *Barden v. Magennis*, 6 Ir. L. Rep. 345, C. P.

In an action against the sheriff of the County of Galway for a false return, the venue being laid in the County of Wicklow. Held on general demurrer that the declaration was sufficient for that stage of the case, as *non constat* but that the sheriff might have made his return in the County of Wicklow. *Green v. Blake*, 1 Ir. Jur. 271, Ex

Uncertainty.—The agreement was stated in the declaration to be "that the said plaintiffs (two) and defendant did thereby bind themselves in a penalty of £200 that they would continue their establishment for one year from the date," and the breaches assigned were "that the defendant did not and would not continue the aforesaid establishment for the said period of one year." Held, that the declaration was bad on special demurrer for uncertainty. *Cummins v. Kenny*, 2 Ir. L. Rep. 347, Q. B.

Ambiguity.—A declaration in the ordinary form of an action of debt, and concluding thus, "yet the defendant hath disregarded his promises, and hath not paid any of the said monies or any part of them. Held bad on special demurrer, it being doubtful whether it was a declaration in debt or assumpsit *Bennett v. Sandheim*, 1 Ir. Jur. 215, Ex.

The *queritur* in the commencement of a declaration in debt is not material, and therefore the sum claimed in it not covering the sum claimed in the counts is not a good ground of special demurrer. *Ib.*

Duplicity.—Covenant for rent. Plea, that the defendant surrendered the premises, and that the plaintiff accepted the same, to which the plaintiff replied, that he (the plaintiff) did not surrender, and that he (the plaintiff) did not accept the same. Demurrer for duplicity. Held, that the surrender and acceptance constituted but one entire matter of defence, and that therefore the replication was good. *Purdon v. Dickson*, 2 Ir. L. Rep. 351, Q. B.

Assumpsit. Plea, that the promises were made jointly with two other persons, and that the plaintiff was indebted to the defendant and said two other persons in a large sum of money, to wit, &c. Demurrer for duplicity, and that it was attempted to set off a joint debt against a separate demand. Held that the plea was good. *Lilburn v. Kenay*, 3 Ir. L. Rep. 327, Q. B.

A plea to a *scire facias* on a judgment against a public officer of a banking company, stating that the judgment was had and obtained, and was still kept on foot, and suffered to remain in force by the fraud and covin of the plaintiff, and of the said public officer, was held to be bad for duplicity. *Neale v. McDonald*, 6 Ir. L. Rep. 163, Q. B.

Traverse.—To a declaration in *indebitatus assumpsit* the defendant pleaded that the promises, &c. were made jointly with one T. P. H. and the defendant, and that the plaintiff sued the said T. P. H. in assumpsit for not performing the identical promises, &c. in the present declaration mentioned, and the jury assessed the damages of the plaintiff on occasion of the non-performing of the said promises, &c., which were the identical promises, &c. in the present declaration mentioned, to a certain sum, which the said T. P. H. afterwards paid to the plaintiff, and the plaintiff accepted the same in satisfaction and discharge of the said damages, &c., which had been so assessed to him. Replication, that the plaintiff did not accept and take the said monies in satisfaction and discharge of the said causes of action against the defendant in the present action. Special demurrer. Held that the replication was bad, not being a direct traverse of the matter alleged in the plea, but the plea being bad on general demurrer, being no answer to the plaintiff's declaration, the demurrer was overruled, and judgment given for the plaintiff. *Small v. Drummond*, 4 Ir. L. Rep. 92, Q. B.

To a declaration debt the defendant pleaded "that he never was indebted in manner and form as in plaintiff's declaration alleged." This plea was held bad on special demurrer. *Dirneford v. White*, 6 Ir. L. Rep. 291, Q. B.

The plea of not guilty only involves a denial of possession by the plaintiff, or of the trespass by the

defendant; and on it the defendant is not at liberty to go at large into evidence of justification or excuse. *Burris v. Coffey*, 6 Ir. L. Rep. 398, C. P.

Plea, the statute of limitations. Replication, a writ sued out with continuance. After stating the defendant's appearance to the last writ, the replication contained a *prout patet* in the following form, "as by the record and proceedings thereof remaining in the court of, &c. may more fully and at large appear." Rejoinder, that there "was not any record remaining in said court, in manner and form as plaintiff had in his replication alleged." Held, on special demurrer, that inasmuch as the several proceedings set forth in the replication constituted but one record, the rejoinder was sufficient in law. *Brennan v. Monahan*, 7 Ir. L. Rep. 545, Ex.

Quære, if the replication was bad on general demurrer, as not having been framed in compliance with the 3 & 4 Vic. c. 105, s. 7. *Ib.*

Repugnancy.—A declaration by an administrator stated a debt to the intestate, and a promise to pay him in his life-time, laying the day on the 14th day of April, 1845. The letters of administration were afterwards to have been granted to the plaintiff, on the 21st of December, 1844. Held on special demurrer, that this date was repugnant, and if rejected, the declaration would be bad, for want of alleging the day. *Hunter v. Macan*, 1 Ir. Jur. 12, Q. B.

A declaration stated the time of the defendant's being indebted to the plaintiff's intestate in his life-time, and of his making the promise to be the 1st day of January, 1845, and stated the time of the grant of the letters of administration to the plaintiff to be the 20th of June, 1844. Held on special demurrer, that the averments were inconsistent, and that none of the allegations of time could be rejected as surplusage. *Hely v. Mulhally*, 1 Ir. Jur. 32, Ex.

Pleas of Tender.—A declaration in debt contained four counts; pleas of tender to the first three, on which issues were taken and found for the defendant. Plea to the fourth count, "that as to the said sum in the said last count of the declaration mentioned, residue of the said several sums above demanded, over and above the said sums in the first, second, and third counts mentioned, the said defendant says he does not owe the same, or any part thereof to the said plaintiffs, in manner and form as the said plaintiffs have above thereof, &c. On issue on this plea, held that the plaintiffs should have shewn a debt beyond the sums contained in the first three counts. Where the defendant told plaintiff's agent that an amount more than sufficient to cover the demand was in a desk in the room, and desired his son to hand the amount to the agent, and the son rose to do so, but was interrupted by the agent, saying that he would not at all take the money, as a third person had forbidden him to do so; Held, this refusal dispensed with the necessity of producing the money, either in number or specie. *Ballina Union v. Walshe*, 1 Ir. Jur. 70, Ex.

Held that evidence of such a transaction was sufficient to support a plea of tender. *Ib.*

Quære, whether the consent of the poor law commissioners to an action for rates, as required by the 6 & 7 Vic. c. 92, s. 2, should be given under their seal; and if so, whether a defendant can avail himself of the non-production of such sealed assent at the trial. *Ib.*

Quære, whether a tender of rates to a collector on a Sunday is a good tender. *Ib.*

Semble, a tender to a rate collector whose appointment continues, binds the guardians, though they may have expressly ordered him not to take the money. *Ib.*

A replication to a plea of tender, stating a writ sued out, but not executed before the tender was made, and then a second writ sued out, without shewing the entry of any continuance, or that the second writ was connected with the first, is no answer to the plea. *Hopburn v. Plunkett*, 8 Ir. L. Rep. 10, Q. B.

Misjoinder.—A declaration containing only the money counts, and commencing and concluding in the usual form by an executor, but omitting proffer of the letters testamentary. Held bad on general demurrer, on the grounds that though the other counts might be upheld as disclosing causes of action personal to the plaintiffs, the count, on an account stated could only be sustained by them in their executorial capacity, therefore there was a misjoinder. *Sharp v. Shearman*, 1 Ir. Jur. 13, Ex.

Replication de Injuriâ.—Assumpsit by the indorsee against the maker of a promissory note. Plea, that the note was not indorsed to the plaintiff until after the same had become due, and that at the time the said note became due it was in the hands of the payee, and, whilst the payee continued to hold the same, and before the commencement of this suit, the payee was indebted to the defendant in the sum of £17 3s. 3d., for the use and occupation of a certain house of the defendant, &c., and that an account was settled and stated between payee and defendant, such account including said note, and the said payee had credit in such account for the full amount of the said note, of all which the plaintiff had full notice, and was well aware, and informed, that the said note remained in the hands of the said payee, to secure the balance due to him on foot of said account; and then averred an indorsement, without consideration, after the note became payable. Replication, *de injuriâ*. Held, on demurrer to the replication, that the plea disclosed matter of excuse, as between plaintiff and defendant, and that *de injuriâ* was properly pleaded. *Healy v. Campion*, 1 Ir. Jur. 24, Ex.

When the plea denies the cause of action, instead of being in confession and avoidance, the replication *de injuriâ* is bad, and a demurrer must be allowed, though the plea is itself specially demurrable as amounting to the general issue. A demurrer to a replication, putting in issue a false plea, will be set down for immediate argument. Signing the name on a blank bill of exchange stamp, with an express agreement to draw it for a specified amount, is not a contract to pay any sum which may afterwards be inserted in the bill as between parties having notice of the agreement. *Allingham v. Walker*, 1 Ir. Jur. 119, C. P.

Immaterial Issue.—The defendant avowed for rent due on a particular day. Plea, "*rien in arere.*" The jury found no rent on the particular day named. Held, that such finding of the jury did not dispose of the actual issue knit between the parties, the precise day, specified by the avowry, not constituting a parcel of the issue; and in such case the time is immaterial. *Nevins v. Phelan*, 1 Ir. Jur. 166, Ex. Ch.

To a *scire facias*, on a judgment against the public officer of a banking company, the defendant pleaded, first, that she was not at any time, nor is she now, nor hath she ever been, a member of said society; secondly, payment; and thirdly, that the said judgment was had and obtained, and was still kept on foot, and suffered to be, and remain in force, by the fraud and covin of the plaintiff, and the said public officer. Held, on special demurrer, that the first plea was bad, as it tendered an immaterial issue, and also as it traversed matter not alleged. *Neale v. McDonald*, 6 Ir. L. Rep. 163, Q. B.

To a declaration in *indebitatus assumpsit* against an administratrix, containing counts for use and occupation, and the money counts, the defendant pleaded to the whole declaration, that before she had any notice of the said demand, and before she had any notice of the making of the said promises, she had fully administered. Held, to be bad, as tending an immaterial issue, and as surplusage. *Commissioners of Education v. Loughnan*, 9 Ir. L. Rep. 167, Q. B.

Held, also, that surplusage, tending to embarrass the pleading, is ground of special demurrer. *Ib.*

Quære, would such a plea to the count for use and occupation be a good plea. *Ib.*

Common Forms.—The first count of a declaration was against the defendant as maker of a promissory note, stating a promise to pay "according to the tenor and effect thereof," and was followed by the money counts, with a promise to pay "the said several monies respectively to the plaintiff on request." Held, that the omission of the words "last-mentioned," in the statement of the second promise, was not ground of special demurrer. *Sonder v. Darcy*, 5 Ir. L. Rep. 50, Ex.

Counts for goods sold, and for work and labour done, the money counts commenced with "whereas also," and the words "last-mentioned" occurred in the conclusion. Held, that the first count was bad, on special demurrer, for want of a promise. *Flanagan v. Nally*, 5 Ir. L. Rep. 230, C. P.

Indorsee against acceptor. The declaration contained a special count, with the usual promise to pay, and the money counts, and concluded, "that the defendant afterwards, in consideration of the promises respectively, then and there, promised the plaintiff to pay the said several last-mentioned monies respectively on request; yet he hath disregarded his promise, and hath not paid any of the said monies, or any part thereof, to the plaintiff's damage, &c." Held, to be a sufficient averment of a breach of the promise contained in the special count. *Burke v. Cooney*, 6 Ir. L. Rep. 204, C. P.

Semble, that the form of pleading the common

counts, prescribed by the general rules of Hilary Term, 1832, constitutes but one consolidated count. *Wade v. Croker*, 6 Ir. L. Rep. 514, Ex. (See contra *McGregor v. Greaves*, 18 L. Jou. N. S. Ex. 109; *Morse v. James*, 11 M. & W. 831; *Morrissey v. Walsh*, 9 Ir. L. Rep. 296.)

In a declaration by payee against the maker of a note, the first count averred, that whereas the defendant made his promissory note in writing, and thereby promised to pay the plaintiff £45 three months after date, which period is now elapsed. Held, on special demurrer, that the promise to pay was sufficiently averred. *Conway v. Lewis*, 8 Ir. L. Rep. 4, Q. B.

The form of declarations, as settled by the judges, should be strictly followed. *Ib.*

In an action by indorsee against drawer of a bill of exchange, the declaration contained the words, "which period is now elapsed," and, in the conclusion of the money counts, the word "promise" was used, instead of "promises." Held good, on special demurrer. *Barrett v. Daly*, 8 Ir. L. Rep. 518, Q. B.

Title of Declaration.—A declaration on promises was entitled generally, as of Michaelmas Term, 1842, and stated the promises and breach thereof to have been made on the 16th of November, 1842. Held good, on general demurrer. *Day v. Wright*, 5 Ir. L. Rep. 240, C. P.

The declaration entitled generally, as of Michaelmas Term, stated, that the defendant, on the 28th of August preceding, made his bill of exchange payable three months after date, which period had then elapsed. Demurrer, because the cause of action appeared thereby to have accrued after declaration filed. The declaration was held to be good. *Fowles v. Mowlds*, 5 Ir. L. Rep. 507, Ex.

Where the cause of action accrues during term, the declaration must be specially entitled. *Crotty v. Snagg*, 8 Ir. L. Rep. 8, Q. B.

Indorsee against acceptor. The declaration entitled generally, as of Michaelmas Term, 1847, and filed on the 16th of November, in that year, stated the bill of exchange as made on the 18th of October, 1847, and as payable forty-one days after the date thereof, which period has now elapsed; a demurrer, assigning for special cause, that the said action appeared to have been commenced before the bill was due, was over-ruled, on the ground that the bill may have been dated on a day prior to that on which it was alleged to have been made. *French v. Tottenham*, 10 Ir. L. Rep. 245, C. P.

The declaration was entitled generally, as of Trinity Term, 1847, and stated that certain persons, "on the 9th day of November, 1846, made their bill of exchange, payable seven months after date, which period has now elapsed." A special demurrer assigning as cause, that the bill appeared to have become payable on the last day of the term of which the declaration was entitled; that by law, and mercantile usage, the defendant was not bound to pay the bill until 9 o'clock, P. M., on that day, and that it did not appear that the declaration was filed after that hour upon that day, was over-ruled. *Southey v. Magan*, 10 Ir. L. Rep. 250, C. P.

Quære, would the demurrer have been sustained

the declaration had stated the bill to have been dated upon the 9th of November, 1846. *Ib.*

A declaration was entitled as of a term subsequent to the term of the defendant's appearance, in order to include a cause of action which accrued since the entry of the appearance. The court set aside the declaration with costs, and refused to allow it to be amended. *Hinds v. Shannon*, 10 r. L. Rep. 458, Ex.

Multifariousness.—Avowry for additional or penal rent. The plea averred, "that a right to demand the said additional rent accrued to the said defendant, more than twenty years before any part of said rent became payable, and that the defendant did not within twenty years next after the right, to demand the said additional rent, accrued to him, receive claim, demand, or make any distress for, or bring any action to recover the said additional rent, but always did thence hitherto receive and accept the said original rent of £158 is. as the rent of, and payable out of the said demised premises. This plea is bad, on special demurrer, as multifarious, being a plea of the Statute of Limitations, and also a plea of waiver, and it is bad, on general demurrer, as a plea of waiver. *Daly v. Lord Bloomfield*, 5 Ir. L. Rep. 74, 76, Q. B.

Names of Parties.—The declaration stated, but by indenture made between W. G., by the name and description of W. F. of the one part, and T. T. of the other part, W. F. demised. Held sufficient, on special demurrer, without an averment that he was known by one name, as well as he other. *Knox v. Irwin*, 6 Ir. L. Rep. 250, Ex.

Pleas amounting to the General Issue.—See *Humphrys v. Lord Mayor of Dublin*, 6 Ir. L. Rep. 159, Q. B.

Demurrers.—If a demurrer be pleaded to the whole declaration, assigning certain special causes to particular counts, and others applicable to the conclusion, the latter can alone be relied upon if any one count be good. *Byrne v. O'Flaherty*, 5 Ir. L. Rep. 90, Ex.

A demurrer which covers too much is bad. *Knox v. Irwin*, 6 Ir. L. Rep. 250, Ex.

Discontinuance.—The declaration contained three counts, on three bills of exchange, and the money counts. Plea, to the third count award and satisfaction, and to the first, second, fourth, fifth, and last counts, a special plea, in the nature of a plea of the Statute of Frauds. Replication, traversing the first plea, and demurring to the second. Held, that though the second plea was bad, judgment should be given for the defendant, there being a discontinuance, the plaintiff having treated the money counts as several counts, and not having replied to the sixth. *Cochrane v. Fitzpatrick*, 8 r. L. Rep. 187, Q. B.

Trespass for taking, detaining, and impounding goods, and that thereby the goods were lessened in value, and damaged. The plea answered the taking, leaving the lessening and damaging unanswered. The plaintiff pleaded over, without marking judgment of *nil dicat*, for the part of the declaration uncovered by the plea. Held, that he

had not thereby worked a discontinuance. *Atkinson v. Nesbitt*, 9 Ir. L. Rep. 271, C. P.

Pleading Statutes.—Although words of equivalent meaning may suffice for pleading a Statute, the better course is an exact adoption of the language of the Legislature. *Kealy v. Bokin*, 9 Ir. L. Rep. 383, C. P.

Plea, *Puis darreign* continuance.—The cause having been called on for trial, the defendant put in a plea in the nature of a plea, *puis darreign* continuance, alleging that the matter of defence arose "after the several supposed causes of action accrued," in an affidavit contemporaneous with, and in verification of the plea, the defendant stated that the matter of the plea had arisen, within eight days last past, next before the pleading of the said plea. Held, that the plea was ill, there being no precise averment that the matter of defence had arisen after the last continuance. *Atkinson v. Nesbitt*, 9 Ir. L. Rep. 271, C. P.; S. C., BL D. & O. 184, N. P. [Per Doherty, C. J.]

A *scire facias*, to revive a judgment after tracing its devolution by assignment, and otherwise, to A., stated her death intestate, and a grant of administration by the Court of Prerogative to B., who, as administratrix, assigned *secundum formam statuti* to the persons from whom the plaintiff deduced title. The plea filed by the co-nuzor stated, that A. made her last will and testament, but named no executor thereof, and that administration, as in the case of intestacy, was granted by the Prerogative to B., but alleged that *puis darreign* continuance, to wit on the 12th day of June, 1847, a sentence was pronounced by the same court, by which the will of A. was established, and the letters of administration granted to B. were "cancelled," and "declared to be utterly null and void, and to have no force or validity in law whatsoever," and by which sentence administration, *cum testamento annexo*, was granted to another person. Held, on general demurrer, that this plea could not be supported. *Bevan v. Lloyd*, 10 Ir. L. Rep. 228, C. P.

Profert.—*Scire facias* by the executor of the cognisee; the defendant was called on to shew wherefore the plaintiff should not have execution against him, "according to the form of the recovery, without an allegation that the plaintiffs did so as executors, profert of the letters testamentary was made. Held, sufficient. *Falls v. Brassington*, 1 Ir. Jur. 8, Ex.

POLICE—See MAGISTRATES. RATES.

POOR LAW.

Guardians.—Where a mandamus directed to the poor law guardians commanding them to appoint collectors of poor's rate, and to issue their warrants to the persons so appointed. The guardians returned, that they had appointed collectors, all of whom save one, had entered into securities as required by the Poor Law Act, and that one of the collectors had not duly perfected his securities, and that the guardians had passed a resolution not to issue their warrants until all the collectors had

been duly appointed, and had perfected their securities. Held, that the return was insufficient, and offered no reasonable excuse for the guardians not doing their duty. *Reg. v. Guardian of the Tuam Union*, 9 Ir. L. Rep. 320, Q. B.

Where the Poor Law Commissioners, under the 1 & 2 Vic., c. 56, s. 36, had ordered the guardians of a union to assess the sum of £400, (an additional sum incurred in completing the workhouse,) on the poors' rate, which the guardians had refused. Held, that a mandamus would lie in such case. *Poor Law Commissioners v. Guardians of Clones Union*, 8 Ir. L. Rep. 26, Q. B.

Held, also, that the court had no power to inquire into the soundness of the discretion exercised by the Commissioners in such a case. *Ib.* [Per Pennefather, C. J., and Crampton, J.] *Sed*, that such a question ought not to be entertained upon motion. *Ib.* [Per Perrin, J.]

Under the 36th section of the Poor Law Act, (1 & 2 Vic., c. 56,) the Poor Law Commissioners had made an order for an additional sum to be raised out of the poors' rate. Held, that they must, on an application for a mandamus to the guardians to levy such sum, show clearly to the court that this order is within the scope of the authority. *The Poor's Law Commissioners v. The Edenderry Union*, 8 Ir. L. Rep. 29, Q. B.

Held, also, that this court has jurisdiction, under the 114th section, to adjudicate upon the legality of such an order, and that such will be done as well upon application for a mandamus as upon a return thereto. *Ib.*

An order directed that a board of guardians should be individually liable for costs, and a rule nisi for an attachment having issued to enforce that order, such rule must be served on all the members of the board. *The Queen v. The Guardians of the Tuam Union*, 9 Ir. L. Rep. 325, C. P.

Guardians of the poor having acted in the office as such, have no power to resign the trust so reposed in them. *Poor Law Commissioners v. The Guardians of the Limerick Union*, 7 Ir. L. Rep. 402, Q. B.

In case the guardians refuse to act, the court will not allow a mandamus to issue, another specific remedy having been provided by the Poor Law Act. *Ib.*

Paid Guardians.—The paid officers, appointed under the 25th and 26th sections of the 1 & 2 Vic., c. 56, may properly sue under the style of "The guardians of the poor of the—— Union." *Guardians of Castlereagh Union v. Dillon*, 1 Ir. Jur. 229.

Poors' Rate]—*See RATES.*

POSTEA—*See PRACTICE. CRIMINAL LAW.*

POWER OF ATTORNEY—*See WARRANT.*

POWERS.

Where a lease of three lives, renewable for ever,

was put in settlement, and a power to the successive tenants for life "to demise, or lease, for any term, or number of lives, or years, consistent with their respective interests therein, to commence in possession, and not in reversion." Held, that a lease for three lives, other than those in the head lease, with a covenant for perpetual renewal, was a valid execution of the power. *Smith v. Clarke*, 2 Ir. L. Rep. 78, 205, C. P.

A power to lease for any term or number of years not exceeding three lives, or thirty-one years. Held, to authorize a lease for the lives of three persons, and also for the term of thirty-one years, to be computed concurrently, which ever should last longest. *Hazier v. Powell*, 3 Ir. L. Rep. 395, Ex.

Though the execution of such a lease operates by way of appointment, it is sufficient to describe it in pleading as a lease made by the donee, by virtue, and in pursuance of the leasing power. *Ib.*

A lease by tenant for life, under a leasing power, reserving rent to the lessor, his heirs and assigns, with whom also the covenants were made in stead of the persons entitled in remainder, was held to be good. *Ib.*

A lease was executed,—under a power which required the execution to be in the presence of two witnesses,—in the presence of one subscribing witness, and in the presence of another person who could testify to the fact, but had not previously, nor at the time been called upon to be a witness. Held, not to be a due execution of the power. *Church v. Donnell*, 4 Ir. L. Rep. 306, C. P.

G. in 1754 obtained a lease of lands, (of which the premises sought to be recovered in the ejectment were part,) for a term of forty-nine years, or three lives; and in 1756 he assigned the residue of the term to T. E. who, in 1764, became entitled to the fee; I. demised his portion to J. M. who remained in possession until a new lease was made to him, in 1805, by K., the assignee of J's interest. The son of T. E., in 1772, made his will, under which his son, E. P., became tenant for life, with remainder to his first, and other sons, in strict settlement; and by that will a power was given to the tenant for life to demise the property, in his possession, for any term not exceeding thirty-one years, in possession, and not in reversion, reserving the best improved rent, with clauses of distress and re-entry. E. P., under that power, executed a lease to K., having the residue of the term vested in him, and J. M. being a tenant to K. under the title derived from J. Held, that such power did not authorize the tenant for life to make a lease of the reversion, and that the lease to K. by E. P. was therefore invalid. *Powell v. Kelly*, 10 Ir. L. Rep. 192, Q. B.

Held, also, that the 5 Geo. 2, c. 4, did not make such lease one in possession; the provisions of that Statute are in reference to, and assume the right of the lessor to execute a renewal. E. P. having but a reversion, had therefore no right to deal with the possession. *Ib.*

Held, also, that surrender of the estate of J. M. could not be presumed, because there was no power to make the lease of 1793. *Ib.*

Held, also, that the registration of a deed, operating in law as a surrender, is not equivalent to the registration of an actual deed or instrument of surrender. *Ib.*

PRACTICE.

I. PRACTICE GENERALLY.

II. PROCESS.

Irregular Service.

Substitution of Service.

III. APPEARANCE.

IV. PRACTICE CONNECTED WITH PLEADINGS.

1. *Declaration.*
2. *Particulars of Demand.*
3. *Rules to Plead, and Motions for Further Time*
4. *Pleas, Demurrers, &c.*
5. *Pleas of Confession.*
6. *Pleas in Abatement.*

V. STAYING PROCEEDINGS.

VI. SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

1. *Writs and Declarations.*
2. *Pleas and Demurrers.*

VII. NOTICE OF TRIAL.

VIII. POSTEA.

IX. MOTIONS.

1. *Generally.*
2. *Motion for liberty to tot.*
3. *Motions for liberty to proceed.*
4. *Motions for New Trial.*

X. DISCONTINUANCE—1 & 2 Vic., c. 109.

XI. JUDGMENT.

1. *Generally.*
2. *Rule for Judgment.*
3. *Motions in Arrest of Judgment.*
4. *Entering Judgment.*
5. *Amendment of Judgments.* (See *Amendment.*)
6. *Priority of Judgments.*
7. *Judgments of Non Pros.*
8. *For not Joining in Demurrers Books.*
9. *For Want of a Plea.*
10. *By Default.*
11. *As in Case of Non Suit.*
12. *Setting Aside Judgment.*
13. *Assignment of Judgments.*
14. *Satisfaction of Judgments.*
15. *Searches for Judgments.*
16. *Releasing Judgments.*

XII. BILLS OF EXCEPTIONS.

XIII. VENUE.

1. *Local.*
2. *Transitory.*
3. *Changing Venue.*

XIV. VERDICT.

XV. VENIRE DE NOVO.

XVI. ERROR, COURT OF.

I. PRACTICE GENERALLY.

Generally.—Parties cannot by consent vary a rule of court, without making such consent a rule of court. *Dawson v. Bell*, 2 Ir. L. Rep. 279, Q. B.

In alleging a defence at law to the merits, it is not necessary to state the facts on which counsel is advised; it is sufficient for the defendant to

allege, that he has fairly disclosed all the facts to his counsel, and that he has advised him, he has a good substantial defence at law, to the action. *Adams v. Nerney*, 3 Ir. L. Rep. 284, C. P.

Where the defendant himself should generally make the affidavit, if he be prevented from doing so by the act of God, an affidavit made by his attorney may be used instead. *Scott v. Macaulay*, 4 Ir. L. Rep. 40 Q. B.

A party is not bound to notice an irregularity when he has notice of the proceeding in reference to which the irregularity is committed, unless such irregularity is apparent on the face of the proceedings. *Mathers v. Coyle*, 4 Ir. L. Rep. 280, Q. B.

It is entirely in the discretion of the judge at Nisi Prius, whether he will admit or reject a rebutting case. *Anonymous*, 3 Ir. L. Rep. 39, Ex.

The court will not grant liberty to proceed in an action after a delay of two years, without serving notice of the application on the defendant. *Seymour v. Blake*, 3 Ir. L. Rep. 285, C. P.

A copy of a petition against an attorney should be served at his registered lodgings, before he is called on to answer the matter of it. *Chambers v. Franklin*, 5 Ir. L. Rep. 356.

When the record of the memorial of the assignment was not on the record before the Court of Error, it was held that the plaintiff in error, who assigned for error, that there was no such record of the memorial, was bound to have made an application upon notice, before the case came on for argument, for a writ of *certiorari* to have the said record brought for inspection, and, not having done so, the court would not suspend their judgment till the application was made, he having no merits. *Creagh v. Fulton*, 5 Ir. L. Rep. 322, Ex. Ch.

II. PROCESS.

Irregular Service.—Where a defendant applied to set aside proceedings, on an affidavit that he had not been served with the process, and he was ordered to prosecute the process server, and upon the trial the jury disagreed, although there was strong evidence of the process server's guilt, the court afterwards made the conditional order absolute, with costs, although the defendant would be thereby enabled to plead the Statute of Limitations to any future action for the same demand. *Comerford v. Burke*, 2 Ir. L. Rep. 197, C. P.

If it appear to the court probable that the defendant was not served with process, they will, on the affidavit of the defendant, that he is ready to prosecute the process server for perjury, order his affidavit to be taken off the file for that purpose, and allow the costs of proceedings to abide the event. *Ib.*

A writ of *ca. ad resp.* was forwarded to defendant's land agent, with a request to forward the same to the defendant, who, it was supposed, was out of the country; subsequently a notice was served upon plaintiff's attorney by O. S., cautioning him from proceeding further in the cause as the defendant was in the country, and at large, when the writ was forwarded to his agent, and the notice was signed by O. S., as "attorney for the defend-

ant," the court allowed the service to be deemed good service. *Anonymous*, 2 Ir. L. Rep. 161, Q. B.

Service of a writ upon the defendant's servant deemed good service of the defendant, giving him notice thereof by a letter through the Post Office, inclosing a copy of the writ, after it was out of return. *Knipe v. O'Reilly*, 2 Ir. L. Rep. 199, C. P.

The court refused to allow the service of a writ on the agent resident in Ireland, of a party who was residing in France, to be deemed good service of the latter. If a sufficient attempt be unsuccessfully made the court will assist. *Gillespie v. Cumming*, 2 Ir. L. Rep. 200, C. P.

To render the service of process at the office of the proprietor of a newspaper, instead of personal service thereof, valid and sufficient to warrant the entry of parliamentary appearance, such facts must be spread upon the affidavits of service, as will bring the case within the provisions of the 6 & 7 Wm. 4, c. 76, and from which it will appear to the court that the suit, or proceeding against the defendant, is in relation to his character of newspaper proprietor. *Coffey v. Barrett*, 4 Ir. L. Rep. 81, Q. B.

A statement of service, "by leaving with a clerk of the defendant, at the office of the said defendant, where the newspaper, of which the said defendant is the registered proprietor, is published, situate, &c., a true copy." Held, insufficient. *Ib.*

In this case the plaintiff might have applied for an order, that the service already had be deemed good service. *Ib.*

Semble, that the Christian and surname of the attorney, for the plaintiff, should be signed in full, at the foot of the English notice attached to the *capias*. *Ib.*

The service of process on Sunday is absolutely void, by the Statute of 7 Wm. 3, c. 17, s. 7; and where it appears from the process server's affidavit that the writ was served on Sunday, the court will set aside the proceedings. *Lewis v. Kirwan*, 5 Ir. L. Rep. 123, Ex.

The service of an order on an officer of a Court of Record, at a place where, and time when, he does not transact the business of the court. Held, bad service. *M'Dona v. Hanly*, 6 Ir. L. Rep. 155, Q. B.

It is no irregularity to include more than one defendant in a *capias*, and afterwards declare against them separately. *Crawford v. McDonnell*, 4 Ir. L. Rep. 194, Q. B.

Where, after due service of process, the process server was attacked, and the original writ taken from him, the court granted a new writ, and allowed the plaintiff to proceed upon it, as he would have been entitled to proceed if the original had not been lost. *Anonymous*, 3 Ir. L. Rep. 40, L. E.

Where defendant, on being served with a copy of the writ, snatched the original from the hands of the process server and absconded, the court deemed such service good, the plaintiff to be at liberty to issue a duplicate writ serving the order. *Robinson v. Weir*, 3 Ir. L. Rep. 41, Ex.

Where it appeared that the *capias* was served by the plaintiff, and a parliamentary appearance entered, the court set aside the proceedings upon

terms. *Beamish v. Fitzmaurice*, 3 Ir. L. Rep. 497, Q. B.

Quære, is service of process by the plaintiff irregular. *Ib.*

The defendant against whom judgment had been marked, and a writ of inquiry had been applied for, having sworn that he had never been served with the process, but admitted the debt, the court ordered him to pay the amount of the plaintiff's demand to him, and that the officer should lay over the process server's affidavit, in order that it might be prosecuted, reserving the question of setting aside the proceedings, and the quantum of costs in the mean time. *Fahie v. Nash*, 4 Ir. L. Rep. 304, C. P.

Where the process server was prosecuted by the defendant, and convicted of perjury, the court set aside the civil proceedings with costs, but refused to make the plaintiff pay the costs of the prosecution. *Lewis v. Hynes*, 4 Ir. L. Rep. 177, L. E.

The court refused to set aside a parliamentary appearance, on the ground of non-service of the writ on the defendant not having sworn to merits, or so how he obtained knowledge of the proceedings, denied service of a copy of the process. *Ba v. Macklin*, 4 Ir. L. Rep. 312, C. P.

Substitution of Service.—This court will substitute service of process upon a partner out of the jurisdiction, by serving a partner within the jurisdiction, although the demand was sworn to be a partnership demand, and that the partnership still continued. *Oldham v. Shaw*, 4 Ir. L. Rep. 1, C. P.

The court will not deem a service of the writ sufficient, unless it is made to appear that the writ has reached the hands of the defendant. *Francis Gore*, 4 Ir. L. Rep. 3, C. P.

The court will order service of a writ of *ad respondendum* to be substituted where there have been several ineffectual attempts made to serve the defendant, and where there are special circumstances to lead to the belief that he is concealed in the house, on one occasion, when the process server went to serve him. *Anonymous*, 1 Ir. L. Rep. 99, Q. B.

In an order to substitute service of process on a partner resident out of the jurisdiction, by serving a partner within it, it is necessary that the writ should state that the cause of action is a partnership demand. The following statement was sufficient—"The action is brought against defendants as partners in trade for goods sold and delivered." *McKenny v. Mark*, 2 Ir. L. Rep. 1, Q. B.

Where it was sought to revive a judgment against the heir and terre-tenants of the defendant, and the heir was resident in England, service on him was substituted, by serving the guardian of his fortune, who resided in this country, and was guardian of his person, with whom he resided in England. *Bond v. Bond*, 2 Ir. L. Rep. 163, C. P.

Conditional order granted to shew cause against service of a *Scire Facias*, (the return of which was out at the time of application,) on the law agent the consor residing out of the jurisdiction, that he was, and had been for some years the

of the conusor. *Bruce v. Poe*, 4 Ir. L. Rep. P.

The court will not make the said conditional absolute, without notice of the motion being given to the law agent. *Ib.*

Where the court will not in general deem service already had good service, the same not being that of the court, but will give an order to substitute service. *Ib.*

Entering the premises, and serving a party interested with the ejectment notice and summons, out of the jurisdiction, will not be deemed good service. *Doe dem. Stewart v. Casual Ejector*, 3 Ir. Rep. 20, C. P.

Where a defendant resided out of the jurisdiction, the court refused to substitute service of a *ca. ad res.* on a receiver appointed over his estate, and on attorney by whom he had entered appearances in other actions in this court two terms previously. *Is v. Austin*, 3 Ir. L. Rep. 258, Q. B.

Where the defendant was out of the jurisdiction, the court refused to substitute service of a *ca. ad res.* on his land agent and attorney, although he had previously brought actions in this court, and recently proceeded by civil bill against the plaintiff, by the same attorney, it not appearing that such actions were still pending. *Fitzgerald v. Doe*, 3 Ir. L. Rep. 259, L. E.

Service of a *ca. ad res.* substituted on the land agent of a defendant resident out of the jurisdiction, where it appeared he was present in person, by his attorney, in an action that was still pending. Service on the land agent, in such a case, is a way of notice only, and not as giving the defendant jurisdiction. *Macculagh v. Sharpe*, 3 Ir. L. Rep. 260, L. E.

The court has no jurisdiction in a personal action, to substitute service on a defendant resident out of the jurisdiction, unless under very special circumstances. *Burke v. Quinlan*, 3 Ir. L. Rep. Q. B.

The plaintiff having sworn that the defendant had left the country for the purpose of avoiding creditors, and the agent of the defendant having informed him that the defendant was residing out of the jurisdiction, the court gave liberty to substitute service of the conditional order, for the *scire facias*, on the said agent. *Ryan v. Lentoigne*, 3 Ir. Rep. 362, C. P.

The court granted a conditional order for substitution of service of a *scire facias* on the brother of the conusor, against whom a separate judgment had been entered for the same debt, the conusor being in America. *Watson v. Armstrong*, 4 Ir. Rep. 219, C. P.

Service of a writ on the hatchman of the sheriff's office will not be deemed good service on a prisoner, nor service on the governor of any of the Dublin gaols will be deemed good service. *Anonymous*, 3 Ir. L. Rep. 275, Q. B.

Service of process on the keeper of the Marshalsea is deemed good service of the defendant, who is in confinement therein, the said keeper having undertaken to bring him into the hatch for the purpose of having him served. *Maguire v. Gardiner*, 4 Ir. Rep. 310, C. P.

Where the refusal of the keeper to bring for-

ward the prisoner, for the purpose of having him served, was a contempt of court. *Ib.*

The court ordered substitution of service, of a *scire facias*, on the land agent of the conusor, who resided abroad, where the amount of the judgment was small, and the expense of attempting personal service would have been great. *Executors of Langton v. Massey*, 4 Ir. L. Rep. 412, C. P.

In an action against partners, the court refused to substitute service of a *ca. ad res.* upon one partner, for another residing out of the jurisdiction; the 3 & 4 Vic., c. 105, s. 37, restricting a plea in abatement for non-joinder of a co-defendant, to cases where the latter is resident within the jurisdiction. *Viner v. Boyd*, 4 Ir. L. Rep. 433, L. E.

Where one of two executors of a deceased conusor of a judgment resided in England, and the other could not be discovered, the court refused to substitute service of the *scire facias* on a party who had acted as solicitor for the said executor in some late Chancery proceedings; but required that the executor residing in England should be served, and granted a conditional order, that service on him should be deemed good service on his co-executor. *Atteridge v. Lord Audley*, 5 Ir. L. Rep. 90, C. P.

An affidavit to ground a motion for substitution of service upon parties out of the jurisdiction, should state the grounds of the belief of the deponent that the parties are resident out of the jurisdiction. *Lessee Trumbal v. Ejector*, 5 Ir. L. Rep. 358, Q. B.

Service of a *cupias ad respondendum* will be substituted on the Irish agent of an English Insurance Company, in those cases only in which the action is brought upon a policy of insurance. *Eiffe v. Caledonian Insurance Company*, 5 Ir. L. Rep. 38, Ex.

Where the members of a mining company were resident out of the jurisdiction, service was allowed to be substituted on the officer who superintended the mines, and paid the workmen. *Roberts v. Cornish*, 5 Ir. L. Rep. 539, Q. B.

The court has authority, under 43 G. 3, c. 58, to order service of process to be substituted on a defendant resident out of the jurisdiction; and it is a question of discretion, depending on the particular circumstances of each case, whether the court will make such order. *Phelan v. Johnson*, 7 Ir. L. Rep. 527, Ex.

Service on clerk of board of guardians is good service on the guardians, if made either immediately before, or at a meeting of the board of guardians. *Poor Law Commissioners v. Cootehill Union*, 8 Ir. L. Rep. 128, Q. B.

This court will not substitute service of a *cupias* on the attorney of a defendant resident out of the jurisdiction, unless a suit be actually pending in this court to which he is a party. *Murphy v. Crewsdon*, 8 Ir. L. Rep. 161, Q. B.

In applications of this nature the practice is for the party to move for an order to substitute, and it is irregular to effect service, and then move to have it good. *Ib.*

Service of process on a lunatic substituted, by serving the manager of the asylum in which he was confined. *Wilmot v. Marmion*, 8 Ir. L. Rep. 224, Q. B.

In an action of covenant against T. H., and his son T. G. H., as co-covenantors in a mortgage deed, a writ of *capias ad respondendum* was served upon the son, and at the same time a copy left with him for his father, who was then out of the jurisdiction, and a copy was also left at the residence of the latter. T. H. shortly after proposed to the plaintiff's attorney an arrangement of the debt, and admitted the service of the writ upon his son. The court refused to hold the above service good service of T. H., or to grant an order to substitute service on him, by serving his attorney in a pending equity suit. *Fowler v. Hemsworth*, 10 Ir. L. Rep. 77, Ex.

The court will substitute service on the agent of an English Insurance company, resident in Dublin. *O'Brien v. —*, 10 Ir. L. Rep. 183, Ex.

Service upon one of two co-partners and co-defendant's deemed good service upon the other, who was absent in England. *Heydon v. Hammond*, 10 Ir. L. Rep. 268, C. P.

The court will substitute service of process on the solicitor of a defendant residing out of the jurisdiction, though the suit in which he is engaged is not in the same court. *Le Compte v. Scott*, Bl. D. & O. 97, Ex.

Service of process will be substituted on the law and land agent of a person resident out of the jurisdiction, the agent having a power of attorney to surrender the lease upon which the action was brought. *Byrne v. Callaghan*, Bl. D. & O. 184, C. P.

The court will not in general direct that service already had of a *capias* be deemed good, and if such an order be improperly obtained, the subsequent proceedings may be set aside on motion. The application should be for liberty to substitute. *Tilly v. Cheyne*, Bl. D. & O. 190, Q. B.

The court will substitute service on a partner within the jurisdiction, it appearing that the contract was entered into with him, and that the absent partner was either avoiding service or lunatic. — *v. M'Entire*, Bl. D. & O. 225, C. P.

The court will substitute service of process on an attorney to whom the defendant has referred, though respecting a different matter. *Ball v. Helsham*, Bl. D. & O. 263, Ex.

When lands were by deed conveyed to a trustee resident in England, on certain trusts, and amongst others to receive the rents thereof, and out of the said rents to pay the head-rents, payable out of one of the denominations of land comprised in that deed, called East Clonkilty, and by that deed power was given to the trustee to appoint a law and land agent in this country for the purpose of carrying out the trusts of the said deed, and of paying the said rents. The court substituted service of the *capias* on the land and law agent. *Mandeville v. Eyre*, 1 Ir. Jur. 269, Ex.

In case for libel against three defendants, two of whom resided in England and one here, the agent of the other two, the court refused to substitute service on the defendants out of the jurisdiction by a service upon them, and on their agent, the co-defendant, in this country. *Waterhouse v. Hatfield*, 9 Ir. L. Rep. 38, Ex.

In an action upon a policy of assurance effected

in Ireland with an English company, the policy containing a proviso, that the trustees of the company shall be answerable only within the jurisdiction of the English courts for the sum assured, the court will not make an order to substitute service of the process upon the agent resident in Ireland. *Lynskey v. Asylum Life Assurance Company*, 9 Ir. L. Rep. 299, Ex.

III.—APPEARANCE.

The court will refuse to receive bail for a defendant in custody, until he enters an appearance for his co-defendant out of the jurisdiction. *Williams v. Ansell*, 1 Ir. L. Rep. 277, Ex.

Where a defendant was arrested under a writ, and gave an undertaking to appear on the day of the ensuing term, or in default thereof judgment might be marked against him. The defendant not having appeared, the Court granted order *nisi* to the plaintiff for liberty to enter a parliamentary appearance for the defendant. *Radford v. Bustard*, 2 Ir. L. Rep. 162, Q. B.

Process against husband and wife, a separate appearance entered for the latter was set aside with costs, to be paid by the attorney who entered it. *Poe v. Jones and Wife*, 2 Ir. L. Rep. 374, Ex.

A plaintiff is entitled to enter a parliamentary appearance for a defendant, even though an appearance had been entered by the defendant at the time, unless notice of such appearance be served in pursuance of the 103d rule of the Court. *Dunn v. Brittan*, 4 Ir. L. Rep. 399, Q. B.

A parliamentary appearance in the name of an infant, was set aside for irregularity. *Scott v. Magee*, 5 Ir. L. Rep. 484.

In an action against husband and wife for a personal tort committed by the wife, who was living apart from her husband, a joint appearance must be entered. *White v. Seaver*, 6 Ir. L. Rep. 465, Q. B.

IV. PRACTICE AS TO PLEADINGS.

Declaration.—Where three defendants were included in the one common law subpoena, and a joint appearance was entered for two of them, upon which separate declarations were filed against each. Held that such declarations were regular. *Leause v. Stokes*, 2 Ir. L. Rep. 109, Ex.

Where the last day for entering an appearance was the last day for filing declarations, and the appearance was entered before twelve o'clock, on the following morning the Court allowed the plaintiff to file his declaration as of the preceding day. *Jackson v. Cottingham*, 3 Ir. L. Rep. 10, Q. B.

By the practice of the office, declarations are allowed to be filed up to twelve o'clock on the day succeeding the last day for filing declarations. *Id.*

By the 27th general rule, a cause is out of Court, unless a declaration be filed within the year, after the return of the process. *Rorke v. M'Carthy*, 6 Ir. L. Rep. 29, Ex.

A declaration, by the bye must be filed in term, and a copy served on the opposite party in the term in which it was filed. *Hunt v. Lane*, 7 Ir. L. Rep. 56, Q. B.

The practice of filing declarations, by the bye considered. *Souhey v. Mogan*, 10 Ir. L. Rep. 250, P.

Where a declaration in chief was filed in Hilary term, and an appearance entered in that term, the plaintiff declared against the defendant on 3rd of April, and served a copy of the declaration on that day. Held, that the proceedings were perfectly regular according to the practice of the court, and that 52nd general rule does not at all alter that practice. *Story v. Hassard*, 10 Ir. L. p. 547.

Strangers to the writ may declare, by the bye before a declaration in chief. *Ball and others v. Cox*, D. & O. 28, Q. B.

In a declaration, by the bye, the plaintiff in the original action is entitled to declare both in the term of the appearance, and in the next term; but a stranger can only declare in the term of the appearance. *Story v. Hassard*, Bl. D. & O. 176, Q. B. A declaration, by the bye, must be filed in term.

A declaration may be filed the day after the year is expired, if the last day be Sunday. *Blake v. Davis*, Bl. D. & O. 114, C. P.

Where the last day for entering an appearance was the first of June, which was also the last day for filing the declaration, so as to have judgment or plea of Trinity Term, and notice of appearance was served on the following day; in consequence of which, the plaintiff lost his opportunity of declaring in time. The court granted liberty to the plaintiff to file a declaration, and the rules to plead as of the first of June, and the costs of the motion. *Broadbent v. Potter*, 1 Ir. Jur. 264, Ex.

If a prisoner be in the custody of the sheriff on a writ of habeas corpus for two terms, without any declaration having been filed against him, he is not entitled to be discharged from custody, under the 8th of Anne c. 9, 1r. The defendant may, at any time within two terms after his arrest, put the usual two-day rule on the plaintiff, to declare against him; but if he suffer two terms to pass without serving such rule, he must have himself removed by *habeas corpus* into the custody of the marshal before he can rule the plaintiff to declare. *O'Donnell v. Sweeney*, 1 Ir. L. Rep. 239, Ex. [Note.—A different practice prevails in England.]

Particulars of demand.—When the plaintiff does not furnish a bill of particulars, the defendant may move at once for them, without making any application to the plaintiff, and he will be entitled to the costs of the motion. *Earl O'Neil v. Orr*, 2 Ir. L. Rep. 287, Q. B.

The plaintiff having, in his bill of particulars, referred the defendant to an account previously furnished, and not having sworn to the probable length of the said account, or to the particular time of the service of it, the court directed him to furnish a full account in his bill of particulars. *Steele v. Leadbetter*, 3 Ir. L. Rep. 376, C. P.

After plea a special case must be made for the delivery of a bill of particulars; an affidavit that they are necessary for the defence is not sufficient. *Blackwood v. Jones*, 4 Ir. L. Rep. 328, C. P.

A bill of particulars for money lent, without spe-

cifying any date, is insufficient. *Ferguson v. Hassard*, 5 Ir. L. Rep. 178, C. P.

But a defendant cannot require the plaintiff to specify in his bill of particulars, under what voucher or document (if any) he claimed with the dates and particulars thereof. *Id.*

A plaintiff omitted to file a bill of particulars with his declaration; but on being served with a notice of motion on the same day, to compel him to furnish it, paying the costs incurred, forwarded it before six o'clock on the same evening, with an offer to pay the costs incurred up to that time. Held, that he was justified in refusing to sign a consent to pay a taxed bill of costs of the motion; and on the defendant moving the original motion to compel him, it was refused with costs. *Hughes v. Fitzgerald*, 6 Ir. L. Rep. 114, C. P.

The plaintiff in an action of covenant, was ordered to furnish a particular of the breaches on which he intended to rely, in consequence of the generality of the breach stated in the declaration. *Sparkes v. Blacquiere*, 6 Ir. L. Rep. 126, C. P.

A plaintiff in trespass was ordered to furnish a bill of particulars of the time when, and the place where the particular acts of trespass complained of were committed, specifying the boundaries by a map. *Larkin v. Lauder*, 7 Ir. L. Rep. 227, C. P.

In cases of undoubted mistake, the court will amend the particulars of demand, without prejudice to the rules to plead. *Scully v. Scully*, Bl. D. & O. 285, Ex.

In action by a stock-broker, for the balance of his account, the particulars of demand need not state the names of the parties who purchased shares, though defendant swear such information is necessary for his defence. *Bacon v. Greer*, Bl. D. & O. 92, Q. B.

In order to entitle the defendant to his costs of demanding further particulars, notice of the irregularity should be given to the plaintiff. —v.—, Bl. D. & O. 99, Ex.

The court will compel the plaintiff to furnish a bill of particulars in an action of covenant, when the breaches alleged are numerous, and of a general character. *Wildridge v. Clarke*, 1 Ir. Jur. 151, C. P.

Rules to plead, and motions for further time.—A motion for time to plead must be upon notice. *Lewis v. Tisdall*, 3 Ir. L. Rep. 39, Ex.

Where the time for pleading has expired, but judgment is not marked, the court will not grant further time to plead in the absence of the plaintiff; but they will grant liberty to serve a notice. *Dancer v. Kelly*, 3 Ir. L. Rep. 32, C. P.

When, after the expiration of the four-day rule to plead—but before judgment has been marked—the defendant applied for time to plead, and obtained leave to serve a notice on the opposite party; after which the plaintiff's attorney marked judgment before the notice had been served upon him, although he had been verbally apprised of the order. The court ordered the judgment to be set aside with costs, and enlarged the time to plead. *Dancer v. Kelly*, 3 Ir. L. Rep. 64, C. P.

A rule to plead was set aside as irregular, having been entered as of a day prior to that on which no-

tice of the filing of the declaration was served. *Anonymous*, 3 Ir. L. Rep. 204, Q. B.

Application for time to plead, after judgment had been marked for want of a plea pending a consent served for time and which offered to plead substantially issuable pleas, was granted on the terms of defendant's paying all the costs incurred, and the costs of the motion. *Adams v. Nerney*, 3 Ir. L. Rep. 284, C. P.

The court will not give time to plead, unless notice of the motion has been given; and notice served the day before is sufficient. *Robinson v. Julian*, 4 Ir. L. Rep. 4, C. P.

The rule to plead was set aside for irregularity, having been entered prior to the day on which notice of filing the declaration was served. *Governor of Bank of Ireland v. Brown*, 5 Ir. L. Rep. 351, Q. B.

The court will, without notice, extend the time for pleading where no trial will be lost. *Osborne v. Power*, Bl. D. & O. 285, Ex.

Under particular circumstances the court will give time to rejoin, though notice of the application be not given. *Dickson v. Gerty*, 2 Ir. L. Rep. 209, C. P.

Pleas, demurrers, &c.—Leave was given to withdraw a demurrer to a plea in replevin after argument; demurrers to four other pleas having been held good, and issue joined on another. *Reeves v. Morris*, 3 Ir. L. Rep. 3, Q. B.

The declaration was filed on the 1st of May, against an attorney of the Exchequer, as if he were an attorney of the Queen's Bench, when, in fact, he was not so; and an amended copy of the same was served on him on the 19th of May, and interlocutory judgment was signed on the 2nd of June. Held, that a cautionary notice on the part of the defendant, on the 4th of June, was too late to ground a motion to set aside the proceedings on the ground of irregularity. *Stewart v. Chadwick*, 3 Ir. L. Rep. 5, Q. B.

Where one of several avowries cannot be amended on the file, it will be necessary to apply to the court for liberty to file a new engrossment of all the avowries to be filed. *Dancer v. Kelly*, 4 Ir. L. Rep. 3, C. P.

The defendant having pleaded a recovery in the Assistant Barristers' Court, *prout patet per recordum*, the plaintiff replied *nul tiel record*, concluding with a verification, and giving a day to the defendant to bring in the record, and afterwards set down the cause for argument. Held, that the plaintiff was irregular in not having given the defendant an opportunity of rejoining. *Fitzimon v. Lyons*, 4 Ir. L. Rep. 222, C. P.

In all cases of pleas of record or demurrer, counsel must certify that the plea or demurrer is tenable, and such certificate will not be considered by the court as a mere matter of form. *M'Nevin v. Mason*, 5 Ir. L. Rep. 89, C. P.

After a demurrer to a declaration has been overruled, the defendant will not be let in to plead, without a special application, grounded on an affidavit of merits. *Lindsay v. Parkinson*, 5 Ir. L. Rep. 124, Ex.

The plaintiff having filed two declarations, in the

same term, against the defendant, who appeared in the second action alone, and filed a demurrer to the declaration in the first. The court held the appearance sufficient, and refused to set aside the demurrer as having been filed without appearance. *Day v. Wright*, 5 Ir. L. Rep. 179, C. P.

Where, on argument of a demurrer, the objections have not been noted in the judges' books, in pursuance of the 134th rule of the court, the party obtaining judgment on such objections will not be allowed his costs. *Cochrane v. Fitzpatrick*, 8 Ir. L. Rep. 187, Q. B.

All grounds of general demurrer should be noted in the judges' books. *Birch v. Blennerhassett*, 8 Ir. L. Rep. 394, Q. B.

A demurrer will not be set aside on motion as being frivolous; but if it appear to be so, the court will set it down for immediate argument. *Barrett v. Daly*, 8 Ir. L. Rep. 518, Q. B.

Where the plaintiff's attorney is prevented from setting down a demurrer to his pleading in time to be argued in the term, by the promises of the defendant's attorney to withdraw the demurrer as frivolous, upon certain terms with which he does not comply, the court will order the demurrer to be put in the list for argument. *Gower v. Brett*, 1 Ir. L. Rep. 8, Q. B.

In an action of libel, the defendant having pleaded the general issue, and the special plea of an apology under the 6 & 7 Vic. c. 96, s. 2, the court refused to allow him to withdraw the latter plea, the plaintiff having sworn that he would be prejudiced thereby at the trial. *Sullivan v. Lenihan*, 7 Ir. L. Rep. 463, C. P.

In an action by the assignees of a bankrupt against sheriff for selling a bankrupt's goods, the defendant was allowed to withdraw his plea for the purpose of serving a notice to dispute the act of bankruptcy. *Thompson v. Waller*, 10 Ir. L. Rep. 135, S. C. Bl. D. & O. 27, Q. B.

Pleas in Abatement.—A plea by an officer of the Court of Chancery, insisting on his privilege to be sued in that court, must be verified by affidavit; and such affidavit must be in positive terms, and not upon belief merely. *Levy v. Fenton*, 5 Ir. L. Rep. 129, Ex.

The defendant, an attorney, who had not taken out license for several years, being served with process, appeared by attorney, and pleaded, in abatement, his privilege to be sued by bill without process. The court refused a motion to set aside the plea, leaving the plaintiff to his replication. *Fury v. Ryan*, 6 Ir. L. Rep. 518, Ex.

Where there is an insufficient plea in abatement the court will give the plaintiff liberty to mark judgment, though the time for pleading has not expired. *Brett v. Taylor*, Bl. D. & O. 35, Ex.

An affidavit to verify a plea in abatement is sufficient, though the names of the defendants be not set out, if it appear by necessary implication that the words in the affidavit "defendants in the suit" mean A. and B., the real defendants. *Sturke v. Hoyte*, Bl. D. & O. 140, Q. B.

Pleas of Confession.—A defendant after issue joined on a plea of payment, and notice of trial, filed a plea of confession, with a stay of execution

yond the time it might have been had, if the trial had taken place, without withdrawing his plea of judgment. The court set aside both pleas, and allowed the plaintiff to mark judgment. *Moffit v. Humphreys*, 5 Ir. L. Rep. 312, C. P.

The practice of requiring pleas of confession to be given contemporaneously with securities by bills notes is improper. *Sawyer v. Maguire*, 7 Ir. L. Rep. 373, Ex.

A plea of confession given by an attorney before trial brought is not invalid, and a judgment entered thereon will not be set aside. *Ib.*

Quære, would it be otherwise in the case of an ordinary individual. *Ib.*

To prevent proceedings being taken, the defendant's attorney undertook to sign a plea of confession for the demand, with the usual stay of execution. The plaintiff's attorney thereupon issued a writ against the defendant, sending a copy to the defendant's attorney, requiring him to enter an appearance thereto for the defendant. The defendant's attorney refusing to do so, but still offering to sign the plea of confession, a motion to enforce the writ of an appearance to the writ was refused with costs. *Green v. Bingham*, 8 Ir. L. Rep. 70, Ex.

Where the defendant inserts a stay of execution in his plea of confession, without the consent of the plaintiff, the application should be to set aside the plea, and the affidavit should negative the fact of consent by the plaintiff. *Moore v. Mockler*, Bl. D. & O. 31, Ex.

V. STAYING PROCEEDINGS.

The defendant may enter a rule to stay proceedings until the costs of not going to trial, pursuant to notice, be paid, a trial having been lost by the default of the plaintiff in not delivering the list of names to the sheriff in sufficient time to enable him to summon the jurors six days before the assizes. *Gillespie v. Cumming*, 2 Ir. L. Rep. 28, Ex.

On a motion to stay proceedings in an action against the bail, on the ground of delay in the plaintiff's proceedings, and that the principal had in the mean time become insolvent, the courts require that the affidavit by the bail should deny collusion with the original defendant. *Smith v. Callan*, 2 Ir. L. Rep. 180, Q. B.

Seven actions of trespass were brought against the same defendant, by different plaintiffs, for the taking and detention of their goods until payment of an alleged claim for tolls, proceedings were ordered to be stayed, (upon terms,) in six of the causes, and abide the event of the seventh. *McDonnell v. Franks*, 3 Ir. L. Rep. 161, Ex.

A motion to stay proceedings in Ireland in an action on a judgment obtained in England, pending a writ of error there, cannot be sustained, unless bail in error have been put in and perfected. *Sims v. Thomas*, 3 Ir. L. Rep. 415, Ex.

Where two actions had been commenced for the same cause of action, and a rule to discontinue entered in one, proceedings will be stayed in the other, until the costs of the rule to discontinue be paid. *Considine v. Mooney*, 5 Ir. L. Rep. 485, Q. B.

Where in an action of trespass for diverting a water-course, the plaintiff was non-suited, proceedings were stayed in a second action brought for the same cause, until the costs of the non-suit were paid. *Horgan v. Quinlan*, 5 Ir. L. Rep. 590, Q. B.

The court stayed proceedings in an ejectment, until the costs of a former one, brought in the Queen's Bench by the assignor of the lessor of the plaintiff, were paid, and the costs of the motion, though the tenant taking defence was discharged as an insolvent. *Cardale v. O'Connell*, 6 Ir. L. Rep. 208, C. P.

A defendant entered the usual rule to stay proceedings, until the costs of not proceeding to trial, pursuant to notice, should have been paid. Held, that defendant by applying for a special jury, and having served notice for the admission of documents before the costs were taxed, waived the benefits of the rule. *Deering v. Palmer*, 6 Ir. L. Rep. 209, C. P.

Proceedings in ejectment were stayed until the costs in two prior ejectments in the Exchequer were paid, though the plaintiff had been allowed to proceed in the second without an order to pay the costs of the first, and the second was out of court. *Duhigg v. Duhigg*, 6 Ir. L. Rep. 212, C. P.

A motion for liberty to enter a rule to stay proceedings till the costs of not going to trial pursuant to notice, will not be granted if the side bar rule be not entered within the first four days of term, unless some fatality has occurred. *Gernon v. Gernon*, Bl. D. & O. 111, Ex.

In an action of covenant the tender of a copy of the deed for oyer is not sufficient, and proceedings will be stayed till the original be produced. *Sterne v. Mooney*, Bl. D. & O. 235, Ex.

The court postponed a case—argued on behalf of the plaintiff—upon the ground of the defendant's attorney having been suddenly summoned to London, upon the terms of the latter paying the costs of the day, and not charging them to his client. *Church v. Dalton*, 9 Ir. L. Rep. 355, C. P.

VI. SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

[*Writs and Declarations*.]—In an action against two defendants who had appeared in different terms, and the declaration had been filed as of the term in which, and on the day before, the last appearance had been entered; the court set aside the proceedings for irregularity, the plaintiff not having entered a rule for liberty to file the declaration as of the subsequent term, and having filed the declaration previous to the last appearance. *Mathers v. Coyle*, 4 Ir. L. Rep. 280, Q. B.

An attorney being sued as an executor, and having voluntarily undertaken to file a plea as an attorney, the court refused a motion to set aside the declaration for want of a writ and appearance, with costs. *Fahy v. Dillon*, 5 Ir. L. Rep. 180, C. P.

The defendant was sued by the name of W. R. Gibson, he appeared by the name of W. P. Gibson. The plaintiff declared against him by the name in the writ, and obtained judgment for want of a plea. The court refused to set it aside on

the ground of irregularity. *Lewis v. Gibson*, 8 Ir. L. Rep. 82, Ex.

The court will set aside the proceedings against a minor for irregularity, though he is fully aware of his position, and it is not in the discretion of the court to allow the proceedings to stand, and leave the defendant to his writ of error. *Green v. Copland*, Bl. D. & O. 110, Ex.

The defendants, and one A. L., on the 1st of May, 1846, were indebted to the plaintiff in £37 7s. 9d., one year's rent, payable quarterly, and the tithe rent charge due to that day; on the 2nd of June following a *capias* issued, returnable the 6th, endorsed for £100 debt, and £3 10s. costs; on the 31st of October the plaintiff's attorney, no steps having been taken in the meanwhile, refused to receive less than a year and a quarter's rent, and demanded the costs of drawing and engrossing a declaration. The defendants, on the 2nd of November, lodged the year's rent in bank to the credit of the plaintiff, and shewed the receipt to his attorney, who, notwithstanding, entered a parliamentary appearance, and proceeded to execution and sale. The court set aside the parliamentary appearance, and all subsequent proceedings, with costs. *Bent v. Livingstons*, 10 Ir. L. Rep. 99, Ex.

By the notice at the foot of the copy of a writ of *capias ad respondendum* the defendant was directed to appear at the return thereof, "the day of May next." The plaintiff having notwithstanding notice of the irregularity, entered a parliamentary appearance, and proceeded thereon to judgment. The court set aside the appearance, and all subsequent proceedings. *Birch v. Shaw*, 10 Ir. L. Rep. 107, Ex.

The defendant, having been served with the writ when going abroad, had forgotten to instruct his attorney. After a writ of inquiry sped, and damages assessed, the court set aside the parliamentary appearance, and subsequent proceedings, upon lodgment of the amount in court, payment of costs, and an affidavit of merits. *Quin v. Arthur*, 10 Ir. L. Rep. 446, Ex.

A declaration was entitled as of a term subsequent to the term of the defendant's appearance. The court set aside the declaration with costs, and refused to allow it to be amended. *Hinds v. Shannon*, 10 Ir. L. Rep. 458, Ex.

Notice of a motion to set aside proceedings ought to state on whose behalf the motion is made. *Crawford v. M'Donnell*, 4 Ir. L. Rep. 104, Q. B.

A writ in which there is no plaintiff's name is a nullity, on which an appearance cannot be entered. *Anonymous*, Bl. D. & O. 50, C. P.

A writ directed to a county of a city, not existing, is a nullity. *Vance M'Cormick*, Bl. D. & O. 42, Ex.

The city of Londonderry is a part of the county. *Id.*

The absence of a date at the foot of a writ is an irregularity, and lapse of time does not waive it, when notice of it has been given at the earliest opportunity. *Keat v. Shaw*, Bl. B. D. & O. 149, Ex.

An erroneous date in the parliamentary notice at foot of the writ, is not such an irregularity as will vitiate subsequent proceedings. *Anonymous*, Bl. D. & O. 183, C. P.

Where a writ has been served without any endorsement, stating the amount of debt and costs, the proceedings will be set aside, although notice has been served by plaintiff's attorney stating the amount of debt and costs. *Warren v.* —, Bl. D. & O. 249, Q. B.

A notice of motion to set aside proceedings for irregularity must set forth the irregularity complained of. *Wade v Dowling*, Bl. D. & O. 249, Q. B.

A notice of motion to set aside proceedings for irregularity should set out the irregularity complained of; but if it appear, from the affidavit made to oppose the motion, that the other side knew what the irregularity was, costs will not be given. *Williams v. Barton*, Bl. D. & O. 253.

Where a trader applies to set aside a judgment as irregular, and contrary to good faith, the court, before granting a conditional order, will put him under terms to commit no voluntary act of bankruptcy. *M'Evoy v. Reid*, Bl. D. & O. 261, Ex.

Proceedings were set aside, upon the ground of an alteration in the direction of the writ after it had sealed and issued. *Couper v. Kerby*, 5 Ir. L. Rep. 254, Ex.

A party who seeks to set aside proceedings on the ground of non-service of the process, should apply to the court for relief immediately after notice of the proceedings, and before additional expense has been incurred by the opposite party. *Lewis v. Berry*, 6 Ir. L. Rep. 45, Ex.

When the defendant swore he had not been served with process, and had a good defence, the court, on a motion to set aside the judgment and proceedings, ordered the amount claimed to be lodged in court, that the judgment be set aside, and that the defendant should plead forthwith, and take short notice of trial. *Hennessey v. Wolf*, 6 Ir. L. Rep. 205, C. P.

The process server having been convicted of perjury in the affidavit of service, the court set aside the parliamentary appearance with costs, it appearing that the debt was paid. *Murphy v. Crofts*, 6 Ir. L. Rep. 334, Ex.

A plea was filed on the 4th of May. The defendant, on the 6th of June following, served a notice of motion to set it aside as frivolous, and filed for delay. The court refused the motion, on the ground of laches. *Reynolds v. Lopdell*, 6 Ir. L. 468, C. P.

In an action by the administratrix of A., against the administrator of B., the declaration stated, that B., in his lifetime, was indebted to A., in his lifetime, in six separate sums of £60, for goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and on an account stated, laying the promise by B. to A. After the words, "and whereas also," the declaration averred, that B., in his lifetime, was indebted to A. in two other sums of £60, for goods sold and delivered, and money lent, stating a promise from the defendant to the plaintiff, in their representative capacities, to pay the sums in this count mentioned." After a second "And whereas also," the declaration averred, that the defendant, as administrator, was indebted to the plaintiff as administratrix, in a further sum of £60, upon an

count stated, with a promise by the defendant to pay the plaintiffs the monies "in the said last mentioned counts" specified. Plea, treating the declaration as containing but three counts. Whereon plaintiff entered a *nolle prosequi* as to the three counts to which the defendant pleaded, and marked judgment by default as to the remainder. Held, that the declaration contained but three counts, and the plaintiff, by his *nolle prosequi*, having put the case out of court, the judgment, and subsequent proceedings, were set aside. *Wade v. Croker*, 6 Ir. L. Rep. 514, Ex. [See *Morrissey v. Walsh*, 9 Ir. L. Rep. 293; *Morse v. James*, 11 M. & W. 831; *McGregor v. Graves*, 18 L. Jour., N. S. 109, Ex.]

Where an attorney's name is entered in the registry book of the residences of attorneys practising in the court, though not an attorney of the court, and though the entry was made without his sanction or knowledge by a former partner of his, the court refused to set aside proceedings taken against him as an attorney of the court. *Knaggs v. French*, 5 Ir. L. Rep. 331, C. P.

The defendant having prosecuted under an order of the court, and convicted the process server of perjury, the court set aside the parliamentary appearance and all subsequent proceedings with costs, and the costs of obtaining the order to take the affidavit off the file. *Fahie v. Nash*, 4 Ir. L. Rep. 304, C. P.

Where there is no cause in court and an affidavit without a stamp is filed, entitled as if in a cause in court, and a fiat obtained thereon, the proceedings will be set aside. *Plunket v. Plunket*, 4 Ir. L. Rep. 366, Q. B.

An affidavit in support of a motion to set aside the service of a writ was held to be defective in not stating the particular place in which the defendant was served, and for not negating that he was served within the jurisdiction. *Muguire v. Scott*, 2 Ir. L. Rep. 224, Ex.

Semble, the Christian and surname of the attorney for the plaintiff should be signed in full at the foot of the English notice attached to the *capias*. *Coffey v. Barrett*, 4 Ir. L. Rep. 81, Q. B.

The copy of a serviceable *capias* must not vary from the original either in sound or sense. *Spence v. Finn*, 4 Ir. L. Rep. 476, Ex.

Pleas and Demurrers.—In trespass for mesne profits, where there was a plea of the general issue, two pleas of *liberum tenementum*, and a plea of no property in the plaintiff, the court will order the latter to be taken off the file, being unnecessary. *Jack v. Swift*, 3 Ir. L. Rep. 7, Q. B.

Where an information in the nature of a *quo warranto* is brought in the name of the coroner at the relation of a private individual, to try the right of the defendant to hold the office of treasurer of the city of Dublin. *Quære*, can the defendant plead several pleas? *Reg. v. Darley*, 3 Ir. L. Rep. 334, Q. B.

Where a defendant pleads several pleas, in a case in which he is only entitled to plead one plea, can the objection be raised by demurrer, or is a motion to set them aside, as irregular, the proper course? *Ib.*

The defendant having demurred to the declaration, for not being properly entitled, the court would

not set aside the demurrer as frivolous. *Alcock v. Holland*, 3 Ir. L. Rep. 366, C. P.

The courts on some occasions have exercised a summary jurisdiction, in ordering objectionable pleas to be struck out; but I am not disposed to carry those decisions farther. *Sims v. Thomas*, 3 Ir. L. Rep. 420, Ex. [Per Brady, C. B.]

A defendant in an action of debt pleaded by mistake *non assumpsit* for *nil debet*. The plaintiff marked judgment for want of a plea, and refused on notice and consent to set it aside without costs. The court set aside the judgment with costs against the plaintiff. *Boileau v. Homan*, 4 Ir. L. Rep. 118, C. P.

Where a party under terms to plead issuably, pleads an informal plea, upon which the opposite party cannot safely take issue, the court will direct it to be taken off the file with costs. *Graydon v. Kernan*, 4 Ir. L. Rep. 121, C. P.

In an action of assumpsit containing a count upon a bill, and the money counts, the defendant demurred to the whole declaration, assigning special causes of demurrer to the first count, and pleaded the general issue to the money counts. The demurrer was set aside with costs. *Warren v. Haughton*, 6 Ir. L. Rep. 26, Ex.

When a frivolous demurrer was filed on the last day of Trinity Term and a trial at the following assizes thereby lost, the court set it aside, and would not let the defendant in to plead. *Scully v. O'Brien*, 2 Ir. L. Rep. 14, Q. B.

VII. NOTICE OF TRIAL.

The 29th rule of the court, requiring a terms notice before going to trial, when the cause is three terms at issue, is not now acted on. *Condon v. Condon*, 7 Ir. L. Rep. 427, Q. B.

Plea, filed after the last day for pleading, and before judgment marked, is good, and notice of trial served—on the last day for pleading, and for serving notice of trial—before plea pleaded, is regular. *Doolan v. Dunne*, Bl. D. & O. 40, Ex.

And under similar circumstances, if there be notice of trial served, the defendant will be made to accept short notice of trial. *Byrne v. Jones*, Bl. D. & O. 40, Ex.

Notice of trial served in anticipation of a plea on the last day for pleading will be deemed sufficient, if the defendant plead issuably. *Lowry v. Robinson*, Bl. D. & O. 197, Ex.

VIII. POSTEA.

When the defendant has obtained a verdict, the plaintiff has no right to prevent him from moving on the *postea*, by lodging with the officer a sum sufficient for the payment of his costs, the defendant being entitled to have a judgment entered for him, as a protection against a future action. *Perrin v. Hodgins*, 2 Ir. L. Rep. 24, Ex.

When the jury in action of trespass, against several defendants, find, on first plea, general damages, and then apportion them between the defendants, such finding is good, and the court will treat the apportionment as surplusage. *Kelly v. Dillon*, Bl. D. & O. 267, Ex.

IX.—MOTIONS.—(See different heads.)

Generally.—A motion brought upon a notice served before the affidavits were filed, on which it is grounded, is irregular, and will not be entertained, though copies of the affidavits be served at the same time with the notice. *Anonymous*, 2 Ir. L. Rep. 169, Q. B.

The defendant is entitled, on the last day of term, to discharge the plaintiff's notice of motion with costs, it not being in the list. On any other day in term, the course would be to put it in the list, and have it discharged with costs. *Laird v. Laird*, 2 Ir. L. Rep. 210, C. P.

The court will not allow the costs of a motion to set aside proceedings, when the notice of motion does not sufficiently specify the defect upon which the motion is grounded. *Lynch v. Ejector*, 2 Ir. L. Rep. 240, Ex.

No motion can be entertained when the cause is out of court, until the expiration of a term's notice to the defendant. *Jones v. Lucy*, 3 Ir. L. Rep. 361, C. P.

The notice of motion to set aside proceedings should state on whose behalf the motion is made. *Crawford v. McDonnell*, 4 Ir. L. Rep. 104, Q. B.

An affidavit of merits made in compliance with a notice of the opposite party, though not sworn or filed until after the day on which the motion might originally have been made, may be used upon the motion. *Boileau v. Homan*, 4 Ir. L. Rep. 118, C. P.

The court will allow an affidavit to be read in support of a motion in Chamber, though not filed at the time of the service of the notice, if a copy be served with the notice. *Smith v. Blair*, 4 Ir. L. Rep. 397, Q. B. Ch.

A notice of motion should always state the grounds upon which it is to be made. *Anonymous*, 4 Ir. L. Rep. 434, Ex.

The affidavit of service of a notice of motion did not state that it had been served before six o'clock in the evening. Held, that defect was not waived by the appearance of the party served, and a cautionary notice served by him, which only specified another alleged defect in the notice. *Boileau v. Homan*, 5 Ir. L. Rep. 183, C. P.

A notice of motion founded on an affidavit "to be filed," is irregular and cannot be used. *Taylor v. White*, 5 Ir. L. Rep. 44, Ex.

The notice of motion ought not to state that it will be grounded on affidavits "to be filed." *Lewis v. Kirwan*, 5 Ir. L. Rep. 123, Ex.

Costs of a motion will not be given if the party moving omit to ask them. *Levy v. Fenton*, 5 Ir. L. Rep. 129, Ex.

A notice of motion will not be discharged till set down in the list by one or other party. *Stevens v. French*, 5 Ir. L. Rep. 244, C. P.

An objection to a notice of motion, stating it to be grounded on affidavits, "this day filed," though not filed till the following day, is waived by the opposite party filing an answering affidavit. *Cooper v. Kerby*, 5 Ir. L. Rep. 254, Ex.

Counsel should not move, unless furnished with a brief of the documents upon which the motion is founded. *Anonymous*, 6 Ir. L. Rep. 237, Ex.

A party filing an affidavit as cause against a conditional order, served no notice of a motion to show

cause; and the opposite party gave notice of a motion to make that order absolute. Held, that the party moving to make the order absolute had a right to begin. *Reg. v. Recorder of Dublin*, 6 Ir. L. Rep. 440, Q. B.

A notice of motion to set aside proceedings for irregularity should specify the irregularity. *Kirk v. Anderson*, 6 Ir. L. Rep. 467, Q. B.

Filing an answering affidavit, and appearing on the notice is no waiver of the irregularity. *Ib.*

A notice of motion is irregular if it does not state the grounds on which it is made, and a reference to an affidavit filed is not sufficient. *Larkin v. Lawder*, 7 Ir. L. Rep. 227, C. P.

A motion to extend the time for making up a bill of exceptions must be upon notice. *Russell v. Whalley*, 7 Ir. L. Rep. 492, Ex.

"When there are two notices pending at the same time, one to show cause against a rule nisi, and the other to make rule nisi absolute, unless the other party shall move his motion on or before a day to be named in said notice; and which day shall not be less than two days after the day named in the notice of showing cause; and if, after the said second notice shall become moveable, a question of precedency, as to the two motions, shall arise, that in such case the motion first brought forward is to have precedency." Q. B. 18th April, 1845.

A notice of motion should specify the grounds of the irregularity on which the proceedings are sought to be set aside. *Cator v. Flattery*, 8 Ir. L. Rep. 117, Q. B.

Taking out an attested copy of a declaration waives an irregularity in the notice of its being filed, and the rule to plead. *Cannon v. Willington*, 9 Ir. L. Rep. 138; S. C. Bl. D. & O. 47, C. P.

A notice of motion signed by an attorney, who is not the attorney upon record, for the party moving is insufficient. *Strettle v.*—10 Ir. L. Rep. 461, Ex.

The court will not, in the absence of new facts or documents, review an order made upon motion. *Lord Miltown v. Reeves*, Bl. D. & O. 273, Q. B.

By the settled practice of the court a conditional order must stand or fall upon the documents on which it has been obtained. *White v. Doolan*, 3 Ir. L. Rep. 500, Ex.

When an affidavit has been filed as cause against a conditional order, but no counsel appeared to shew cause, the court will not, without notice to the opposite party, make the conditional order absolute. *Fenton v. Motherwell*, 4 Ir. L. Rep. 353, Q. B.

Motion for Liberty to Tot.—In an action of covenant on an annuity deed, by the executor of the grantor, who had obtained judgment on demurrer, the ordinary rule for liberty to tot is the proper one. *Brien v. Lord Ponsonby*, 7 Ir. L. Rep. 422. [Pennefather, C. J., dissentiens.]

Motions for Liberty to Proceed.—The court refused to allow the plaintiff to proceed in a replevin suit, giving a term's notice, when nearly four years had elapsed since the last step was taken, though some of the goods had not been returned. *Armstrong v. Freeman*, 5 Ir. L. Rep. 174, C. P.

Liberty to proceed, giving a term's notice on a

declaration filed six years back, will be granted, unless the defendant can shew some special cause to the contrary, such as the absence or death of a material witness. *Moroney v. Danagher*, 5 Ir. L. Rep. 562, Ex.

When issue has been joined for three years, liberty to proceed, on giving a term's notice, must be applied for by motion in court upon notice. *O'Reilly v. Monaghan*, 5 Ir. L. Rep. 567, Ex.

Issue had been joined, and notice of trial served six years back, and then withdrawn at the request of the defendant then promising to settle the demand; and subsequently in two years by a letter, the court gave the plaintiff a conditional order for liberty to proceed to trial, giving a full term's notice, and serving the order on the defendant and his attorney personally, previous to the next term. *Connor v. Blake*, 6 Ir. L. Rep. 341, C. P.

The 29th rule of the court, requiring a term's notice, before going to trial, if the cause be three terms at issue, is not now acted upon. *Condon v. Condon*, 7 Ir. L. Rep. 427, Q. B.

Motion for New Trial.—The court will not grant a new trial when the damages would necessarily be nominal, and there is no title in question. *Purcell v. Nolan*, 1 Ir. L. Rep. 258, C. P.

A new trial will not be granted upon the ground that the count in the declaration was not properly framed, if it could have been correctly done. *Minneer v. O'Leary*, 1 Ir. L. Rep. 73, Q. B.

A tenant, sued for use and occupation, and who obtains a verdict by reason of the misdirection of the judge, cannot rely upon a wrongful eviction by the landlord during the tenancy, suspending the rent, as cause against a motion for a new trial. *Smyth v. Kellett*, 1 Ir. L. Rep. 43, Q. B.

When the trial is had before a Baron of the Exchequer the order for a new trial is absolute in the first instance. *Doe v. Kennedy*, 1 Ir. L. Rep. 35, Ex.

In an action against the defendant as the acceptor of three bills of exchange the plaintiff produced three witnesses, one of whom, who had but imperfect means of knowing the defendant's hand-writing, after stating his belief that two of the bills were accepted in the hand-writing of the defendant, admitted that he thought the acceptance of one of the bills more like the hand-writing of the defendant than the other; the second witness having also given general evidence as to his belief of these acceptances, gave evidence similar to that of the former witness, and added that the hand-writing of the defendant's nephew was very like that of the defendant; the third witness positively swore that neither of these bills were in the hand-writing of the defendant and that one of them was written by his brother. Upon this evidence there was a verdict for the plaintiff, the defendant not having examined any witness. Upon motion to set this verdict aside, and for a new trial upon the ground that it was had against the weight of evidence, and by surprise, and founded on affidavits denying that the defendant ever accepted those bills or authorized any person to do so, and that he was misled by observations of the plaintiff's attorney to the effect that he intended to rely solely upon a case of authority and not of actual hand-writing. Held, that this verdict was not against

the weight of evidence; but the court, without admitting the surprise, considering the unsatisfactory evidence of hand-writing and the positive swearing of the defendant, granted a new trial. *Smith v. McGonagal*, 2 Ir. L. Rep. 267, Q. B.

If a party intend to rely upon a case of surprise for the purpose of disturbing a verdict, he should bring the fact of surprise under the attention of the judge that a note of it may be taken. *Ib.*

A. declared for the disturbance of a water-course, through which he alleged he had a right to have the water of a certain ancient stream flow, "at all reasonable times." It appeared that A. was tenant from year to year to B., who had a use of this and certain other water from the same stream for more than twenty years, using one at one time, and another at another time, as he pleased; and under whom, until the interest of B was evicted, the plaintiff had been enjoying the benefit of the stream. Since the eviction the tenant had been holding as tenant from year to year to the head landlord, as he previously held from B; a verdict being found for the plaintiff. Held, on a motion for a new trial, or for a non suit, on the ground of a variance between the right declared on, and proved, that there was no variance. *Hough v. Kennedy*, 2 Ir. L. Rep. 182, Q. B.

Water alone cannot be demised without deed; but may be so in conjunction with land. *Ib.*

Where a verdict was had subject to objections, and the court were of opinion that one of the questions, which the judge at *nisi prius* refused to leave to the jury, should have been so left. A new trial was refused, as it appeared the result of a second trial would be similar. *Kennedy v. Hayes*, 2 Ir. L. Rep. 186, Q. B.

The Judge at *nisi prius* has no power to reserve leave to the party against whom the verdict is given, to move to set aside that verdict, and have a verdict entered for himself without the consent of the opposite party. *Hely v. Hicks*, 3 Ir. L. Rep. 92, Ex.

The court will not disturb a verdict, though the conclusion the jury came to was not such as the members of the court might individually have arrived at. *Rooney v. White*, 3 Ir. L. Rep. 153, Ex.

A trial was had by consent upon several judgments of the same date, and between the same parties, and the plaintiff attempted to rebut certain payments, given in evidence by the defendant, by the production of two other judgments against the same party, and which were vested in the plaintiff in a different right from the four preceding, and were the subject of two other distinct actions. The court set aside a verdict for the plaintiff, on payment of costs by the defendant. *Daly v. Kelly*, 3 Ir. L. Rep. 174, C. P.

In an ejectment on the title there was an issue comprehending two questions, viz., a part and parcel question, and of the existence of a *cestui que vie*. The attention of the judge was not directed to the 7 W. 3. c. 8. and the jury found for the defendant, without stating, or being asked by counsel or judge, on which of the grounds the verdict was found. The court set aside the verdict, and directed a new trial. *Coote v. O'Fallon*, 3 Ir. L. Rep. 265, C. P.

Held, that the evidence as to M. H. being the principal debtor, was some proof of the allegation in

the declaration of a pre-existing separate debt due by M. H. to the defendant; also that the judgment was some evidence of the bond and warrant, and therefore, the court could not set aside the verdict on the ground of the inducement not being proved. *Honan v. Ryan*, 6 Ir. L. Rep. 106, C. P.

The expression by a judge, of his opinion as to the facts of the case, without submitting them exclusively to the jury, is no ground for setting aside a verdict for mis-direction of the judge. *Reg. v. O'Connell*, 7 Ir. L. Rep. 261, Q. B.

On a motion for a new trial on the ground, that an affidavit had been improperly rejected in evidence the court, if it see that the evidence so rejected will not affect the verdict, will not grant a new trial. *White v. Dowling*, 8 Ir. L. Rep. 128, Q. B.

The court, in setting aside a verdict on the ground of the non-production of a written agreement, will put the defendant under the terms, to produce the document to enable the plaintiff to have it stamped. *Thunder v. Warren*, 8 Ir. L. Rep. 181, Ex.

When an order *nisi* had been made, setting aside a verdict generally, and no mention made of the costs of the trial, the party succeeding in the second trial is entitled to the costs of the former. *Rush v. Purcell*, 8 Ir. L. Rep. 379, Q. B.

Notice of motion to set aside verdicts, and for new trials, must, according to the practice of this court, be served within the first two days, and moved on within the first four days. The court will not relax the stringency of this practice, though the party seeking the dispensation, has been prevented from serving notice by a fatality, unless he disclose to the court a case of merits. *Blake v. Vaden*, 10 Ir. L. Rep. 1, C. P.

The court, prior to the motion, will not allow additional affidavits, in answer to affidavits filed to resist the application, to be filed by the party applying for a new trial. *Kelly v. Dolphin*, 2 Ir. L. Rep. 78, C. P.

Where a cause had been tried by a special jury, and upon a bill of exceptions a *venire de novo* was awarded, and the defendant brought down the cause by proviso, it appeared that upon the latter occasion the *distringas* was in the common form, except that the words "by proviso" were written under the officer's name, and it was objected at the trial; first, that the *distringas* was informal and irregular; and secondly, that the special jury which had been struck on the former trial was the proper one to try the case. The court refused to disturb the verdict had for the defendant. *Smith v. Nangle*, 2 Ir. L. Rep. 296, Q. B.

The court will not, after refusing an application for time to make up a bill of exceptions, grant a conditional order to set aside the verdict. *Bridgford v. Dublin and Kingstown Railway Company*, 3 Ir. L. Rep. 19, C. P.

The court will not postpone the entry of judgment on the *postea*, in a trial of an ejectment, and a verdict had for the defendant, until after the trial of witnesses of the defendant who were indicted for perjury; the motion being a new trial motion, and moveable during the first four days of term. *Rogers v. E. of Arran*, 3 Ir. L. Rep. 25, C. P.

If an application to set aside a verdict be made

and refused, it is contrary to the rule of court to grant any other motion that is substantially the same. *Ib.*

If the judge at *Nisi Prius* entertain a doubt, and wish to have the question reserved for the opinion of the court, costs will not in general be given against the unsuccessful party. *Aliter*, if the question be reserved by the party seeking the advantage of them. *Barrett v. Hyndman*, 3 Ir. L. Rep. 109, Q. B. [See Acc., *Daly v. Colbert*, *Ib.* 355.]

On a motion for a new trial, on the ground of excessive damages, the certificate stated that the damages were excessive, for the reasons, in the affidavit of the defendant, stated. Held, that this certificate was defective, in omitting to state the facts from which it appeared that the damages were excessive. *Doe v. Power*, 3 Ir. L. Rep. 438, Ex.

The court will not give leave to serve notice of motion for a new trial on the last of the four days, though an affidavit be made of the party being ignorant of the record being in this court, or of the rule of the court. *Coppinger v. O'Dell*, 4 Ir. L. Rep. 297, C. P.

If a defendant in ejectment have judgment against him for non-appearance to confess lease, entry, and ouster, the court will not grant a new trial on any terms, unless it clearly appear that the defendant has a just and legal defence to the action. *McDonald v. Lowton*, 4 Ir. L. Rep. 303, C. P.

A notice of motion for a new trial, which refers to the certificate of counsel for the grounds of the motion, is informal. *Anonymous*, 4 Ir. L. Rep. 434, Ex.

A motion to increase or reduce damages is in the nature of a new trial motion, and subject to the same rule; and notice of it must be given within the first four days of term. *Taylor v. White*, 5 Ir. L. Rep. 44, Ex.

A record was tried a second time in mistake, pending a notice for a new trial; the parties on both sides appearing, and producing their evidence, and a verdict given against the party who obtained the first verdict, if the court are satisfied there has been a fair investigation, they will not disturb it. *Knos v. Lord Lucan*, 5 Ir. L. Rep. 96, C. P.

To set a verdict for surprise, the party applying should state specifically the evidence he could have produced. *Ib.*

Semble, if the facts appear upon the record, and are proved, the judge should not non-suit. The proper course is to move to arrest the judgment, or for judgment *non obstante veredicto*. *Keenan v. Phillips*, 5 Ir. L. Rep. 440, Q. B.

If an objection be taken at the trial as to the effect of a deed, and cannot be sustained on a motion for a non-suit, the party making it is not precluded from looking into the deed, and making any other objection. *Kingston v. Ready*, 5 Ir. L. Rep. 367, Q. B.

X.—DISCONTINUANCE.

1 & 2 Vic., c. 109.]—The court after argument of points saved will not permit the plaintiff to discontinue without costs, under the 1 & 2 Vic., c. 109. *Purcell v. Wigmore*, 1 Ir. L. Rep. 318, Ex. note. [Per Pennefather, B.]

where—where a defendant had demurred to the count of a declaration, but neither pleaded or moved to the *indebitatus* counts, and after arguing of demurrer, but before judgment, the plaintiff moved the defendant with a rule for judgment generally, and the defendant then pleaded to the whole declaration; on motion by the plaintiff to set aside the plea as irregular, and for judgment generally court gave judgment for the plaintiff on the plea allowing the plea to stand to the *indebitatus* counts only and requiring the defendant to give short notice of trial;—was there any discontinuance before the court gave judgment on the demurrer? *French v. Tottenham*, 10 Ir. L. Rep. 245. respasse for taking, detaining, and impounding lands, and that thereby the goods were lessened and damaged; the plea applied to the taking and left lessening and damaging unanswered, plaintiff moved over without marking judgment of *nisi* *dicitur* be part of the declaration uncovered by the plea. Held, that he had not thereby worked a discontinuance. *Atkinson v. Nesbitt*, 9 Ir. L. Rep. 271, C. P.

—JUDGMENTS, (See *Scire Facias*. Warrant.)

Generally.]—Semble, the grounds of a foreign judgment are not examinable in another country, and such judgment be plainly repugnant to natural justice, or to the law of the land where it is pronounced. *Sims v. Thomas*, 3 Ir. L. Rep. 1, Ex.

A vested remainder in fee after an estate tail in session is bound by a judgment, although such remainder never came into possession of the usor. *Martin v. McCausland*, 4 Ir. L. Rep. 1, C. P.

The day marked on the margin of the judgment, pursuant to the 7 W. 3, c. 12, s. 11, is the true date of the judgment. *O'Loughlin v. Fogarty*, 5 Ir. L. Rep. 63, Ex. [Per Brady, C. B.]

After judgment the functions of the attorney are at an end, and he is not then competent to sign, on behalf of his client, a consent to vacate it. *Dean v. Mahon*, Bl. D. & O. 34, Ex.

Upon the motion of the assignee of a judgment to set a *scire facias* to revive, the affidavit should state that a memorial of the assignment had been enrolled, and an attested copy of it be produced. *Seaward v. Lee*, Bl. D. & O. 262, Ex.

In bringing a writ of error from the Exchequer Chamber to the House of Lords it is necessary that the original transcript of the judgment from the court below, as well as also the judgment of the court of Exchequer Chamber should be lodged with the clerk of the errors of that court. *Rogers v. Despard*, Bl. D. & O. 91, Q. B.

Rule for Judgment.]—The rule for oyer does not stop the entering the rule for judgment, though it does stop the entering the judgment itself. *Fitzpatrick v. Fleming*, 1 Ir. L. Rep. 238, Ex.

After the court gives judgment on a motion for judgment as in case of non-suit, or for a new trial, it is not necessary to enter the four day rule for judgment, but judgment may be signed immediately, there be no reservation in the conditional rule. *Mc v. Kiernan*, 2 Ir. L. Rep. 273, Q. B.

The rule for judgment may be entered on a plea of confession with stay of execution, at any time within a year from the time when the stay of execution expired. *Oldham v. Dowling*, 4 Ir. L. Rep. 468, Q. B.

A judgment of *non proes* was set aside as irregular, the rule for judgment having been entered within the year, but not served till after its expiration. *Rorke v. McCarthy*, 6 Ir. L. Rep. 29, Ex.

Motions in Arrest of Judgment.]—In an action for use and occupation, the declaration—entitled generally, as of Easter Term, 1840—stated, that the defendant, “heretofore to wit on the 31st of October, 1840,” was indebted, &c. The money counts averred, that the defendant, “on the day and year aforesaid,” was indebted, &c. Plea, general issue, verdict for the plaintiff. A motion in arrest of judgment was refused, the court presuming that the judge at Nisi Prius directed the attention of the jury to the matters properly in issue, and excluded from their consideration all causes of action which had not accrued before the commencement of the term of which the declaration was entitled. *Taylor v. White*, 5 Ir. L. Rep. 44, Ex.

In an action of covenant, the defendant craved oyer, and pleaded that the deed was void, because made in pursuance and performance of said supposed agreement, for the purpose of evading a Statute, and the jury having found for the plaintiff, it was held that the defendant could not move in arrest of judgment, on the ground of a corrupt agreement being embodied in the deed as pleaded. *Osborne v. Byrne*, 5 Ir. L. Rep. 93, C. P.

A motion in arrest of judgment must be made within the first four days of term. *Hanan v. Power*, 8 Ir. L. Rep. 505, Q. B.

It is not the practice to grant concurrent orders to arrest the judgment, and set aside the verdict. *Conway v. Lewis*, 6 Ir. L. Rep. 421, Q. B.

Entering Judgment.]—Where there was a plea of confession as to part of a count, and non-assumpsit as to the remainder, the court, after trial and verdict, will give liberty to enter judgment on the confession *nunc pro tunc*. *Lindsay v. Cluston*, Bl. D. & O. 286, Ex.

Where there are issues in fact and law, and the plaintiff succeeds on the former, the court will not direct their officer to enter judgment on the demurrer, for the purpose of allowing the plaintiff to have judgment on the postea, unless the defendant consent. *Bolton v. Cooke*, Bl. D. & O. 43, Q. B.

In an action of debt to recover the sum of £60 plaintiff marked judgment for £690, being the sum stated in the commencement of the declaration as the aggregate of all the counts. Held, that this judgment was irregular, and that plaintiff should not mark judgment for a larger sum than he was entitled to issue execution for. *Lord Miltown v. Reeves*, Bl. D. & O. 272, Q. B.

Where a defendant dies, between the term in which a demurrer has been argued, and the pronouncing of judgment by the court, judgment will not be entered *nunc pro tunc*, if there are issues in fact undisposed of. *Armstrong v. Lloyd*, 3 Ir. L. Rep. 57, C. P.

Where after verdict for the plaintiff, and pending a motion for a new trial, the defendant died, the court granted liberty to enter up judgment as of a former term, upon the terms of the plaintiff undertaking not to interfere with the rights of intermediate *bonâ fide* creditors or purchasers. *Hosier v. Powell*, 3 Ir. L. Rep. 406, Ex.

The court will not allow a plaintiff to mark judgment as for want of a plea, because the defendant being a female pleads in the masculine gender. *Berry v. McNeill*, 4 Ir. L. Rep. 17, C. P.

The court will grant but a conditional order to enter up judgment against a defendant, who has not appeared to the writ of *distringas*, in an action of *quare impedit*. *Marquis of Winchester v. Bishop of Killaloe*, 6 Ir. L. Rep. 344, C. P.

In February, 1844, by an order of *nisi prius*, a verdict was taken for the plaintiff, subject to arbitration; in Michaelmas Term, 1846, a balance was found to be due by the plaintiff, and a verdict was entered for the defendant, who died on a day in the same term, prior to the entry of the verdict for him. The court held that the proceedings were notwithstanding, regular, and directed the judgment to be enrolled as of the first day of Easter Term, 1844. *Wright v. Keene*, 10 Ir. L. Rep. 97, Ex.

Amendment of Judgments.—See AMENDMENT.

Priority of Judgments.—There can be no priority between judgments entered as of the same day. *Daly v. Kelly*, 3 Ir. L. Rep. 176. [Per Ball, J.]

The second section of the 9th G. 4, c. 35, relating to judgments entered within twenty years before the passing of the act, does not apply to the case of purchases made before that act. Held, that a judgment of Easter Term, 1809, did not lose its priority over a subsequent conveyance, for valuable consideration, executed on the 20th of September, in the same year, although the judgment was not revived or redocketed since the entry thereof, nor within five years after the passing of the 9th Geo. 4, c. 35. *Geraghty v. Abbott*, 8 Ir. L. Rep. 60, Ex.

C. in Hilary Term, 1818, recovered a judgment against R. M., and in the same term recovered another against R. M. jun. These judgments were revived Hilary Term, 1821, and again in Michaelmas Term, 1840, against the heir and terre-tenants of each consors; an annuity deed of the 11th June, 1819, charged the lands of the consors with an annuity of £225. The judgments were not revived or redocketed within five years after the passing of the 9th Geo. 4, c. 35. Held, that the judgments were null and void against the parties entitled under the annuity deed, by reason of their not having been revived or redocketed pursuant to the provisions of the 9th Geo. 4, c. 35. *Collyer v. Marnell*, 10 Ir. L. Rep. 353, Q. B. [Per Blackburne, C. J., and Crampton, J.; contra, per Burton, J. and Perrin, J.]

Judgment of Non Pros.—The words of the 27th general rule are to be construed strictly; therefore, the year is to be computed from the return day of the writ, and not from the date of the appearance; and consequently the rule for judgment of *non pros* must be entered within one year from the return of the writ. *Lewis v. Meehan*, 3 Ir. L. Rep. 350, Ex.

A judgment of *non pros* was set aside as irregular, the rule for judgment having been entered

within the year, but not served till after its expiration. *Rorke v. McCarthy*, 6 Ir. L. Rep. 29, Ex.

For not joining in demurrer books.—Where a party applies for leave to enter judgment on the ground that his opponent has neglected to supply his portion of the demurrer books. Held, that notice must be given of such application. *Roche v. Hackett*, 2 Ir. L. Rep. 278, Q. B.

The court will allow a plaintiff to enter judgment where the defendant has taken a demurrer, and neglected to furnish the points to be argued, although called upon to do so, and notice of the motion having been given. *Willne v. O'Connor*, 2 Ir. L. Rep. 284, Q. B.

As for want of a plea.—Although the defendant, a female, pleaded the general issue in the masculine gender, the court would not allow the plaintiff to mark judgment as for want of a plea, she having had had notice to amend, and which notice had not been attended to. *Assignees of Berry v. McNeill*, 4 Ir. L. Rep. 17, C. P.

Judgment by default.—The defendant in an action on a bill of exchange by allowing judgment to go by default, admits the date of the bill to be as stated in the declaration; and the officer may calculate interest therefrom. *Doyle v. Duffy*, 6 Ir. L. Rep. 153, C. P.

As in case of non-suit.—Where a party obtains a conditional order for judgment, as in case of non-suit, and does not make it absolute, the court will not allow him to do so after an undertaking and notice of trial served, though that notice be withdrawn. *Carey v. Williams*, 1 Ir. L. Rep. 115, C. P.

On a motion for judgment as in case of a non-suit, after default in a peremptory undertaking to go to trial, the plaintiff will be put under terms to pay the defendant the costs already incurred,—the costs of the motion, and further that the defendant may enter up judgment without further motion, if the plaintiff again fail in this undertaking to go to trial. *O'Donohoe v. O'Donohoe*, 1 Ir. L. Rep. 9, Q. B.

Where a cause has been entered for trial, but not tried, and the plaintiff be guilty of no default, the defendant cannot have judgment as in case of non-suit, his remedy is to bring the case to trial by proviso. *Wright v. Hodgins*, 1 Ir. L. Rep. 268, Ex.

A rule to stay proceedings until the payment of costs, of not proceeding to trial pursuant to notice must be vacated before the defendant can apply for judgment as in case of non-suit. *Read v. Shaw*, 1 Ir. L. Rep. 269, Ex.

It is not necessary to serve a notice of a motion for judgment as in case of non-suit. *Anonymous*, 1 Ir. L. Rep. 345, Q. B.

On a motion for judgment as in case of non-suit, after notice of trial has been served and withdrawn, if it appear that the record was withdrawn at the instance of the defendant, or by any understanding to that effect between the parties, that will be a sufficient answer to such motion. *Clarke v. Callaghan*, 1 Ir. L. Rep. 345, Q. B.

Where a conditional order has been obtained for judgment as in case of non-suit, a peremptory undertaking is not of itself sufficient cause against an absolute order, the plaintiff must show some "just

ause" for his delay. *Gillman v. Connor*, 1 Ir. L. Rep. 346, Ex.

If the record be brought down for trial and notice of trial withdrawn by the plaintiff, that will not be sufficient cause against this motion. *Ib.*

Aliter, if the cause be made a remanet, or the plaintiff be obliged by some circumstances of surprise to withdraw it. *Ib.*

Where a cause was entered in the list of records or trial at the sittings after term, but in consequence of the death of the Lord Chief Baron was not tried, the court refused to give judgment as in case of non-suit, the plaintiff not having withdrawn the record or been in default. *Graydon v. Reardon*, 1 Ir. L. Rep. 355, C. P.

If the plaintiff withdraw the record after entering the case for trial, the defendant may have judgment as in case of non-suit, the mere entering of the record for trial not being sufficient to prevent it. *Ib.*

Where the record is brought down to trial and withdrawn with the assent of the defendant, he cannot have judgment as in case of a non-suit. *Anonymous*, 2 Ir. L. Rep. 167, Q. B.

The meaning of the rule as to bringing down the record, is not merely bringing it down and entering it but proceeding to trial, unless the cause be made a remanet. *Ib.*

Upon showing cause against a conditional order for judgment as in case of non-suit, it appeared that notice of trial had been served before the motion came on, that the sum to be recovered was but £5, and the plaintiff stated he had a just cause of action. Held, to be sufficient cause. *Anonymous*, 2 Ir. L. Rep. 263, Q. B.

Where in an action for false imprisonment arising out of a disputed right of fishing, the cause had been at issue since Michaelmas Term, 1838, and the delay from thence till June, 1839, was not accounted for except by an allegation that the principal action to try the right was pending during that time, and since June the plaintiff had been unable to proceed in consequence of the illness of his attorney. Held to be insufficient cause. — *v. Worthington*, 2 Ir. L. Rep. 266, Q. B.

By the practice of the Court of Exchequer a peremptory undertaking to go to trial at the next sittings or assizes is considered as just cause against a motion for judgment as in case of non-suit. *Tuthill v. Bridgeman*, 2 Ir. L. Rep. 361, Ex.

Where a term intervenes between the obtaining of the conditional order for judgment as in case of non-suit, and the motion to make it absolute, the court will not make the order absolute on a certificate of no cause. *Bell v. Bell*, 3 Ir. L. Rep. 79, Q. B.

In Easter Term, 1839, the lessor of the plaintiff brought two ejectments for lands in the counties of M. and G.; defence was taken in Trinity Term following, and the defendant having refused to consent to waive temporary bars, the lessor was compelled to file a bill to compel him to do so, a decree was pronounced on the 2nd of June, 1840, there appeared to be no delay on the part of the plaintiff. A motion on the part of the defendant was held to be premature, as the time in which he was engaged in the equity proceedings could not be counted against him. *Rutledge v. Rutledge*, 8 Ir. L. Rep. 102, Q. B.

Where it appeared by implication from the defendant's affidavit that the plaintiff's knowledge of the defendant's poverty was subsequent to the commencement of the action, and the defendant did not state an ability to pay, the court refused to allow a judgment as in case of non-suit to be entered. *Goings v. Dempsey*, 3 Ir. L. Rep. 184, C. P.

In shewing cause against a conditional order for judgment as in case of non-suit the affidavit must state positively some just cause why plaintiff delayed going to trial. *Wallace v. McClelland*, 3 Ir. L. Rep. 199, Q. B.

Where the indorser of a bill of exchange having sued the acceptor ineffectually, sued his immediate indorser; after the commencement of the second action the debt and costs were paid by the acceptor; the court refused a motion by the indorser for judgment as in case of non-suit. *White v. Doolan*, 8 Ir. L. Rep. 500, Ex.

Where a bill had been filed against a banking company, and a receiver appointed over all their property, with a reference to the Master to report on the suits to be prosecuted or defended by them, the court would not allow judgment, as in case of non-suit, to be entered against them in a cause at issue more than three terms, they undertaking to go to trial on the first *nisi prius* day in next term. *Hughes v. Glenny*, 4 Ir. L. Rep. 5, C. P.

In an ejectment on the title against eleven persons, the defences of five of those persons had been consolidated, and the cause was brought to trial against those five; but such trial was postponed at the instance of the defendants to the next assizes; and at the following assizes the plaintiff could not proceed, by reason of the absence of his counsel; and it was stated that the cases of all the defendants were similar. Held, that was a sufficient cause against a motion for judgment, as in case of non-suit, on behalf of the defendants whose cases had not been brought to trial. *Lord Powerscourt v. Brislín*, 4 Ir. L. Rep. 283, Q. B.

Issue was joined in Hilary Term; a motion for judgment, as in case of non-suit is moveable in Trinity Term. An affidavit is not necessary to sustain such a motion, and the court will refuse it, on the plaintiff giving a peremptory undertaking to go to trial, the costs to be costs in the cause. *Comyns v. McGrath*, 4 Ir. L. Rep. 412, C. P., and see note, *Ib.*

In ejectment cases the cause is not at issue until the second declaration is filed, and three terms must therefore elapse from that time before judgment as in case of a non-suit can be obtained. *Dempsey v. Nowlan*, 4 Ir. L. Rep. 490, Ex.

An affidavit filed by one of several defendants, will not be considered as cause against a conditional order to enter up judgment as in case of non-suit obtained by another defendant. *Chevolly v. Whittly*, 5 Ir. L. Rep. 40, Q. B.

A party having entered a rule to stay proceedings, cannot move to enter judgment as in case of non-suit without having first vacated the rule. *Raleigh v. Raleigh*, 5 Ir. L. Rep. 182, C. P.

If a party permits an order for judgment as in case of non-suit to be made absolute he cannot after object to the proceedings for irregularity. In ejectment the defendant may file a second declaration and enter up judgment as in case of non-suit, without enter-

ing a rule for liberty to proceed on giving a terms' notice. *Kenny v. Coffey*, 5 Ir. L. Rep. 225, Q. B.

A conditional order for judgment as in case of non-suit was served on the 21st of November, entitled in a wrong cause, and the plaintiff gave notice of the irregularity the following day, and also gave notice of trial for the 26th, on the 23rd he withdrew the notice of trial and served notice of trial for the sittings after term, on the 25th the defendant served a conditional order properly entitled. Held, that there was no such laches as dissatisfied the defendant to the benefit of his conditional order. *Murray v. O'Hanlon*, 5 Ir. L. Rep. 374, Q. B.

A peremptory undertaking to go to trial, is a sufficient answer to a motion for judgment, as in case of non-suit. *Anonymous*, 5 Ir. L. Rep. 242, C. P.

The costs of such a motion are always costs in the cause. *Ib.*

A plaintiff will be allowed to enter a *stet processus* on the ground of the defendant's insolvency, notwithstanding default made in a peremptory undertaking to go to trial. *Sterne v. Sheane*, 6 Ir. L. Rep. 25, Ex.

In the Exchequer it is necessary to give notice of a motion for judgment, as in case of a non-suit. *Anonymous*, 6 Ir. L. Rep. 44, Ex.

A motion for judgment, as in case of non-suit, on the ground of the insolvency of the plaintiff, will not be granted after issue joined; but the court will stay the proceedings. *Filton v. Evans*, 6 Ir. L. Rep. 466, Q. B.

In ejectment the cause is not at issue until the second declaration has been filed; but where the lessor of the plaintiff served notice of trial after defence taken; but before he had filed a second declaration. Three terms after the service of this notice, the court gave liberty to the defendant to file a second declaration, and enter judgment thereon, as in case of non-suit. *Creagh v. Creagh*, 6 Ir. L. Rep. 528, Ex.

A plaintiff in showing cause against a conditional order for judgment, as in case of non-suit, averred his belief that the defendant was in insolvent circumstances, and stated facts from which such insolvency might be inferred. The defendant in answer must aver that he is solvent. *O'Connor v. Evans*, 7 Ir. L. Rep. 210, C. P.

A defendant entitled to judgment, as in case of non-suit, will be allowed to enter that judgment without costs, the plaintiff having refused to proceed in consequence of the embarrassed circumstances of the defendant, and of the fact of his having threatened to take the benefit of the Insolvent Act, in the event of the plaintiff succeeding against him. *Crawford v. Cronther*, 8 Ir. L. Rep. 99, Ex.

Where the defendant had become insolvent after action brought, a motion to enter up judgment as in case of non-suit was refused with costs, the defendant having refused a *stet processus* out of court. *Brennan v. Mullins*, 9 Ir. L. Rep. 39, Ex.

In answer to a motion for judgment as in case of non-suit, it was shown that the proceedings had been carried on by an attorney, by the direction of a third party, in the names of the plaintiffs, without their knowledge or consent, or their being interested in the suit, and that the attorney had since died. The court ordered a *stet processus* to be

entered without costs. *Dowling v. Boswell*, 10 Ir. L. Rep. 443, Ex.

It is a sufficient answer to a conditional order for judgment, as in case of non-suit, in an action by the drawer against the acceptor of a bill of exchange, that the bill has been paid by an indorsee. *Manning v. —*, 10 Ir. L. Rep. 484, Ex.

Semble, that if, in such a case, the defendant has a good defence to the action, the proper course, in order to obtain his costs, is to bring the case to trial by proviso. *Ib.*

Where a rule to stop has been entered—and afterwards withdrawn—that term is to be excluded in computing three terms to found an application for judgment, as in case of non-suit. *Dawson v. Loughnan*, Bl. D. & O. 45, C. P.

If a plaintiff proceed both at law and in equity, for the same demand, and elects to proceed in the latter, the court will enter judgment as in case of non-suit. *Hollier v. Eyre*, Bl. D. & O. 108, Ex.

If a plaintiff become insolvent after issue joined, the defendant is not entitled to judgment, as in case of non-suit, but a *stet processus* will be entered. *Jones v. Newbury*, Bl. D. & O. 147, Ex.

Where a record has been left a *remanet at Nisi Prius*, and no proceedings taken for three years, the court will not grant liberty to the defendant to enter up judgment, as in case of a non-suit. *Stevenson v. Stephens*, 1 Ir. Jur. 39, Ex. [*Collier v. Jones*, 1 H. & B. 321, over-ruled.]

In *quare impedit* cases the court will only give a conditional order to enter judgment, as in case of non-suit, against a defendant who has not appeared to the writ of distringas. *Marquis of Winchester v. Bishop of Killaloe*, 6 Ir. L. Rep. 344, C. P.

Setting aside.—Where a conditional order was obtained to set aside a judgment entered upon a bond and warrant, on the ground that they were forged; on motion to make the order absolute, the court being unable to decide on the conflicting statements, directed the plaintiff to declare on the bond, which not being done, the order was made absolute. *Connors v. Connolly*, 1 Ir. L. Rep. 244, Q. B.

The court will set aside a judgment obtained on a parliamentary appearance, when there is a substantial question to be tried between the parties, though no irregularity be alleged in the marking of the judgment. *Heron v. —*, 1 Ir. L. Rep. 51, C. P.

The court will set aside a regular judgment where the party has by a fatality been prevented from pleading in time, though the time for pleading had previously been enlarged. *Ryan v. Francis*, 1 Ir. L. Rep. 154, C. P.

Judgment was entered on a bond and warrant of attorney, executed by the defendant to the plaintiff, the former being in custody at the suit of the latter, and no attorney being present at the execution. The defendant being subsequently arrested under an execution on this judgment, took the benefit of the Insolvent Act, and returned the judgment in his schedule. Held, that by returning the judgment, he waived the irregularity. *Doherty v. McDaid*, 1 Ir. L. Rep. 236, Ex.

Where, after the expiration of the four-day rule

plead, but before judgment had been marked, the defendant applied for time to plead, and obtained leave to serve a notice on the opposite party; after which the plaintiff's attorney marked judgment before the notice had been served upon him, though he had been verbally apprised of the order. The court set aside the judgment with costs, and enlarged the time to plead. *Dancer v. Kelly*, 3 Ir. Rep. 64, C. P.

After notice of trial in a *quare impedit*, the defendant entered into a consent that judgment should be entered against him, with sixpence damages, and a release of errors, on the understanding between the parties that such a consent carried the costs of the action, and the judgment was accordingly entered with costs. The court on a motion by the defendant, refused to strike out the portion of the judgment awarding costs. *Archbold v. Bishop of Down and Connor*, 3 Ir. L. Rep. 281, C. P.

In a *replevin* case the defendant's attorney having promised the plaintiff's counsel additional time to join in demurrer, which was afterwards withdrawn by the orders of the defendant himself and judgment marked, the plaintiff having pleaded no plea to the writ, the judgment was set aside without any costs to either party, *Daniel v. Bingham*, 4 Ir. L. Rep. 36, C. P.

An affidavit of merits made in support of a motion to set aside a judgment should state positively that there is a good cause of defence, if the judgment be entered irregularly or *mala fide* no affidavit of merits is necessary. *Lenahan v. Earl of Bantry*, 4 Ir. L. Rep. 274, Q. B.

The court set aside a judgment marked for want of replication, the plaintiff having omitted to enter a plea to discontinue under a mistaken impression, though the defendant had relied on the same, in an answer to a bill filed in equity by the plaintiff to raise the amount of the judgment. *Lynch v. Lynch*, 4 Ir. L. Rep. 298, C. P.

A judgment having been entered on a bond and warrant the latter of which alone was executed, the court set aside the judgment and execution without costs. *M'Lernan v. M'Lernan*, 4 Ir. L. Rep. 331, C. P.

The court refused to set aside a regular judgment of *non pros* on the terms of the payment of the costs of it, the affidavit of merits being sworn by the attorney's clerk who conducted the business, and was positively contradicted by the affidavit of the defendant himself. *Cater v. Plattery*, 5 Ir. L. Rep. 175, C. P.

Judgment of *non pros* was set aside as irregular the rule for judgment having been entered within the year, but not served until after its expiration. *Rorke v. McCarthy*, 6 Ir. L. Rep. 29, Ex.

A. f. fa. having issued upon a judgment obtained upon a plea of confession filed in pursuance of a written authority signed without any attorney being present on his behalf, or any process having been served upon him, the court set aside the execution judgment, and previous proceedings with costs. *Wilcox v. O'Gorman*, 10 Ir. L. Rep. 459, Ex.

The defendant appeared in the Queen's Bench to a writ issued out of that court, the plaintiff's attorney served notice of a declaration and the rule to plead, and marked judgment in the Exchequer. Held, that

the judgment could not be sustained. *Anonymous*, 10 Ir. L. Rep. 467, Ex.

The defendant having appeared in the Queen's Bench to a writ sued out of that court, the plaintiff's attorney served notice of a declaration and the rules to plead and marked judgment. Held, that the judgment could not be sustained and that the defendant was not deprived of his right to object to its validity by having received notice of the declaration and rules to plead, without apprising the plaintiff of the defect in his proceedings. *Ib.*

Assignment of judgments.—When a judgment has been assigned to new trustees by a person appointed for that purpose pursuant to an order of the Court of Chancery, made upon petition under the 1 W. 4, cap. 60, the court directed the proper officer to perfect the assignment. *Burrowes v. Hogan*, 2 Ir. L. Rep. 369, Ex.; *S. P. Burrough v. Ferrard*, *Ib.* 372.

A judgment, upon the marriage of the conusee, was assigned to the trustees of the marriage settlement, and a memorial of the assignment duly enrolled; the conusee having married a second time, the judgment was again assigned to the trustees of a second settlement. The personal representative of the surviving trustee of the first settlement having refused to assign the judgment to the surviving trustee of the second, the court refused to allow the memorial of the first assignment to be taken off the file in order that a memorial of the second might be enrolled. *Beresford v. Beresford*, 4 Ir. L. Rep. 316, Ex.

When a judgment, the property of an insolvent conusee, is vested in his assignee under the Insolvent Act, the court will direct an assignment by the latter to a third party to be enrolled without the judgment having been revived in the name of the assignee of the insolvent. *Browne v. Browne*, 1 Ir. Jur. 70, Ex.

Satisfaction of judgments.—The defendant applied for leave to lodge the amount due to the plaintiff out of two judgments, and for an order that the plaintiff should execute warrants to satisfy same. There was a dispute as to the time to which the defendant was bound to pay interest, and the defendant had also been guilty of laches in making the application. The motion was refused. *Quin v. Eastwood*, 2 Ir. L. Rep. 165, Q. B.

A judgment creditor having got into possession of the lands of his debtor by *elegit*, and the officer, on a reference to account, having reported that he had been overpaid his debt, the court granted a conditional order to shew cause why satisfaction should not be entered on the roll. *Birch v. Meredith*, 3 Ir. L. Rep. 138, C. P. [See *acc. Wilkinson v. Meredith*, *Ib.* 139.]

The court will not order satisfaction to be entered on the record of a judgment on a warrant of attorney by one of two trustees of the fund secured by the judgment, though the other never accepted the trust, and was out of the jurisdiction, and refused to act. Satisfaction will not be allowed to be entered on a judgment obtained at the suit of two conusees, on the allegation that the full amount had been paid to one of them, the other having emigrated in 1837, and not having been heard of since. *King v. King*, 4 Ir. L. Rep. 329, C. P.

The court refused to allow a judgment to be satisfied on payment to the plaintiff's attorney of a sum agreed upon between him and the defendant, the plaintiff residing in New South Wales, although the attorney held a general power of attorney to sue for and give discharges for all debts due to the plaintiff, and had been empowered by letter to issue execution on said judgment. *Brennan v. French*, 4 Ir. L. Rep. 120, C. P.

Where a judgment has been satisfied under a warrant of attorney fraudulently and improperly obtained, and the facts, upon which the warrant is impeached, are clearly made out by the affidavits, the court will, upon motion, set aside the satisfaction entered on the roll, without directing an issue, or sending the case to be tried by a jury. *Nuttall v. Nuttall*, 4 Ir. L. Rep. 480, Ex.

A judgment collateral with a mortgage was obtained against E. C. in the names of two trustees; one of the trustees had never acted in the trusts, and had disclaimed by deed. Held, that a warrant to satisfy the judgment executed by the acting trustee alone was sufficient. *Wise v. Creed*, 8 Ir. L. 222, Q. B.

Searches for Judgments.—An application since the passing of the Registration of Judgments Act, 7 & 8 Vic. c. 90, for liberty to inspect the judgment-book and roll of the court to ascertain whether any judgments were entered against a third party was refused, the Act having directed that no search shall be made except in the office established under it. *In re Bagot*, 8 Ir. L. Rep. 295, Ex.

Quære, whether an executor or administrator would be entitled to make a search for judgments against his testator or intestate. *Ib.*

Releasing of Judgments.—Judgments being a charge upon both B. and A. were by deed poll executed by the judgment creditors released as against B. Held, the effect of the release was to discharge both A. and B. *Handcock v. Handcock*, 10 Ir. L. Rep. 565, C. P.*

XI. BILL OF EXCEPTIONS.

When objections were taken to the judge's charge and overruled, and the judge gave time to have the exception reduced to writing and the document was not delivered to the judge until after the jury were discharged. Held, that they could not hear those exceptions, as it did not appear from the record whether they were taken before the jury were discharged. *Close v. Batt*, 1 Ir. Jur. 256, Ex.

The court with great reluctance allowed time for filing a bill of exceptions where the trial had taken place more than two years before, though the parties had by consent between them extended the time until within a few days of the term in which the application was made. *Dawson v. Bell*, 2 Ir. L. Rep. 279, Q. B.

The court will not enlarge the time for making up a bill of exceptions though the evidence in the case was very voluminous, where the whole long vacation had elapsed since the trial, and but four

days of that time had been occupied in negotiations for a compromise. *Bridgeford v. Dublin & Kingstown Railway Co.*, 3 Ir. L. Rep. 12, C. P.

The court, after refusing an application for time to make up a bill of exceptions, will not grant a conditional order to set aside the verdict. *Ib.*

The defendant in a bill of exceptions stated that he had insisted before the learned judge, "that the said condition of re-entry, in the said fee-farm grant contained, was altogether gone by the assignment and release; and if not, that the said power of re-entry was gone by the assignment, in the matter of the insolvency of J. D." Held, that it was not open to the defendant to argue that the said right of re-entry had been transferred to the provisional assignees of the insolvent. *Orr v. Stevenson*, 5 Ir. L. Rep. 2, Ex. C.

By the operation of the rules of the Court of Common Pleas, a party taking a bill of exceptions at a trial in the sittings after term, is not irregular in not setting down the same for argument in the ensuing term. *Reid v. Mitchell*, 4 Ir. L. Rep. 300 C. P.

Where it was a matter of warranty in a policy of insurance, that the habits of a party whose life was insured, were "strictly temperate." Held, that the words "strictly temperate" are subject to construction, and that the defendants, (the directors of the company), were not entitled to a direction from the judge that those words should be construed in their literal sense; and a general exception taken by the defendants to the judge's charge, so far as it was explanatory of their meaning, was over-ruled, much of the charge being admittedly right, and the defendants not having pointed out by their exception, the particular parts of it which were objectionable. *Scanlon v. Seale*, 5 Ir. L. Rep. 139, Ex.

The counsel for the defendant objected to the testimony of B. M., on the ground that said testimony was offered to sustain her husband's deed; and called upon the judge to reject said testimony, but he refused, and permitted her to be examined, to sustain the issue on the part of the plaintiff; to which opinion of the judge, the defendant did then and there except, and the said B. M. was sworn and examined subject to said exception. Held, too large, as portion of her evidence was admissible. *Burris v. Coffey*, 6 Ir. L. Rep. 29, C. P.

Second exception—That the learned judge should, upon the whole of the evidence so given by the parties, plaintiff and defendant respectively, upon the issue, have directed a verdict for the plaintiff, was held to be too general. *Ib.*

A motion to extend the time for making up a bill of exceptions, must always be upon notice. *Russell v. Whaley*, 7 Ir. L. Rep. 492, Ex.

A lease for years, containing a covenant to renew, which was declared on as absolute and unqualified, and the value of the interest under such lease, with the covenants for renewal being proved, and no evidence being offered of the eviction of the covenant by title paramount, but bare evidence of an eviction, and a notice served by the defendant, stating that he had no title to renew. Held on exception, that the judge was right in refusing to direct the jury to find for nominal damages, as there was no evidence that the title to the term, if granted,

* By the 11 & 12 Vic. c. 48, s. 72, a portion of the lands charged may be released.—EDITOR.

would have been invalid. Semble, such refusal was not ground of exception. *Kean v. Strong*, 9 Ir. L. Rep. 83, Q. B.

Held, that exceptions, to different expressions in the charge of the learned judge, *seriatim*, without stating clearly what the judge did tell the jury, or what the defendant required him to tell them, was not a proper mode of framing a bill of exceptions; and per Blackburne, C. J., on this ground alone the exception should be over-ruled. *Kean v. Strong*, 1 Ir. Jur. 333, Ex. Ch.

XII. VENUE.

Local.—In an action of assumpsit, for money had and received, brought by the assignees of a bankrupt against the sheriff, to recover the proceeds of a sale of the bankrupt's effects made by the sheriff pursuant to writ of *fi. fa.* the venue is local. The venue will be changed in a local action on terms. *Anonymous*, 9 Ir. L. 394, Q. B. And see *Hennessy v. Synge*, 10 Ir. L. Rep. 184, Q. B.

Transitory.—In an action for pound breach, and the removal of a distress, founded on the statutes 7 W. 3, c. 22, and 15 Geo. 2, c. 8, the venue is transitory. *Earl of Meath v. M'Phail*, 9, Ir. L. Rep. 316.

Motion to change venue.—The court will change the venue to an adjoining county in an action against a magistrate if there be reason to suppose that a satisfactory trial cannot be had in the county where the venue was originally laid. *Stewart v. Lynam*, 1 Ir. L. Rep. 199, C. P.

The court will not change the venue in an action of ejectment on the title, where there have been two verdicts for the defendant. *Jackson v. Lodge*, 1 Ir. L. Rep. 161, Q. B.

Where the venue has been changed upon the usual affidavit the party seeking to retain the venue is not bound to come in within four days after the rule to change. *Stanton v. Magrath*, 1 Ir. L. Rep. 293, Q. B.

The venue was changed upon the usual affidavit. A motion to retain it on the ground of partiality in the jury, and that the defendants exercised undue influence upon the jurors, was refused. *O'Shaughnessy v. Lambert*, 1 Ir. L. Rep. 104, Q. B.

The court will not change the venue in an action on a bill of exchange, though the defendant swears that he himself and all his witnesses reside in the county to which it is sought to be changed. *Harnett v. Torrens*, 1 Ir. L. Rep. 116, C. P.

A motion to change the venue on the usual affidavit is too late after plea pleaded. *Muloany v. White*, 2 Ir. L. Rep. 33, Ex.

In transitory actions an attorney has the privilege of suing in his own court, and laying and retaining the venue in the county it is situated in. An application to change the venue on the usual affidavit was refused upon that ground. *Montgomery v. Cheyne*, 2 Ir. L. Rep. 163, Q. B.

The common affidavit to change the venue is informal in not stating in express terms that the cause of action did not arise in the county in which the venue was laid, and also in introducing any thing beyond the usual form as to the place where the cause of action arose. *Anonymous*, 2 Ir. L. Rep. 286, Q. B.

Where the venue has been changed on the usual affidavit, and it appears incontrovertibly that the allegation in the affidavit is untrue, the court will bring back the venue. *Nichol v. Hickson*, 2 Ir. L. Rep. 328, Q. B.

The venue will not be changed on the ground that the plaintiff is a county surveyor, and is on that account possessed of influence with the jurors. *Hall v. M'Kernan*, 2 Ir. L. Rep. 359, Q. B.

In an action by an attorney for the recovery of a bill of costs, the venue was changed, before plea pleaded, to the adjoining county from the county of the city in which the venue was laid, upon an affidavit that a fair and impartial trial could not be had there. *Boyes v. Smith*, 2 Ir. L. Rep. 366, Ex.

The venue in an action on a policy of insurance was changed from the county of a city to the adjoining county upon an affidavit that a fair and impartial trial could not be had in the former. Slight grounds are sufficient to change the venue from the county of a city to the adjoining county. *Scanlan v. Scales*, 2 Ir. L. Rep. 368, Ex.

The venue was retained in an action of covenant for waste, notwithstanding the defendant's affidavit that all the witnesses resided in the county to which the venue was sought to be changed, and that a view of the premises, which were in the county to which it was sought to bring the venue, would be necessary, on the terms that the plaintiff should previously admit the defendant's witnesses to view the premises to the trial. *Hawthorne v. Denham*, 3 Ir. L. Rep. 1, Q. B.

The court will not change the venue from the county of the city of Dublin to the county of the city of Cork, though the defendant state in his affidavit that he has twenty witnesses to examine, all of whom reside in the latter place, it appearing from the plaintiff's affidavit that some of his witnesses resided in the locality where the venue had been laid. *Watson v. Kennelly*, 3 Ir. L. Rep. 214, Q. B.

The venue will be changed on special grounds in an action on a bill of exchange. *O'Callaghan v. Sullivan*, 3 Ir. L. Rep. 256, Ex.

In an action of libel the court refused to change the venue to the county in which the action had wholly arisen, though all the witnesses resided therein, the plaintiff having sworn to the prevalence there of excitement on the subject, though he did not deny but that an impartial trial might be had. *Galagher v. Cavendish*, 3 Ir. L. Rep. 375, C. P.

Where the defendant is prevented by the act of God from making the usual affidavit to change the venue it may be made by his attorney. *Scott v. Macaulay*, 4 Ir. L. Rep. 40, Q. B.

The rule to change was discharged on the usual undertaking to give material evidence, though the defendant undertook to admit such evidence at the trial. *Ib.*

No leave being reserved, the costs of a party appearing to oppose a motion to change the venue within the last four days of term will not be allowed, though he may have been served with notice of the motion. *Mara v. Murphy*, 4 Ir. L. Rep. 138, C. P.

In an action on a promissory note the court would not change the venue from Dublin to Mayo, on an affidavit stating "that the cause of action arose in Mayo, that the defendant had good grounds on the

merits for disputing the consideration, and that the several witnesses, fifteen in number, necessary and material to be examined, resided in the county Mayo." *Flanagan v. Reynolds*, 5 Ir. L. Rep. 335, C. P.

In an action by an attorney for work and labour done, the court changed the venue from Dublin to Cork, on an affidavit of the defendant, that the defendant and the principal witness for the defence were aged persons, on the terms of the defence being confined to a single point (a denial of the retainer), and that judgment for the plaintiff, if any, should be entered up as of the term in which the motion was made, and that the costs of the motion should be costs in the cause. *Geary v. Warren*, 5 Ir. L. Rep. 425, C. P.

The common affidavit to change the venue need not state the cause of action. *Anonymous*, 5 Ir. L. Rep. 508, Ex.

The prescribed form of the common affidavit to change the venue at the instance of the defendant must be strictly adhered to. *Walker v. Collins*, 1 Ir. Jur. 232, Ex.

Proof of the ordinary rule to lodge money in court, in discharge of the action before declaration filed, satisfies an undertaking to give material evidence in the original venue. *Brady v. Rotherham*, 1 Ir. Jur. 246, Ex.

In an action of libel the court will not change the venue upon special grounds, if issue be not joined upon all the counts in the declaration. *Macneil v. Dunlop*, 1 Ir. Jur. 269, C. P.

The venue was changed in an action on a bill of exchange, on an affidavit stating that the bill was a forgery and that defendant's witnesses resided in the county where he sought to have a trial. *Lorimer v. McElrath*, 5 Ir. L. Rep. 588, Q. B.

An affidavit to change the venue stated, "that the cause of action arose in the county of C. and not in the county of the city of D. nor elsewhere in Ireland save in the said county of C." Held, to be an improper deviation from the usual form, and an order to change the venue obtained upon such an affidavit purporting to be the common one was set aside. *Lewis v. Fitzgibbon*, 5 Ir. L. Rep. 255, Ex.

The court will not allow a plaintiff to change the venue without some special grounds being stated. *Aungier v. English*, 7 Ir. L. Rep. 226, C. P. [See *King v. Sharry*. *Ib.* Note, Q. B.]

Where the venue has been changed upon the usual affidavit and the plaintiff can give the undertaking required by the 47th general rule, the venue will not be brought back except upon the terms of his giving that undertaking, in that case it being insufficient to falsify the defendant's affidavit. *Lewis v. Nixon*, 7 Ir. L. Rep. 359, Ex.

Where the venue had been changed upon the usual affidavit, and a motion was made to bring it back upon the ground that the cause of action arose partly in England, but that fact did not distinctly appear, the court refused to make the order except on the plaintiff's undertaking to give material evidence in the county where the venue was originally laid, or out of the jurisdiction. *Ib.*

Venue was changed in an action of covenant from the county of L. to the city of Dublin, before issue joined, upon an affidavit of the defendant, that it would be necessary for him to examine on the trial

several witnesses, all of whom resided in Dublin, and some of them were medical men in practice there, on the terms of defendant undertaking to pay plaintiff's extra costs of bringing from L. to Dublin a person who was sworn to be a material witness for the plaintiff, if on the trial he should appear to be so, also undertaking to rejoin gratis and take short notice of trial. *Shagog v. Murphy*, 7 Ir. L. Rep. 550, Ex.

The common affidavit to change the venue should be made by the defendant, unless a sufficient excuse be shewn. *O'Reilly v. Bond*, 8 Ir. L. Rep. 118, Q. B.

Notice of a motion to change the venue on the common affidavit must be served, and if the plaintiff does not appear on the motion he cannot afterwards move the court to bring back the venue on the usual undertaking to give material evidence. *Simpson v. Dickson*, 8 Ir. L. Rep. 410, C. P.

The venue will be changed in a local action on terms. *Anonymous*, 9 Ir. L. Rep. 394, Q. B.

In a motion by an Assurance Company to change the venue, after issue joined, to the county in which the fire took place, on an allegation that a view was necessary for the defence, this court will not grant the motion unless the reason why such a view is necessary appear on the face of the affidavit. *M'Loughlin v. R. Exchange Assurance Company*, 9 Ir. L. Rep. 510, Ex.

Motion by defendant to change the venue after issue joined to a county, because the witnesses for the defence reside there is sufficiently met by the plaintiff, on an allegation that the majority of his witnesses reside in the county in which he has brought the action. *Ib.*

On behalf of a defendant, the court will be slow to change the venue to a county where the father of the attorney of defendant is sub-sheriff. *Ib.*

Where the venue was changed upon the usual affidavit and a statement at the bar that the declaration was in the ordinary form for work and labour, but it subsequently appeared that the declaration contained a special count for work and labour done in pursuance of an agreement and specification in writing, the court discharged the rule to change the venue though it was admitted that no part of the cause of action arose in the county in which it was laid. *Alford v. Begg*, 10 Ir. L. Rep. 104, Ex.

In an action against the sheriff the first count of the declaration stated, the recovery of a judgment by the plaintiffs, the issuing of a *scire facias* thereon, the delivery of it to the sheriff, and that he seized thereunder the goods of the debtor and levied the amount, and averred as a breach that he had not the money so levied in court, on the return of the writ, nor had paid the same to the plaintiff, and that he falsely returned *nulla bona*. The second count after stating the recovery of the judgment, the issuing of the *fi. fi.* and the delivery thereof to the sheriff, averred that though there were before the return of this writ, goods of the debtor in the defendant's bailiwick, whereof he ought to have levied the money endorsed on the writ, and assigned as a breach that he would not levy the money, and returned *nulla bona*. Held, that supposing the false return to be an essential part of the evidence in such action, it was not one exclusively for a false return, and consequently the plaintiffs might bring their action

in the county in which the return was filed, or where the matters of fact necessary to be proved, occurred. *Hennessy v. Syngs*, 10 Ir. L. Rep. 184, Q. B.

On a motion to change the venue from Dublin to Galway in an action against the proprietors of a Galway newspaper, it appeared that on the eve of the trial, letters calculated to excite a prejudice in the plaintiff's favour were published in a newspaper circulating in Dublin, and, on the other hand, that a report of certain proceedings, reflecting injuriously on the plaintiff's character, published in the defendant's newspaper, had been read from the altars of many chapels in the county of Galway. The court changed the venue to a third county. *Ryder v. Burke*, 10 Ir. L. Rep. 474, Ex.

In an action for use and occupation, upon an application to change the venue, the affidavit stated that several of the witnesses resided in Cavan, where the lands also were situated. Held to be sufficient. *Richardson v. Prasken*, Bl. D. & O. 190, Q. B.

Notice must be served of a motion to change the venue on the common affidavit, and if the plaintiff does not appear on the motion, he cannot afterwards move the court to bring back the venue, on the usual undertaking to give material evidence in the original county. The venue can only be brought back upon special grounds. *Simpson v. Dickson*, 8 Ir. L. Rep. 410, C. P.

An affidavit in support of a motion to change the venue under the 6 Geo. 4, c. 51, need not set forth special grounds. *Thompson v. Gregg*, Bl. D. & O. 276, Q. B.

The court will change the venue where the common affidavit contains a special ground, which would not, of itself, be sufficient, but will not give costs. The undertaking to give material evidence will not be a sufficient answer to an application to change the venue, where the plaintiff falsifies the affidavit in the first instance. *Griffith v. Cunningham*, Bl. D. & O. 35, Ex.

After plea, the court will not in general change the venue, when the party might have previously moved on the common affidavit. *Rutledge v. Irwin*, Bl. D. & O. 29, Q. B.

XIII. VERDICT—(See Criminal Law.)

A special verdict need not be as technical as an indictment—it need not negative every possible fact. *Regina v. Burke*, 5 Ir. L. Rep. 549, Q. B.

A special verdict cannot be opened by a member of the inner bar. *Nixon v. Blake*, 5 Ir. L. Rep. 581, Q. B.

As to the doctrine of *aider* after verdict, and the authorities thereon, see the law fully discussed and considered. *Cambie v. Barry*, 5 Ir. L. Rep. 34, Ex. Ch.

A judge cannot receive a verdict upon some issues, and discharge a jury on the remainder if those issues be material. *Edge v. Wandesford*, 9 Ir. L. Rep. 161, Q. B.

XIV. VENIRE DE NOVO.

Quare, can the court under the provisions of the 28 Geo. 3, c. 31, s. 2, enter judgment for the

party taking a bill of exceptions, without awarding a *venire de novo*. *Orr v. Stevenson*, 5 Ir. L. Rep. 2, Ex. Ch.

The first count being bad for the omission of the averment of the granting of a special warrant to the parties named in the guarantee, and not being such as could be cured by the verdict, Held that a *venire de novo* should issue. *Barry v. Cambie*, 6 Ir. L. Rep. 34, Ex. Ch. [Lefroy, B. Perrin, Cramp-ton, & Burton, J. J., *dissentientibus*.]

Where on a bill of exceptions, the court above award a judgment of *venire de novo*, no writ of error lies on such judgment. *Kennedy v. Gregg*, 10 Ir. L. Rep. 359, Q. B.

XV. ERROR, (COURT OF.)

Where the record of the memorial of the assignment was not on the record before the Court of Error, it was held that the plaintiff in error, who assigned for error that there was no such record of the memorial, was bound to have made an application upon notice, before the case came on for argument, for a writ of certiorari, to have the said record brought up for inspection; and that not having given notice of such an application, and having no merits, the court would not suspend their judgment until such an application could be regularly made. *Craugh v. Fulton*, 5 Ir. Rep. 322, Ex. Ch.

Where there was judgment for the plaintiffs below on demurrer, and also on a bill of exceptions, and it was admitted on the part of the plaintiffs below, that the judgment on the demurrer could not be sustained, the Court of Exchequer Chamber refused to enter up a judgment of acquittal for the plaintiffs in error, with the costs of their defence in the court below; before that the question raised by the bill of exceptions, had been argued and decided on by them. *McCausland v. Martin*, 6 Ir. L. Rep. 469, Ex. Ch.

Semble—That when the judgment of the court below was for the plaintiff, the court of Exchequer Chamber, on a reversal of that judgment, was bound to enter up the same judgment for the plaintiff in error, which the court below should have given *Id.*

PRESENTMENT—See GRAND JURY. MALICIOUS INJURIES.

PRINCIPAL AND AGENT—See STATUTE OF LIMITATIONS (ACKNOWLEDGMENT). EVIDENCE. EJECTMENT (NOTICE TO QUIT).

A., the clerk of a loan society, received money from K., for the purposes of the society, upon an agreement with A. (who acted on behalf and with the sanction of the manager of the society), that K. should receive six per cent. interest upon the loan, being a rate of interest which the society was not legally competent to give. A., upon receiving the money, gave K. the following acknowledgment: "Mr. Thomas King has deposited with me this day, by his son, the sum of £100 sterling, to be added to the amount of capital in the Drumskett loan fund, and for which he will get interest

at the rate of six per cent. from this date. Dated this 12th of March, 1844." Held that notwithstanding this receipt, and the illegality of the transaction, A. was not personally liable for the sum lodged with him, in an action by the representatives of K. *King v. Ker*, 1 Ir. Jur., 261, C. P.

The husband of a *cestui que* trust, who resided in a house, a portion of the trust property, and received the rents of the residue, gave orders to the plaintiff to execute certain repairs; a portion of the trust fund was reserved by the trust deed for the maintenance of this property, which was vested in the trustees by conveyance, and after such conveyance the repairs were executed. Held that the husband was the agent of the trustees, and that they were liable to pay for the work done. *Bradley v. Beddy*, 10 Ir. L. Rep. 363; S. C., Bl. D. & O. 117, N. P., Q. B.

Plaintiff furnished G. with a sample of oatmeal for sale, and G. sold the oatmeal to the defendant. G. did not at the time enter any memorandum of the sale, or deliver a bought and sold note, but in a day or two after made this memorandum: "Sold Mr. J. R., (the defendant) for Mr. R. G. (the plaintiff) 100 loads of oatmeal, to be delivered here immediately, and to be full weight, and to be fully equal to sample, at 28s. per load, cash. Held that G. was an agent lawfully authorised by both parties. *Richey v. Garvey*, 10 Ir. L. Rep. 544, Q. B.

A principal cannot set up as a defence, forgery by his agent, if the act be done within the scope of the authority delegated to the agent. *Durcay v. Jennings*, Bl. D. & O., 12, N. P., Ex. [Per Brady, C. B.]

Where certain suits were pending, in which A. and B. were defendants, and a reference was made to the Master to report the incumbrances affecting the freehold lands of A., and amongst others he reported B. a creditor by a judgment affecting them for a certain sum. Held that this was not such an acknowledgment in writing by the agent of A. to B., or to his agent, as would take the case out of the Statute of Limitations. *Hill v. Stawell*, 2 Ir. L. Rep. 302, Q. B.

PRINCIPAL AND SURETY—*See* SURETY.

PRIEST—*See* MARRIAGE.

PRIORITIES—*See* JUDGMENTS. DEEDS.

PRISONER—*See* ARREST. CRIMINAL LAW.

Declaration against Prisoner.—*See* PRACTICE.

PROCESS—*See* PRACTICE.

PROCHEIN AMIE. *See* INFANT.

PROCTOR.

A registrar of one of the Ecclesiastical Courts,

in obtaining probate of letters of administration in uncontested cases, and charging and receiving fees for the same, is not liable to the penalties imposed by the 10th section of the 54 Geo. 3, c. 68, which prohibits any person or persons, in his or their own name, or in the name of any other person, from performing any act in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, functions, or practice of a proctor, without being admitted or enrolled. *Stephenson v. Higginson*, 9 Ir. L. Rep. 458, Ex. Ch. [*Dissentientibus*, Ball, J., Crampton, J., Doherty, C. J., and Blackburne, C. J.]

Held that the evidence of witnesses to prove the practice of other Ecclesiastical Courts in England and Ireland, in permitting the registrars thereof to obtain probates and letters of administration in uncontested cases, and to charge fees and costs for the same, was admissible on the part of the registrars. *Id.*

PRODUCTION OF DOCUMENTS.

The court refused to order certain bills of exchange, &c., in the hands of the defendants, and which were produced and relied on by him at a former abortive trial, to be lodged with the officer for inspection by the plaintiff, on an allegation that some of them were forgeries. *Daly v. Kelly*, 2 Ir. L. Rep. 209.

When the defendant alleges that certain bills on which he is sued are forgeries, the court will order the plaintiff's attorney to exhibit them to the defendant for inspection. *Smith v. McGonegal*, 2 Ir. L. Rep., 272, Q. B.

If a proprietor in the Grand Canal Company apply for a mandamus to compel the directors to allow him to inspect the books and proceedings of the company under the provisions of the 11 and 12 Geo. 3, c. 31, s. 15, he must show that in his application to the directors he stated the object for which he required the information he desired to obtain, and that the application was a reasonable one, and that the refusal of the directors was unreasonable. *Reg. v. Grand Canal Co.*, 1 Ir. L. Rep. 337, Q. B.

A declaration in debt upon an annuity deed contained two counts; the first, four years' arrears, due 1st of May, 1840; and the second for five years' arrears of the same, due to the 1st of May, 1841. The court refused to strike out the first count as superfluous, or to compel the plaintiff to furnish the defendant with a copy of the deed of assignment, it having been suggested that there had been an assignment of the deed. *Clarke v. M'Daniell*, 4 Ir. L. Rep., 131.

A land agent is not bound to produce a deed the property of his principal, though the title of the latter be not in question. If a lease be not produced, the party requiring its production may give secondary evidence, whether obtained by accident or otherwise. *Flood v. Moriarty*, Bl. D. & O., 165, N. P. [Per Pigot, C. B.]

PROFERT.

It is not necessary to make profert of a deed making a tenant to the precipe, and leading the uses of a recovery, or of any conveyance operating under the statute of uses. *Cooper v. Hamilton*, 4 Ir. L. Rep. 225, C. P.

When administration is not granted to the plaintiff, but to the party through whom he derives, it is not necessary in a *Sci. Fa.* to make profert of the letters of administration *Barry v. Hoare*, 4 Ir. L. Rep. 97, Q. B.

PROHIBITION.

A prohibition does not lie to the president of the Court of Conscience to restrain him from proceeding in an action of debt in which the question of marriage arises incidentally. *Coghlan v. Boland*, 1 Ir. L. Rep. 63, Q. B.

Semble, if it appear that the action was only colourably for debt, but really to try the validity of a marriage, a prohibition will be granted. *Ib.*

The rejection of a plea to the jurisdiction of an inferior court is not a ground for a prohibition, unless it appear that the plea was verified by affidavit. *Ib.*

PROLIXITY—See AFFIDAVIT.

PROMISE—See ASSUMPSIT.

PROMISSORY NOTE—See BILLS OF EXCHANGE.

PROVISIONAL ASSIGNEE—See BANKRUPTCY AND INSOLVENCY.

PUBLIC BUILDINGS—See RATES.

PUBLIC COMPANY—See SCIRE FACIAS. BANK. RAILWAY.

Notice to treat for Purchase.—By a local Act, power was vested in the council of the borough of B. to purchase certain properties in a schedule to the Act specified, and to complete the same within five years, and the Land's Clauses consolidation Act, 1845, was incorporated with said local Act. The council of the borough served a notice on the lessees of said properties, requiring the particulars of their title, and the amount of compensation they sought. Held, that the relation of vendor and purchaser was thereby created, and that the council were bound within a reasonable time to complete such purchase. *Suffern v. The Council of the Borough of Belfast*, 10 Ir. L. Rep. 40, Q. B.

PUBLIC OFFICER—See QUO WARRANTO.

PUBLICAN—See REVENUE.

QUAYAGE—See RATES.

QUARE IMPEDIT.

Amendment.—See AMENDMENT.

Pleading.—A declaration in *quare impedit* stated that, by an indenture of the 6th of June, 1683, the advowson of Athassel was vested in trustees to hold, after certain uses which had since determined to the use of the first Duke of Ormond in tail male, with remainder to Richard Butler for ninety-nine years, if he should so long live; with remainder on his death to his first and other sons successively in tail male; the declaration averred that, under the remainder to the first Duke in tail male, the second Duke became seized of an estate in tail male, that he died without issue male, and that his brother Charles Earl of Arran became seized of an estate in tail male, under the remainder to the first Duke in tail male; that Charles Earl of Arran died without issue male, and that John Butler became seized of an estate in tail male, under the remainder to the first and other sons of Walter Butler in tail male, and from John Butler, deduced title, to the plaintiff. The sixteenth plea stated, that by Statute 1 Geo. 1, made for Ireland, and passed at Westminster, it was enacted, that the second Duke of Ormonde should stand attainted of high treason, and his estates be forfeited, unless he surrendered himself at, or before, a given day to take his trial; the plea then stated that he, not having surrendered at the prescribed time, became attainted of high treason, and all his estates within this kingdom of which he was then seized, became forfeited to the king; and that afterwards by another Act, (7 Geo. 1), made for Ireland, and passed at Westminster, reciting the attainder of the second Duke, it was enacted that Charles, Earl of Arran, was thereby, for a valuable consideration, declared to be the purchaser of the second Duke's forfeited estates, and that those estates were thereby vested in trustees to the use of Charles, Earl of Arran, for ninety-nine years, if he should so long live, with remainder to his first and other sons in tail male, with remainder to himself in fee, the plea having averred that Charles, Earl of Arran, being seized and possessed of the forfeited estates, died without issue male, having first devised to trustees upon certain trusts, concluded with a special traverse of the seizin of John Butler. Held, upon general demurrer, that this plea was bad, as not showing that the remainders over, after the estate tail in the second Duke of Ormonde, was forfeited, or in anywise affected by his attainder, or by the Acts of Parliament as pleaded, inasmuch as those Acts only professed to deal with the estates which were forfeited. *The Marquis of Ormonde v. The Bishop of Cashel*, 10 Ir. L. Rep. 577, C. P.

The plaintiff proceeded for four separate churches of Athassel; the declaration contained a distinct count for each church. The defendant in some of his pleas averred, that the four churches were one and the same church, and not several churches, as alleged by the declaration. Held, on special demurrer, that these pleas were good. *Ib.*

The eighteenth and nineteenth pleas were framed for the purpose of taking advantage of the Statutes 6 & 7 Vic., c. 54, and 7 & 8 Vic., c. 27, which

limit, after the 1st of January, 1845, under certain circumstances, the bringing of actions relating to presentations. These pleas concluded by a denial that this suit had been commenced, or that any original writ had been issued in this action on or before the 1st of January, 1845, in manner and form as the plaintiff had alleged. The only allusion to the original writ in the declaration was the statement that the defendant had been summoned to answer, &c. Held, upon special demurrer to those pleas, for having traversed that which was not alleged in the declaration, that they were good. *Ib.*

The twenty-second plea was, that no clerk was at any time offered, or presented, by the late Marquis of Ormonde, in his life-time, or since his decease, by the plaintiff, as a fit clerk to be admitted by the defendant, (the ordinary,) nor did any clerk claiming to be admitted, instituted and inducted by virtue of any such presentation, offer himself to the defendant for examination, or approval, respecting his fitness, or qualification, to be accepted, and admitted to the said church by the defendant. Held, bad for duplicity. *Ib.*

Whether the twenty-second plea was bad as amounting to the general issue *ne disturba pas*? *Quære.* *Ib.*

In a declaration on a *quare impedit* the plaintiff set out as the commencement of title, letters patent of the 6th of April, 1662, whereby King Charles the Second granted unto Rickard, the sixth Earl of C., and his heirs *inter alia*, the advowson of K. habendum to the use of C. M. C., Lord M., his heirs and assigns, until the said Rickard or his heirs should pay to the said Lord M., his heirs or assigns, the several sums in said letters patent specified at the time and in the manner therein mentioned, which sums, the declarations averred, had been long since duly paid off, and discharged—to wit, on the day and year, and at the place last aforesaid, and from and after due payment of said several sums in form aforesaid, then to the use of the said Rickard, and his heirs male, &c. The declaration then stated that by the act of settlement (14 and 15 Car. 2) it was enacted that all houses, castles, &c., and other hereditaments whatsoever, granted by said patent, should be immediately vested, settled, and established, and were thereby vested, settled and established in the said Rickard and his heirs to and for the uses, &c., expressed and set forth in said patent, saving all manner of persons, &c., other than his said Majesty his heirs and successors, or those claiming under him and other than such whose estate would have vested in his said Majesty, his heirs and successors, or those claiming under him, and other than such whose estates would have vested in his said Majesty, by the scope of this act, if the above provision had not been inserted, and other than such as might claim any right or title thereto in prejudice of any of the uses limited by said patent by descent, or by virtue of any estate tail in remainder from any of the late Earls of C. It was then averred that the said Rickard, as also his heir William, the seventh Earl, were and continued to be Irish Papists until their respective deaths, and that by the act of explanation (17 and 18 Car. 2) it was enacted that nothing in the acts

of settlement or explanation should be understood to give, restore, or confirm, to any Irish Papist any advowson or right of patronage, but all should vest, remain and continue in his Majesty, his heirs and successors until the conforming of such Papist, and after such conforming, should re-vest in the person so conforming and his heirs. It was then averred that King Charles the Second being seized of the said advowson, did by patent of the 19th of December, 1681, reciting the act of explanation and that Richard, Lord Dunkellin (the eldest son of William the seventh Earl), had renounced the communion of the Church of Rome, and had embraced the Protestant religion, and had thereby put himself in the capacity of obtaining a mark of the said king's favour, grant to the said Lord Dunkellin and his heirs continuing Protestants, *inter alia*, the said advowson of K. It then averred a presentation of said advowson to said Lord D., which was the presentation relied on. Held that the words in the act of explanation providing that the advowsons of Irish Papists should "remain and continue" in the king, until conforming were introduced to retain and preserve that species of property in the crown until the conforming of the Irish Papist who had forfeited it, and therefore that it was not competent for Charles the Second to grant the advowson to Lord D., and that consequently the declaration was bad, in not showing a presentation which could be referred to the title relied upon. *The executors of the Marquis of Winchester v. the Bishop of Kilmore*, 9, Ir. L. Rep., 107, Q. B.

Held also, that the declaration was defective, in not having averred that Lord D. was a Protestant, or had conformed at the time of the patent of 1681. *Ib.*

The title of the plaintiff, as stated in the declaration, was a term of 500 years, created by settlement of 1785, which was not to commence until the determination of a previous term of 300 years, created by a private act of the 10 Geo. 3, and "the trusts of which said term (it was averred) had been long since satisfied, and the said term ceased and determined." Held that the declaration was bad, in not having shown in what event or events that term was to cease or determine, or that any event or events had occurred upon which the term did cease and determine. *Ib.*

Quære, did the said declaration show that a good title to present to the said vicarage was vested in any person anterior to, or at the time of, the presentation on which the plaintiff relied. *Ib.*

In an action of *quare impedit*, for the recovery of the advowson of Camus, in the county of Londonderry, in which the Bishop of Derry was the defendant, the principal issues being on the seisin of King James the First, and the seisin and possession of the plaintiff, the plaintiff gave in evidence, (among other things,) a Royal Commission, directed to the Bishop of Derry (among others), and an inquisition taken at Limavady in obedience thereto, on the 30th of August, 1609, finding that the patronage of all the advowsons in the county of Coleraine (afterwards Londonderry), of which Camus was one, did of right belong to the king, in right of his crown. They next gave in evidence articles of agreement, dated in the following Janu-

ary, between the Lords of the Privy Council of King James the First, and the Mayor and Commonalty of the City of London, whereby it was stipulated that the City of London should have the patronage of all the churches, as well within the City of Derry and town of Coleraine, as in all the lands to be undertaken by them, and a patent by the king, dated 29th March, 1613, incorporating the Irish Society (the plaintiffs), and granting to them (*inter alia*) the advowson of Camus. The defendant, in support of his case, offered in evidence a surrender of the 1st of August, 1610 (not confirmed by the Dean and Chapter, and not enrolled in Ireland), by George Montgomery, Bishop of Derry, to King James the First, of the rectory of Derry, and also all parsonages, advowsons, &c., within the diocese of Derry and County of Coleraine, and the ferry of Derry to be disposed of at the king's good will and pleasure. Also a patent of the 3rd of August, 1610, enrolled in England but not in Ireland, to Bishop Montgomery, by which King James the First granted to the said bishop and his successors for ever several denominations of lands, including the lands in Camus, and the advowsons, &c., to them, and the said bishoprick belonging or appertaining, excepting certain advowsons expressly excepted, and nine out of fifteen advowsons which, by mutual consent, were to be transferred from the bishop to the society; and after a recital that "whereas we are informed that there are, in the county of Coleraine, and within the said diocese of Derry, fifteen advowsons of churches, &c., anciently belonging and appertaining to the said bishoprick of Derry; and also of the agreement that the bishop was to have six and the society nine of them, there was a provision for the election and appropriation of the said advowsons by and to their respective patrons. The said patent also contained a covenant on the part of the bishop for further assurance to the king and his successors, of the aforesaid glebe lands, ferry, and water of Derry, and the premises excepted. Also, two king's letters, under the privy seal, nominating and discharging from the first fruits the two subsequent Bishops of Derry, bearing date respectively the 11th of August, 1610, and the 21st of December, 1611, reciting and enjoining the performance of the aforesaid agreement between the crown and the society. Held, that notwithstanding the said articles of agreement of January, 1609, the said patent and the surrender as connected with it, were admissible as evidence of an act of the crown, at variance and inconsistent with the finding of the inquisition of Limavady, and leading to the inference that the crown had no prior title of its own to all the advowsons in Coleraine. *Irish Society v. the Bishop of Derry*, 4 Ir. L. Rep., 198, Ex. Ch.; S. C. 8 Ir. L. Rep., 467, Dom. Proc.

Semble, that the said surrender and patent were some evidence of an admission that Camus anciently belonged to the bishoprick. *Ib.*

Held that the two letters under the privy seal were admissible on the same ground as the letters patent, and as recognising the bargain with the bishop therein mentioned. *Ib.*

Held that the 35 Geo. 3, c. 39, cured the objec-

tion of the patent not having been enrolled in Ireland. *Ib.*

Held that the bishop's returns to the first-fruits writs were admissible as secondary evidence of collations, by the bishops and their successors to the livings of Camus, and part of the same being receivable in evidence, the defendant was entitled to have the whole submitted to the jury as being one official act. The circumstance of the returns having been made by the bishop or his predecessors only affected the value and not the admissibility of the evidence. *Ib.*

Held that the Primate's triennial visitation books, and entries of the Bishop's returns in the First Fruits books, were admissible on the part of the defendant, as secondary evidence of the collations by the bishop. *Ib.*

Held that the original collations by the bishops were admissible as evidence of the possession of the advowson. *Ib.*

Judgment.]—See PRACTICE.

QUARTER SESSIONS—See ARREST.
ATTORNEY.

QUO MINUS—See PLEADING.

QUO WARRANTO—See CORPORATION.
MANDAMUS.

S. and D. in 1836 were candidates for the office of treasurer of the public monies of the city of Dublin, the former was elected—the returning officer (the Lord Mayor) having rejected the votes of some of the divisional justices of the city who attended and tendered them for D. D. subsequently filed an information in the nature of a *quo warranto*, and obtained a verdict that S. was not duly elected, to which exceptions were taken and overruled, the court holding that these justices had a right to vote. D. then applied for a mandamus to the Lord Mayor to convene a meeting to complete his (D.'s) election, and at the same time applied for a mandamus to the Lord Mayor to hold a new election, on the ground that the former was void, the court granted the former and refused the latter application. To this mandamus the Lord Mayor made a return, setting out that the divisional justices were not duly summoned, and to shew the election void, and while that question was pending he held another election at which S. was the only candidate, and was elected. D. then obtained an order to quash the return, and for a peremptory mandamus to the Lord Mayor by virtue of which he was put into possession of the office. The present relator now applied for a *quo warranto* against D. upon the ground that the election of 1836 was void, the divisional justices not having been duly summoned; and the court—though it was insisted among other things that this was really the application of S., who hitherto had upheld the validity of that election, and had several opportunities of raising the same question—made the rule for the *quo warranto* absolute. *Reg. v. Darley*, 2 Ir. L. Rep. 253, Q. B.

To an information in the nature of a *quo warranto* the defendant must set forth fully in his pleas the

title upon which he relies against the right of the crown. *Reg. v. Darley*, 3 Ir. L. Rep. 334, Q. B.; S. C. 5 Ir. L. Rep. 108, Ex. Ch.; 8 Ir. L. Rep. 484, Dom. Proc.

Where a plea to such an information, after admitting the vacancy stated in the information set forth, that afterwards, &c., a meeting was held at, &c., between the hours of twelve in the fore-noon, and two in the afternoon of said day, for the purpose of electing a fit and proper person to the office, in the room of, &c., the deceased, pursuant to the statute in such case made and provided. Held, that a traverse which put in issue the fact that said meeting was held pursuant to the statute, was a good traverse. *Ib.*

Quære, whether the defendant was entitled to plead several pleas. *Ib.*

Quære, whether, when a defendant pleads several pleas in a case where he is only entitled to plead one, the objection can be raised by demurrer, or whether a motion to set them aside as irregular, is not the proper course. *Ib.*

On a motion for an information in the nature of a *quo warranto*, the election of a town councillor being impeached by objections to his voters, on the ground of personation, it is no answer in shewing cause, that, upon the defendant's affidavit, enough of the opposite party's votes are bad to reduce his number in the poll below that of the defendant. *Regina v. Byrne*, 4 Ir. L. Rep. 273, Q. B.

Quære, is a *quo warranto* information maintainable for the office of borough weigh-master, appointed under the 4 Ann, c. 14, within the statutes 19 Geo. 2, c. 12, and 38 Geo. 3, c. 2? *Honan v. Versker*, 10 Ir. L. Rep. 64, Q. B.

RAILWAY COMPANIES.

Generally.—Where certain calls were made by the directors of a railway company, who were bound by the 90th section to pay up all calls due by them before they acted in any way; and before these calls were made, or anything done upon them, they were again rescinded. Held, that the directors were authorised to rescind the resolution for these calls, though they had not paid them. *Dublin and Drogheda Railway Company v. Nash*, 4 Ir. L. Rep. 289, Q. B.

Where a conditional order for a mandamus was obtained against a railway company, to compel them to hold an inquisition to assess compensation, and in the interval between the obtaining of the order, and the shewing cause, they held the inquisition, and lodged the purchase money, the court will compel them to pay the costs of the conditional order, when a reasonable time had elapsed between the notice to treat, and the date of the order. *Reg. v. Great Southern and Western Railway Company*, Bl. D. & O. 139.

Provisional Committees.—The members of the committee of a company provisionally registered, under the 7 & 8 Vic. c. 110, are not partners so as to make one liable for the acts of the other. The fact of a person agreeing to become a member of the provisional committee, and signing the consent required by the Act of Parliament, merely amounts

to an engagement to arrange measures for a future partnership; therefore in an action against a provisional committee-man, for work done by the order of another person, on behalf of the intended company, to render the defendant liable, he must be shewn to have entered into the contract. *Forrester v. Bell*, 10 Ir. L. Rep. 555; S. C., Bl. D. & O. 119, N. P., Q. B.

Railway Shares.—A stockbroker negotiating the sale and transfer of shares in a railway company, is not within the term "promoter of a company," in the 7 & 8 Vic. c. 110, s. 24. To an action, therefore, brought by him for to recover money paid for the defendant in the purchase of shares, it is no defence that such shares were in companies not registered. *Rooney v. Palmer*, 9 Ir. L. Rep. 327, Q. B.

Notice to Treat.—If after the service of a notice to treat by a railway company, the party served replies thereto by a notice stating his title to the lands, and the compensation he claims, and the company neither refer the matter to arbitration, or summon a jury to decide it. Held, that they thereby acquiesce in the offer made, and that the 8 Vic. c. 18, s. 68, gives a right of action to the owner of the land for the amount claimed. *Eaton v. The Midland Great Western Railway Company*, 10 Ir. L. Rep. 310, Q. B.

Held, also, that the 68th, 184th, and 124th, sections of that statute, (the Lands Clauses Consolidation Act, 1845,) are not repugnant to each other. *Ib.*

Appearance by.—See *Hill v. Coleraine Railway Company*, Bl. D. & O. 43, Ex.

Recovering back Deposits.—See ASSUMPSIT.

An allottee of shares in a railway company provisionally registered, paid a deposit of £2 2s. per share, and signed the subscriber's agreement, which gave the provisional directors power to carry on the undertaking, or any part of it, or to abandon the whole, or any part of it, and out of the money which should come to their hands by way of deposit, or otherwise, to make such deposits, or investments, as might be required by the standing orders of Parliament, &c., and generally to apply such moneys in paying and satisfying all other costs, expenses, or liabilities, which they might incur in paying and satisfying all other costs, expenses, or liabilities, which they might incur in relation to the undertaking. The project proved abortive, and in an action of assumpsit to recover back the deposit, Held, that the plaintiff could not, in such action, impeach the validity of the subscriber's agreement, and that by executing that deed he had authorized the directors to dispose of the money, and, therefore, could not recover back any portion of the deposit. *Daly v. Rooney*, 1 Ir. Jur. 196, Q. B.

The defendant being the proprietor of certain shares in a projected stock company for which he paid a deposit of £50, sold the same to the plaintiff for £250, through a third person who negotiated the entire sale. In about a fortnight after the project was set on foot it was entirely abandoned, and before any deed or written agreement was exe-

cuted by the parties, the plaintiff received back the £50, the amount of the original deposit on the shares he purchased, and then brought the present action for money had and received for his use by the defendant, in order to recover the residue of the £250. Held, that he was entitled to recover that sum. *Maguire v. Goddard*, 3 Ir. L. Rep. 306, Q. B.

Actions for Calls.—A. was a subscriber for five shares in the D. & R. C., and in February, 1836, executed a parliamentary contract, covenanting for himself, his executors, administrators, and assigns, to pay the amount of the shares he subscribed for; and afterwards, in May, 1836, sold his shares, and assigned his scrip to B.; and in August in that year an Act of Parliament was passed incorporating the subscribers into a company; but A. continued as the registered proprietor, in the books of the company of these shares. B. never claimed any right as assignee, nor was he recognised as such by the company. Held, that A. continued liable for the amount of calls, on foot of the five shares made after the said assignment, as the proprietors thereof. *Dublin and Drogheda Railway Company, v. Nash*, 4 Ir. L. Rep. 239, Q. B.

Lodgment of Purchase Money.—An affidavit to ground an application for liberty to transfer money lodged by a railway company, under the 8 Vic. c. 18, must state accurately the rights of the persons claiming. *In re Great Western Railway Company*, Bl. D. & O. 112, Ex. [See, *Ex parte Grange*, 3 You. and Col. 62.]

Mandamus.—See MANDAMUS.

The prosecutor was possessed of a piece of ground on the sea shore, on which he erected a dwelling-house, for the purpose, among others, of bathing; of which enjoyment he was deprived, in consequence of a railway embankment raised between the dwelling-house and the sea. Held by a majority of the judges, that a mandamus lay against the company, under the provisions of the 68th section of the 8 & 9 Vic. c. 20, (Railways Clauses Consolidation Act); and that it was not a subject for compensation under the provisions of the 94th section of the 8 & 9 Vic. c. 18, (Lands Consolidation Clauses Act.) *Falls v. B. & B. Railway Co.*, 1 Ir. Jur. 303, Ex. Ch.

RATES.

Police rates.—By an act of Parliament a power was given to Commissioners, &c., to levy rates for cleansing and lighting the town of B., and the valuers were to value "the several messuages, tenements, houses, buildings, and hereditaments;" and the persons assessed were "all and every person who should rent or occupy within said town, any messuage, house, warehouse, shop, cellar, vault, stable, coach-house, brew-house, granary, malt-house, building, garden, land, tenement, or hereditament." Held, that a person who derived quayage from a quay in the town, was not rateable in respect of the quay or quayage derived therefrom. *Tombe v. Commissioners of Borough of Belfast*, 1 Ir. L. Rep. 164, Q. B.

Poor's Rate.—The Grand Canal Company being rated under the Act for the relief of the poor for the canal and its banks, an additional rate is assessed on them for the "value of land or water supplied to the pipe water establishment of the city of Dublin," and for "profits" received from the pipe water establishment for the water supplied for "watering the streets," and "profits from the supplies to the public fountains." Held, bad as being a rating of the whole already rated. *Grand Canal Company v. Guardians of the South Dublin Union*, 6 Ir. L. Rep. 424, Q. B.

Held also, that the Canal Company are not occupiers under the 61st section of the 1 & 2 Vict. c. 56, so as to make them rateable. *Ib.*

Quære, are those profits "rateable hereditaments" under the 1 & 2 Vic. c. 56, s. 63. *Ib.*

The landlord of a house and land occupied as a charitable institution is not liable to be rated to the relief of the poor under the 1 & 2 Vic. c. 56. *Ex parte Hayes*, 8 Ir. L. Rep. 196, Q. B.

Rates on Public Buildings.—When a dead wall or void space of ground attached to a public building abuts on a street, so much of the street as lies immediately in front of the public building is, under the 54 Geo. 3, c. 221, liable to be taxed by the square measure, and the remainder by lineal measure only. *King's Inns Society v. Commissioners of Paving*, 8 Ir. L. Rep. 157, Q. B.

The 65th section of the 1 & 2 Vic. c. 56 enacts, "that the particulars of every rate made for relief of the poor shall be entered in a book in the form given in the schedule to the Act annexed, and the Guardians shall before the same is levied sign the declaration at foot of said form, and the said book shall be evidence of the truth of every particular so contained therein." Actions of debt were brought by Guardians of the poor to recover from the defendant the amount of a rate made upon him as "immediate lessor," of occupiers of hereditaments of less annual value than £4. The guardians produced the rate book at the trial and relied on them as establishing conclusively the liability of the defendant to the rate. Held, that the defendant was at liberty to rebut the statement contained in the rate books, and to go into evidence to show he was not the immediate lessor. *Guardians of Castlebar Union v. Lord Lucan*, 1 Ir. Jur. 142, Q. B.

Ministers' Money.—Ministers' money is a rate within the meaning of the 3 & 4 Vic. c. 108, and is necessary to be paid, before the person liable can be enrolled as a burgess. *In re O'Flynn*, 10 Ir. L. Rep. 47, Q. B.

RE-BUTTER—See PRACTICE.

RECEIVER—See EJECTMENT. (NOTICE TO QUIT.)

RECITALS.

Held that a recital in a deed read by a party is sufficient to rebut secondary evidence given by the same party that the contents of the recited deed differed from the recital. Held, that the jury should

presume a deed to have been made in accordance with the recital, rather than believe the evidence to contradict it. *Flood v. Moriarty*, Bl. D. & O. 165, N. P. [Per Pigot, C. B.]

◆
RECOGNIZANCE—*See* SCIRE FACIAS.

The court will not vacate a recognizance against a party when there is a bill of costs entered up against him in the Crown-office, without notice to the Crown-solicitor, though a long period has elapsed since the entry. *Anonymous*, Bl. D. & O. 205, Ex.

◆
RECORD—*See* PLEADING. PRACTICE.

Amendment.]—*See* AMENDMENT.

Quære, can an order for the removal of a record under the 3 & 4 Vic. c. 105, s. 30, issue without a *certiorari*. *McDonna v. Hanley*, 6 Ir. L. Rep. 155, Q. B.

Should the original record be returned, or is an exemplification of it a sufficient compliance with the statute? *Ib.*

No subpoena shall in future issue for the production of any record in the custody of the paymaster of civil services, or of any other officer of her Majesty, distinct from those under the controul of the several courts, without the order of the court, or of one of the judges thereof, upon special application in the cause where the same shall be deemed necessary, and notice of such application must be given to the Crown-solicitor of the district wherein the record is deposited; and the order served on the officer in whose custody it is with the writ of subpoena or *duces tecum*. *In re Attorney-general*, 5 Ir. L. Rep. 185.

The court will amend the return of a record by extending the same to the following term, provided it is not out of return at the time of the application, and that the amended return-day be not beyond the time at which the record might at first have been made returnable. *Bagot v. Graham*, Bl. D. & O. 239, Ex.

◆
RECORDER—*See* MAGISTRATE.

◆
RE-DOCKETTING—*See* JUDGMENT.

◆
RE-ENTRY—*See* EJECTMENT.

◆
REGISTRATION—*See* DEED.

The registration of a deed operating in law as a surrender is not equivalent to the registration of an actual deed or instrument of surrender. *Powell v. Kelly*, 10 Ir. L. Rep. 193, Q. B.

◆
REGISTRY—*See* ELECTION.

◆
REJOINDER—*See* PRACTICE. (FURTHER TIME TO PLEAD.)

◆
RENEWAL OF WRITS—*See* HABERE. SHERIFF.

RENT—*See* DEBT. COVENANT. REPLEVIN. STATUTE OF LIMITATIONS. LANDLORD AND TENANT. TRESPASS. TITHE-RENT CHARGE.

◆
RENT CHARGE—*See* DEED. COVENANT. PLEADING.

Apportionment of.]—*See* SEQUESTRATION.

◆
REPLEVIN.

Amendment.]—*See* AMENDMENT.

Generally.]—Quære, can the bailee of a chattel maintain an action of replevin, and if he can, is it necessary that he should have the actual possession of the chattel at the time of the seizure? *Butler v. Bridge*, 3 Ir. L. Rep. 464.

Quære, should the bailment be replied specially to the pleas of property. *Ib.*

A general avowry by the assignee of an insolvent for rent, which had accrued due to a former assignee who had died, is bad. *McKeon v. Smith*, 5 Ir. L. Rep. 291, C. P.

In an action of replevin the defendant pleaded—first *non cepit*, secondly, that the goods seized were not the property of the plaintiff, thirdly, a special cognizance that he seized the goods under a statuteable execution against a third party and that these goods were not the goods of the plaintiff, on which pleas, issue was joined as to the property in the goods, and a verdict found for the plaintiff. Held that under such circumstances a motion for a nonsuit could not be sustained. *Keenan v. Philips*, 5 Ir. L. Rep. 440, Q. B.

A defendant in replevin may move for judgment *non obstante veredicto*. *McCreany v. Jackson*, 5 Ir. L. Rep. 443, Q. B.

In an action of replevin, an immaterial issue had been joined on a replication, and a verdict found for the plaintiff. Held, that the avowant was not entitled to judgment *non obstante veredicto* upon that issue, though there was no confession of the cause of action in that plea. *Ib.*

Distress.]—As to the necessary amount of evidence of insufficiency of distress. *See Orr v. Stephenson*, 5 Ir. L. Rep. 6. [Per Pennefather, B.]

The 6th section of the 6 & 7 W. 4, c. 75, requiring a landlord to deliver a particular of distress, does not apply to actions of replevin in the superior courts. *Daly v. Bloomfield*, 5 Ir. L. Rep. 65.

An agreement to change the gale-days on which the rent is to be paid, and ascertaining the fraction payable on the then last new gale-day, will be sufficient evidence, to go to the jury, of rent being in arrear, so as to support a distress. *Parcell v. Nolan*, 1 Ir. L. Rep. 258, C. P.

Writ.]—A writ of replevin will not be quashed if it issue to get back goods, which the defendant obtained by virtue of a contract, to convey them over the sea for the plaintiff, there being questions of law and fact which can be tried in the action. *Corscaden v. Stewart*, 1 Ir. L. Rep. 166, Q. B.

When the plaintiff, from whom a mare had been stolen, which was found in the possession of the defendant, who had purchased her from a party accused of having stolen her, had issued a writ of

replevin, returnable into this court, and thereby obtained possession of the mare, after informations had been sworn against the reputed felon, but before he had been tried. The court ordered the writ to be quashed, and the mare to be returned to the defendant. *Doyle v. Kelly*, 4 Ir. L. Rep. 9, C. P.

Pleading.—Where in replevin, the plaintiff declared for a taking on the 9th of August, 1838, and the defendant avowed for five years arrears of rent, next before, and ending on the 25th of March, 1836, due to the defendant by virtue of a demise theretofore made, and the plaintiff pleaded, amongst other pleas, a plea of the recent statute of Limitations (3 & 4 W. 4, c. 27, s. 42), to the whole amount of the arrears; the defendant demurred, principally on the ground, that the plea of the statute should have been confined to the period of the five years which were outside six years; but the court overruled the demurrer. *Wilson in replevin v. Jackson*, 2 Ir. L. Rep. 1, Q. B.

Although the terms of the contract must be accurately stated in an avowry, and a variance in respect to them would be bad, yet the time stated is not material. [Per Burton, J.] *Ib.*

Where a further plea to an avowry, in the formal part (as to leave of the court, &c.), professed to be an answer to the whole of the avowry; but in the substantial part of the plea professed to be an answer, and only answered a part of the demand. Held good on general demurrer. *Ryan v. Young*, 2 Ir. L. Rep. 76, Q. B.

Sembla—That this plea would be bad on special demurrer. *Ib.*

Where, to an avowry, the defendant pleaded that the property in question was the joint property of himself and the plaintiff. Held, that this was a good plea; and where to the avowry several other pleas were pleaded; in all of which, the taking was denied, and the detention justified. Held, that the said pleas were bad for duplicity. *Raeves v. Morris*, 2 Ir. L. Rep. 309, Q. B.

The plaintiff in replevin being under terms to plead issuably, pleaded to all the avowries and recognizances, in the names of different parties, a plea of riens in arrear, "from the plaintiff to the said defendant." The court ordered the plea to be taken off the file with costs; but gave the plaintiff liberty to plead anew. *Graydon v. Kernan*, 4 Ir. L. Rep. 121, C. P.

In replevin the declaration stated that the defendant on, &c., "in the parish of St. Thomas, in the county of the city of Dublin, in a certain dwelling house, there took the goods, &c." of the plaintiff; and the defendant demurred, specially on the ground that the *locus in quo* was not sufficiently described. Held, that the description in the declaration was sufficient. *Kenny v. Simpson*, 4 Ir. L. Rep. 42, Q. B.

In replevin of a distress for a rent-charge, the defendant, in the cognizance, set out deeds which made title to part of the lands on which it was charged, as well as the rent-charge itself. Held, that it was not necessary to plead the lease and release as distinct deeds, as the conveyance might be resorted to as grants at common law. *Cooper v. Hamilton*, 4 Ir. L. Rep. 225, C. P.

Held, that it was not necessary to aver continuance of seizin in fee of the rent in the party distraining at the time of the distress, and that an averment at the conclusion of the cognizance, that "the *locus in quo* is, and at the time when, &c., was part of the premises granted and re-leased by the deed of 1712; and by virtue of which deed, the premises therein mentioned were charged with, and made subject to the said yearly rent, to be issuing and growing thereout; and because a certain sum at the said time, when, &c., was due, &c.," was a sufficient allegation of the lands being charged with the rent, at the time of making the distress. *Ib.*

Held also, that it is not necessary to make proffer of a deed making a tenant to the præcipe, and leading the uses of a recovery; or of any conveyance operating under the statute of uses. *Ib.*

An avowry, which, after stating that the taking or detention of several distinct parcels of goods was for several and distinct gales of rent, in the conclusion justified the taking or detention of all the goods, for the whole arrear of rent, is bad on general demurrer. *Dejoncourt v. Rogers*, 8 Ir. L. Rep. 450, Ex. Ch.

A plea to an avowry in replevin, framed under the 10th section of the 9 & 10 Vic. c. 111, ought distinctly to apprise the defendant of the precise default complained of by the plaintiff; and therefore where the language of the plea was so ambiguous as to leave it doubtful whether the plaintiff complained of a non-delivery of the particulars of distress, to a person in possession—there having been such a person—or of the defendant's having omitted to put the same on a conspicuous part of the premises, being vacant at the time. Held to be bad for uncertainty. *Richardson v. Newnham*, 1 Ir. Jur. 204, Q. B.

Sembla—The plea might have been in the alternative; provided that neither allegation was so worded as to leave the materiality of the other doubtful, for the purposes of the pleading in question. *Ib.*

Sembla—That the plea was bad, having been pleaded to two avowries, differing in respect of the rent-days, and nevertheless referring to a single particular. *Ib.*

Variance.—Lands were leased after the passing of the 4th Geo. 4, c. 99, and an establishment for the composition of tithes, within the parish at a yearly rent of £104 8s. 6d., together with £7 1s. 6d., for tithe payable half-yearly; and the landlord, after the passing of the 1 & 2 Vic. c. 109, distrained for half-a-year's rent due, viz. one-half of the foregoing rent and tithe, minus one-eighth of the latter, and in an action of replevin, avowed for the full amount of the said one half-year's rent and tithe, without deducting the one-eighth of the latter; and at the trial gave the lease in evidence. Held not to be a variance. *Burke v. Dignam*, 3 Ir. L. Rep. 368, C. P.

Amendment of Pleadings.—A notice and consent served on the plaintiff, to allow the defendant to amend and add new avowries, on the terms of amending the plaintiff's copy, entering the rules to plead *de novo*, and paying to the plaintiff such costs as might be incurred by him, by reason of the

amendment. Held to be sufficient, without the additional terms of the defendant paying the costs of pleas in bar. *Whelan v. Annesley*, 4 Ir. L. Rep. 17, C. P.

Evidence.—In replevin it appeared that the plaintiff, who was an admirer of paintings, became acquainted with the defendant, who represented himself as an artist, and immediately after lent 42 paintings from his dwelling-house, for exhibition in the defendant's lodgings, in order, as it was alleged, to assist defendant, and also to have them cleaned; and in about a month afterwards, the plaintiff purchased several paintings through the defendant, which were also sent to the same place with the plaintiff's consent. With respect to one painting, it appeared that the plaintiff gave the defendant the money to purchase it; sent him to buy it; and directed him to bring it to Nassau-street. The defendant purchased the painting, but did not bring it to Nassau-street, but took it to his own lodgings with the rest of the plaintiff's paintings. It further appeared, with respect to three others of the paintings, that when the plaintiff went with the sheriff, to point out to him his paintings in the defendant's lodgings; these three were missing, and the defendant said he had sold them; but upon search they were discovered removed from the room in which the others were, and concealed in the garret of the house. Held, by the whole court, that with respect to the one painting above mentioned, there was sufficient evidence of a taking of it by the defendant to go to the jury, and to sustain their finding for the plaintiff on the plea of *non cepit*. *Reeves v. Morris*, 3 Ir. L. Rep. 494, Q. B.

Where to a declaration in replevin, the defendant pleaded that the goods were the property of A. Held, that A. was not a party to the suit, nor a person on whose individual behalf the action was defended, and therefore that he was a competent witness. *Kemp v. Mathews*, 9 Ir. L. Rep. 405, Q. B.

On an issue in replevin, as to whether a person named Garvin was tenant at a certain period to A. or B. Garvin, was produced at the trial as a witness, and an attested copy of an affidavit, made by a person of the same name, in a cause in the Court of Exchequer, was offered in evidence, in which the allegations as to facts were different to what Garvin swore at the trial. Held, that such attested copy was admissible in evidence—proof being given of the identity of the person, with the person who swore the affidavit. *Garvin v. Carroll*, 10 Ir. L. Rep. 323, Q. B. [*Ferrin, J. dubitante.*]

Costs.—See COSTS.

Replevin Bond.—See DEBT. CIVIL BILL.

Setting aside Judgment.—See PRACTICE.

REPLY.

Right of.—See COUNSEL.

REPUGNANCE.—See PLEADING.

RESTITUTION.

Writ of Restitution.—See EJECTMENT.

A writ of restitution will not be granted to a tenant, who lies by for eight months after the execution of the *habere*, and permits the landlord to repair and re-let the premises, though the latter had obtained judgment in the ejectment upon entering into a consent that he should execute a lease of the premises in question to the tenant for a term of three lives. *Martin v. Pierce*, 9 Ir. L. Rep. 297, Ex.

RETURN.—See SHERIFF.

REVENUE.—See MAGISTRATE. MANDAMUS.

A grocer, obtaining the license specified in the 6 & 7 W. 4, c. 38, s. 3, to retail spirits in quantities, not less at one time than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer, is liable to the higher rate of duty imposed upon retail spirit licenses, by the 2nd section and schedule 6 Geo. 4, c. 81. *Dickson v. Pape*, 7 Ir. L. Rep. 74. [*Brady, C. B. dissentiente.*] S. C.—Decision reversed. *Dickson v. Pape*, 7 Ir. L. Rep. 107, Ex. Ch. [*Lefroy, B., Richards, B., Torrens, J., & Pennefather, B., dissentientibus.*]

The effect of the 6 & 7 W. 4, c. 38, s. 3, is, that a licensed publican is not entitled to a grocer's license for the sale of coffee, tea, &c., on the same premises; and a person holding a grocer's license, is not entitled to any other license, for the sale of spirits, but that mentioned in 6 & 7 W. 4, c. 38, s. 3. *McKenna v. Pape*, 7 Ir. L. Rep. 98, Ex. C.

The 7th section of the 3 & 4 W. 4, c. 68, applies to the case of a person applying for a license for the first time; and therefore it is necessary that a party applying for, and obtaining a license, should enter into the bond required by the 7th section, even though he should have obtained a license, and entered into a similar bond in the preceding year. *McGarry v. Pape*, 9 Ir. L. Rep. 141, Ex. Ch.

A person who is already a licensed publican, is not entitled to a grocer's license since the passing of the 6 & 7 W. 4, c. 38. *Reg v. Commissioners of Excise*, 2 Ir. L. Rep. 287, Q. B.

A. and Co. being brewers, at W., and having two licenses, one authorising them to brew for sale, and another to brew and retail beer, to be consumed elsewhere than on their premises—sent a van to C., in charge of a servant, who from it, on their behalf, sold beer by retail to any person who offered to buy. Held, that no other license for doing so was required by the 6 & 7 G. 4, c. 81. Quære, was any license necessary for such a sale. *Stevens v. Strangmans*, 1 Ir. Jur. 159, Ex.

Semble—That in cases of serious doubt, as to the construction of statutes, and licences thereunder, the court will be slow to inflict penalties for their infringement. *Ib.*

Information.—Where a defendant was arrested under the 95th section of the 3 & 4 W. 4, c. 53, by virtue of a *capias*, which recited that an information had been exhibited—no information having been exhibited or filed. Held, that the pro-

ceeding was regular. *Attorney General v. Kyle*, 8 Ir. L. Rep. 87, Rev. Ex.

Held also, that the defendant was not entitled to a copy or an inspection of the affidavits, upon which the fiat for the *capias* was grounded. *Ib.*

The appearance in court, mentioned in the 95th section, may be made by attorney; and bail to answer the forfeitures, may be taken before commissioners appointed by the parties. *Ib.*

An information being exhibited before a magistrate against two parties, under the 1 & 2 W. 4, c. 55, for that they did keep a certain mill, and did permit to be received into it certain malt, the duties of which had not been paid; and the evidence adduced to support the information, having proved that the mill was the property and kept by one of the two parties only, the magistrate dismissed the case. Held, that the information was not supported by the evidence, and that the decision of the magistrate was correct. *The Queen v. McCullon*, 8 Ir. L. Rep. 27, Rev. Ex.

Under the 19th section of the 1 & 2 W. 4, c. 55, an information was exhibited against the defendant for having been found in a certain place, where the process of distillation was then carrying on. Held, that the decision of the magistrates dismissing the complaint, on the ground, that the evidence proving that the defendant was not seen or arrested in the place, but was only seen coming out of a shed attached to an old house within which the distillation was carrying on, and was arrested within a few paces of the shed, did not sustain the information, was erroneous. On *certiorari* to this court, that decision was quashed, and the case sent back to the magistrates to re-hear and decide on the merits. *Reg. v. Mulkins*, 8 Ir. L. Rep. 33, Rev. Ex.

The court quashed the decision of certain magistrates, dismissing an information exhibited before them, under the 19th section of 1 & 2 W. 4, c. 55, against the defendant, for having been found in a certain place wherein the process of illicit distillation was then carrying on—the magistrates erroneously conceiving that evidence of the defendant being found not upon the place, but being seen coming out of it, and pursued and arrested at some distance from the place, the officer arresting not having during that period lost sight of him, was not sufficient to support the information. *Reg. v. Moran*, 8 Ir. L. Rep. 35, Rev. Ex.

Where an information charged that a party did knowingly harbour and conceal, and did also permit and suffer to be harboured and concealed certain contraband articles, and the conviction thereon adjudged him guilty of the offence so charged. Held that this information did not charge two offences, and that there was no duplicity in the conviction. *Reg. v. McNaghten*, 8 Ir. L. Rep. 93, Rev. Ex.

An appeal does not lie under the 7 & 8 Geo. 4, s. 53, s. 82, from a dismissal, by parties at petty sessions, of an information brought for a custom's offence, (under the 3 & 4 W. 4, c. 53, s. 44,) by an excise officer, by virtue of the 4 & 5 W. 4, cap. 52, 28. *Reg. v. McFeely*, 7 Ir. L. Rep. 395, Q. B.

In revenue cases the court will not grant the ordinary rule that the defendant join in the expense of the demurrer books or judgment for the plaintiff. *Reg. v. —*, 1 Ir. Jur. 236, Rev. Ex.

Habeas Corpus.—For the practice as to issuing an *habeas corpus* at the revenue side of the Exchequer, see *The Attorney-general v. Sullivan*, 5 Ir. L. Rep. 254, Rev. Ex.

Notice of Trial, 1 & 2 W. 4, c. 55, s. 19.]—The defendants having been arrested in a house in which illicit distillation was then carrying on, and brought before a magistrate, were then admitted to bail under the 36th section of that Act, to appear on a certain day before the petty sessions. On the day fixed for the trial they appeared, and objected that they were not duly summoned, or any notice of trial for that day served upon them, in contravention of the terms of that statute. The magistrates, admitting the objection, dismissed the complaint. Held, that such summons or notice for trial was not necessary; and therefore this court, upon *certiorari*, quashed the decision of the magistrates, and sent the case back to them to re-hear on the merits. *Reg. v. Gillespie*, 9 Ir. L. Rep. 36, Rev. Ex.

7 & 8 Geo. 4, c. 52, s. 1, and 4 & 5 W. 4, c. 51, s. 6.]—Held, that so much of the 7 & 8 Geo. 4, c. 52, s. 1, as imposed the forfeiture of malt found in an unentered building was impliedly repealed by the above enactments of the latter. *Attorney-general v. Dunne*, 1 Ir. L. Rep. 357, Ex.

When two statutes have the same purview, and inflicting different punishments for the same offence, the punishments are not to be taken as cumulative, but the latter statute is to be taken as expressing the intention of the Legislature, and therefore, so far as relates to the punishment, repealing the former one. *Ib.*

REVERSION.

Between Landlord and Tenant.—See EJECTMENT, (LESSOR'S TITLE.)

REVIVAL—See SCIRE FACIAS.

ROMAN CATHOLICS—See MARRIAGE.

Where by a charter of the reign of Edward I. perpetual chantry of one or two chaplains was founded in the church of St. Nicholas in the city of Dublin, and leave and license was thereby granted to the said chaplain or chaplains, and their successors to acquire lands, and to the amount of £—, to hold to them and their successors for ever; and leave and license was thereby also granted to the proctors of the said church for ever, by and with the assent of the "honest parishioners of said church" whenever and as often as it should happen that the said chaplain or chaplains, or his or their successors, should die or misbehave themselves, to discharge, depose, and remove him or them from their service, and elect and constitute one or more fit persons in the stead of him or them so removed or deposed from time to time for ever. Held, that the Roman Catholic parishioners are disqualified at the present day from voting in elections of such chaplain or chaplains. *Reg. v. Scott*, 3 Ir. L. Rep. 219, Q. B.

Semble, that a naturalized Jew might vote in this election. *Ib.*

A marriage without the degrees of consanguinity

forbidden by the 33 Hen. 8, c. 6, celebrated between Roman Catholics by a Roman Catholic priest is a valid marriage, sufficient to make a second felony within the statute of bigamy. *Reg. v. Burke*, 5 Ir. L. Rep. 549, Q. B.

Roman Catholics are not admissible to scholarships in Trinity College Dublin. *In re Denis C. Heron*, 9 Ir. L. Rep. 56, n.

The certificate of a Roman Catholic clergyman is not sufficient evidence of the fact of marriage. *Farrall v. Maguire*, 3 Ir. L. Rep. 187, Q. B.

SAVINGS' BANK—See CHARGING ORDER.

SCIRE FACIAS—See PLEADING. SHERIFF. STATUTE OF LIMITATIONS.

I. JUDGMENT.

II. RECOGNIZANCE.

I. JUDGMENT.

Issuing Scire Facias.—Where an arrangement had been entered into by a committee consisting of several members of a company, for the purpose of contributing and collecting contributions, in order to discharge the debts of the company, the court refused to allow a *scire facias* to issue, on a judgment obtained, against the public officer of the company, by a creditor put forward by such committee, against a former member of the company, who was alleged to be a member for the time being, but whose name did not appear on the registry. *Sutherland v. Hodges*, 6 Ir. L. Rep. 292, Q. B.

The court granted a *scire facias* to revive a judgment more than twenty years old, although there was nothing to take it out of the statute, except a revivor against the conusor in 1825, and an acknowledgment in writing by his wife, written, as the applicant believed, with the sanction and authority of her husband. *Assignee of Egan v. Joyce*, 6 Ir. L. Rep. 341, C. P.

The court issued a *scire facias* to revive a judgment more than twenty years old, recovered against a personal representative *de bonis testatoris*, although there had been no payment of principal or interest, or acknowledgment in writing within twenty years, and nothing to keep it alive except the continuance of a Chancery suit. *Gower v. Monks*, 6 Ir. L. Rep. 343, C. P.

Where a judgment had been obtained in 1818 by A. against B., and in 1832 a *scire facias* had been sued out thereon by the joint administrators of A., which *scire facias* was served, and the rule for judgment entered thereon in January, 1834, and no further proceedings were had on foot of the *scire facias*, the court refused to grant liberty to proceed on the *scire facias*, and to allow a suggestion to be entered for that purpose, stating the death of one of the plaintiffs. *Roche v. Blake*, 6 Ir. L. Rep. 479, Q. B.

A judgment in *scire facias* is headed of the term of which the first writ of *scire facias* is tested, but is entered on the roll of the term in which the judgment is marked. *O'Reilly v. Monaghan*, 6 Ir. L. Rep. 507, Ex.

In an affidavit to ground a motion for liberty to issue a *scire facias* to revive a judgment, a state-

ment that payments of interest were made "for and on account" of the conusor, and not stating by whom, is insufficient. *Wigmore v. Wigmore*, 1 Ir. L. Rep. 103, Q. B.

The affidavit of an assignee of a judgment, who seeks to revive, must shew by special circumstances that it is still unpaid. *Holmes v. Gregory*, 3 Ir. L. Rep. 66, C. P.

Upon motion for liberty to issue a *Sci. Fa.* to revive a judgment twenty years old, the affidavits must state by whom payments of interest have been made. *Crenim v. Stephenson*, 2 Ir. L. Rep. 287, Q. B.

One of two conusors of a joint judgment being dead, a *sci. fa.* may issue to revive it against the surviving conusor, and the heir and terre-tenants of the deceased conusor. *Keegan v. Deakin*, 4 Ir. L. Rep. 15, C. P.

An affidavit for liberty to issue a *sci. fa.* to revive a judgment, if the judgment be over twenty years old, should specify the particulars as to the payments of interest relied upon. *Anonymous*, 4 Ir. L. Rep. 104, Q. B.

A *scire facias* to revive was issued, the judgment being more than twenty years old, it being merely sworn "that several sums had been paid within the last thirteen years, on foot of interest." *Woodrooffe v. Blake*, 4 Ir. L. Rep. 417, C. P.

A judgment may be revived by the personal representative of the *cestui que trust*, the personal representative of the person in whom the legal estate was vested, being out of the jurisdiction. *Taffy v. Kelly*, 4, Ir. L. Rep. 220, C. P.

Scire facias to revive a judgment of Hilary Term, 1807—it was never revived or redocketed; the conusor was entitled for his life to the interest of the sum secured by the judgment, the principal to go upon his death to his issue. The conusor was discharged as an insolvent debtor. Held, that the representatives of the conusor were entitled to revive. *Dillon v. Kennedy*, 1 Ir. L. Rep. 296, Q. B.

On a motion by the assignee of a judgment, for liberty to issue a *sci. fa.* to revive, the court dispensed with the usual affidavit of the original conusor; that the full sum was due on foot of the judgment, at the time of the assignment—it being sworn that the conusee was bed-ridden, and unable to make an affidavit. *Salmon v. Lord Audley*, 5 Ir. L. Rep. 91, C. P.

The court would not grant liberty to the assignee of an assignee of a judgment, to issue a *sci. fa.* to revive it—the original conusee being dead, and the first assignee making no affidavit; and the applicant merely swearing that the judgment was assigned to him in consideration of the sum of £400, without stating that he had paid anything for it. *Ib.*

A judgment of 1719 having been assigned in 1830, the conusor and conusee being previously dead, the court would not issue a *sci. fa.* to revive it, on an affidavit which stated that all interest due on foot of it had been paid up to the preceding May, without stating anything specific of the payments previous to the assignment. *Kirwan v. Blake*, 5 Ir. L. Rep. 187, C. P.

The court will not grant an order for liberty to issue a *sci. fa.* to revive a judgment more than

ty years old, when there has not been any payment of interest, or anything to take it out of the debt, except a written acknowledgment given at the expiration of the twenty years. *Brady v. Fitzgerald*, 1 Ir. L. Rep. 295, Q. B.

An admission in the schedule of an insolvent of his due on foot of a judgment, is an admission in the 40th section of the 3 & 4 W. 4, c. 27; liberty to issue the *sci. fa.* will not be granted unless the affidavit grounding the application have copy of the schedule containing the admission attached to it. *Cockburn v. White*, Bl. D. & O., Q. B.

Service.—Service of a *scire facias* to revive a judgment need not be personal. *Hill v. Stawell*, 1 L. Rep. 104, Q. B.

Service of this writ by throwing it into defendant's yard through an open in the gate, was deemed good service under the circumstances of this case.

Substitution of Service.—Service on the conusor of a judgment, who has absconded from the country, of the conditional order for liberty to issue *sci. fa.* to revive a judgment, will be substituted serving his wife and son who reside upon his property, and a receiver who has been appointed in it in an equity cause. *Molloy v. Clarke*, 1 Ir. Rep. 38, Q. B.

Service of a *scire facias* was substituted on the heir of the heir of the conusor, who was residing in America. *Johnson v. Wilson*, 3 Ir. L. Rep. 273, P.

Where the residence of the heir-at-law and one issue cannot be ascertained, the court will substitute service of a *sci. fa.* on the remaining devisees resident in this country. *Bell v. Fyan*, Bl. D. & 31, Ex.

Return to Writ.—See SHERIFF.

Moving on Sci. Fa.—A party will not be permitted to move on a *sci. fa.* in a term it is not returnable, unless he take the earliest opportunity of applying to the court for liberty to do so; but a delay the part of the plaintiff, in not applying until late in the term, was cured by the circumstance of the defendant having asked the plaintiff for time to answer. *Maley v. O'Malley*, 5 Ir. L. Rep. 1, C. P.

Setting aside Scire Facias.—Where a judgment of revivor and execution thereon had been set aside, on allegations of non-service and of payment, on terms of the plaintiff issuing another *scire facias*, and trying an issue on a plea of payment at the next assizes, the defendant undertaking not to bring any action whatever. The plaintiff having failed to issue said *scire facias*, the court continued the setting aside the *scire facias* and execution, and struck out the undertaking on the part of the defendant not to bring an action. *Tutill v. Shank*, 7 Ir. L. Rep. 205, C. P.

The plaintiff, being the personal representative of the surviving assignee of the judgment, was defeated in the title of a demurrer to the *scire facias* the assignee of the judgment, and the plaintiff having marked judgment, the court set it aside, but allowed the plaintiff to amend. The defendant

having made no affidavit of merits, and it appearing that the plaintiff could not amend, he was allowed to quash the writ. *Lowe v. Hoare*, 3 Ir. L. Rep. 263, C. P.

An affidavit, to ground a motion for a *sci. fa.* to revive a judgment at the suit of a banking company, made by the solicitor of the company, is not sufficient unless the facts deposed to be within his actual knowledge. *Bank of Ireland v. —*, 9 Ir. L. Rep. 266, Ex.

Pleading.—*Scire facias* upon a judgment setting forth an assignment by deed of the judgment debt, according to the form of the statute in such case made and provided, "as by the memorial and record of the same enrolled manifestly appears." Plea, that no one witness to the memorial, who was a witness to the deed of assignment, made an affidavit at the foot of the memorial of the true perfection of the deed of assignment and memorial before the officer, &c., where the judgment was entered *secundum formam statuti*, and that therefore the judgment was not duly assigned *secundum formam statuti*. Held bad as amounting to a plea of *nul tiel* record. *Walters v. Lidwell*, 9 Ir. L. Rep. 362, C. P.

To a *scire facias* on a judgment, the return alleged that the conusor, at the time of the rendition of the judgment, was seised of a descendible freehold, but did not aver it to be still subsisting. Plea by the heir, that A. B. was seised in fee before the issuing of the *scire facias*, and being seised before the issuing of the *scire facias*, to wit, on &c., demised to the heir for one year, and so from year to year, by virtue of which demise, which is still subsisting, the heir is still possessed, and that the conusor was not, at the time of the rendition of the judgment, seised of a descendible freehold still subsisting. Replication, that he was seised at the time of rendition of judgment, *modo et formâ*, as in *scire facias* and return stated. Quære, first, whether the replication is bad for not averring the descendible freehold to be still subsisting; secondly, whether the plea is bad being a plea by the heir of non-seisin in the ancestor. *Ib.*

Plea (to the same *scire facias*) alleging, that it is stated in the memorial that the deed of assignment bears date the 19th of June, 1843, and that it is not stated in the memorial that the deed was perfected on any other day, as appears by the record of the memorial, and averring that the deed was not perfected on the 19th of June, 1843, but was in fact perfected on another day, Held to be bad as amounting to a plea of *nul tiel* record. *Ib.*

A judgment, and by the executors of the conusor, a judgment in debt obtained for the amount of the debt secured by the original judgment, and of another debt; death of the debtor in execution under a *ca. sa.* upon the second judgment is no bar to the assignee of the original judgment having execution against the lands of the conusor. *Ib.*

The omission of the *quod recuperet* in a writ of *scire facias* to revive a judgment is bad on special demurrer. *Moriarty v. Wilson*, 1 Ir. L. Rep. 52, C. P.

Scire facias issued by the executors of a conusor of a judgment, recited and prayed execution of the judgment, which was recovered upwards of twenty

years before the issuing of the writ. Plea, statute of limitations, 3 & 4 W. 4, c. 27, s. 40. Replication, a judgment of revivor recovered by themselves within twenty years. Held by the House of Lords that the plea was a sufficient answer to the claim as stated in the declaration, and that the replication was bad upon general demurrer, being a departure from the declaration. *Farran v. Beresford*, 5 Ir. L. Rep. 487, Dom. Proc.

A new right accrued with said executors by the judgment of revivor. *Ib.*

Semble, the time of limitation, prescribed by the 3 & 4 W. 4, c. 47, s. 40, begins to run from the entry of the original judgment, and not from the date of the judgment of revivor, except that where a new right was conferred by the judgment of revivor the money sought to be recovered may be considered to have been secured to them by that judgment, within the true meaning of the 40th section of the 3 & 4 W. 4, c. 27, and the time, therefore, begins to run from the date of such a judgment in *scire facias*. *Ib.*

In a *scire facias* at the suit of the assignee of the personal representative of the conusor, the writ, after stating the recovery of the judgment, stated that "the said D. F. (the conusee) is since dead, and afterwards D. B. F., administrator of the said D. F. deceased, by his deed duly executed, the judgment debt and damages aforesaid, according to the form of the statute in such case made and provided to R. B., the plaintiff, transferred and assigned, as by the said memorial, &c." Held, upon special demurrer to this writ, first, it was not necessary to state the time of the death of the conusee; secondly, it was sufficiently shown that the assignment was executed after the death of the conusee; thirdly, that it sufficiently appeared that administration to the conusee was obtained before execution of the assignment—the document amounting to this, that D. B. F. being administrator, assigned. Fourthly, the same averment supplied the want of an averment that the conusor died intestate, as it imported that D. B. F. was the legal administrator of the conusee, and whether he was so to an intestate, or administrator with the will annexed, is not material, and when the administration is not granted to the plaintiff, but to the party through whom he derives, it is not necessary to make profert of the letters of administration, or set out the particulars thereof. Fifthly, that it was not necessary to make profert of the assignment; and sixthly, that it is not necessary to specify the time of the entry of the memorial upon the roll. *Barry v. Hoare*, 4 Ir. L. Rep. 97, Q. B.

A *scire facias* stated a judgment of 1825 for £2000, and £2 ls. damages recovered in the court of the late King George IV. before our justices. Held not to be a variance either in the description of the court or in the statement of the amount of the judgment. *Farr v. Rutledge*, 4 Ir. L. Rep. 405, C. P.

A *scire facias* against a surviving conusor, and the heir and terre-tenants of the deceased conusor, and prayed execution against the former generally, and against the lands which were of the latter, &c. The sheriff at the conclusion of his return certified that "at the time of the rendition of the within judgment, or at any time afterwards during the lifetime of the said A. D. that there are not, nor were

there any heir or heirs of the said A. D., nor were there any tenants of any other lands or tenements which were of the said A. D., at the time of the rendition of the said judgment, or at any time afterwards, within my bailwick, to whom I could make known, as by the within writ I am commanded." Held, that there was no misjoinder in the said writ, and that the prayer of execution was not irregular. Held also, that the sheriff's return was bad in having restricted the return of the tenants to those who were tenants of the lands during the life of the deceased conusor. *M'Nevin v. Dolphin*, 4 Ir. L. Rep. 406, C. P.

To a *scire facias* by the assignee of a judgment of Hilary Term, 1809, against the assignee of the conusor, who had been a bankrupt, the defendant pleaded that at the time of the rendition of the judgment, and from thence continually until the issuing of the commission, the conusor had been a trader, &c., and that upon the 1st of June, 1819, he had been indebted to A. in £100, and being so indebted afterwards, to wit, on the day and year last aforesaid, he became a bankrupt, and thereupon afterwards a commission of bankruptcy issued against him. Held, on special demurrer to the plea, that it sufficiently appeared that the bankruptcy occurred after the rendition of the judgment. *Stewart v. Beggs*, 3 Ir. L. Rep. 379, Q. B.

A *scire facias* by the assignee of a judgment recited the recovery of the judgment, and that D. St. Q., afterwards by his deed duly executed, the judgment debt and damages aforesaid, according to the form of the statute in such case made and provided, to H. Fulton, transferred and assigned, as by the memorial and record of the same in our court before us remains and appears. Held to be a sufficient averment of title in the assignee, without specially setting out the due performance of the requisites of the 9 Geo. 2, c. 5. *Creagh v. Fulton*, 5 Ir. L. Rep. 322, Ex. Ch.

Held, that the defendant having pleaded *nil tiel* record of the memorial of the assignment, that a replication of *tiel* record and praying inspection, was correct. *Ib.*

Held, that the record of the memorial of the assignment not being on the record before the Court of Error, the plaintiff in error, who assigned for error, that there was no such record of the memorial, was bound to have an application on notice, before the case came on for argument, for a writ of *certiorari*, to have the said record brought for inspection. *Ib.*

In a *Sci. Fa.* by an executor of the conusee, the defendant was called on to show anything for himself, why the plaintiff should not have execution against him, according to the form of the recovery, without stating as executor. Held to be sufficient. *Hanington v. Cairnes*, 5 Ir. L. Rep. 838, C. P.

In a *Sci. Fa.* by the assignee of a judgment, it is not necessary to make profert of the deed of assignment, or to show that the memorial was enrolled pursuant to the statute 9 G. 2, c. 5; or executed with the several requisites thereby prescribed. *Dillon v. Hanlon*, 5 Ir. L. Rep. 568, Ex.

The *Sci. Fa.* stated that J. D., on the confession and acknowledgment of J. H., recovered a judgment "against the said defendant." Held a suf-

sufficient averment of a recovery against J. H., without expressly averring the latter to be the defendant. *Ib.*

An averment in a *Sci. Fa.* that the conusor "died, and that A. H. became his executrix." Held, on special demurrer, not to be too general, A. H. being styled in a subsequent part of the writ, executrix of the last will and testament of the conusor. *Ib.*

A negative plea to a writ of *Sci. Fa.*, ought not conclude, either with a verification, or to the country. *Cullen v. Sharkett*, 6 Ir. L. Rep. 239, Ex.

No pleading to a writ of *Sci. Fa.* ought to conclude to the country. *Ib.*

In *Sci. Fa.* on a judgment a plea of non-seisin of the conusor, properly concludes with a verification. *Clarke v. Lynch*, 6 Ir. L. Rep. 240, (n.) C. P.

A *Sci. Fa.* tested 6th of May, 1843, and directed to the sheriff of D., commanding him to make known, &c., as before commanded. Plea, that the present action or suit of *Sci. Fa.* was commenced on, &c., and that a present right to receive the money secured by the judgment, &c., accrued to J. S. twenty years before the commencement of the action or suit of *Sci. Fa.*; and that, at the time the right to receive the money secured by the judgment so accrued to J. S., he was capable of giving a discharge for the same; and that no part of the principal money secured by the judgment, or any interest thereon, was paid at any time within twenty years before the issuing of the writ. Replication—That on sundry times, within twenty years next before the issuing of the writ, the defendant paid several sums on account of the money secured by the judgment *absque hoc*. No part of the principal money secured by the judgment, or any interest thereon, was paid at any time within twenty years before the issuing of the writ. Held, on special demurrer, that this replication was bad. *Birch v. Blennerhassett*, 8. Ir. L. Rep. 394, Q. B.

Held also, that the plea could not be objected to on general demurrer, for not stating whether an original *Sci. Fa.* had issued; it appearing to the court, from the record, that no original *Sci. Fa.* had issued. *Ib.*

Practice in the action of *Sci. Fa.* *Ib. note.*

A *Sci. Fa.* recited a judgment for the not performing certain promises and assumptions. The judgment had been entered on the money counts, on plea of *nul tiel record*. Held—no variance. *Morrissey v. Walsh*, 9 Ir. L. Rep. 293, Ex.

A *Sci. Fa.* to revive a judgment recovered to secure punctual payment of an annuity. This circumstance was not stated on the *Sci. Fa.* Held to be no ground of objection on a plea of *nul tiel record*. *Haig v. Kirk*, Bl. D. & O. 251, Q. B.

Scire Facias by the executors of the cognisees. The defendant was called upon to show "wherefore the plaintiffs should not have execution against him," according to the form of the recovery, without an allegation that the plaintiffs did so "as executors." Profert was made of the letters testamentary. Held, on special demurrer to be sufficient. *Vance v. Brassington*, 1 Ir. Jur. 8, Ex.

An administrator *cum testamento annexo* may maintain a *scire facias* upon a judgment obtained *durante minore etate*, and the *sci. fa.* is sufficient

in form, though it does not aver that the defendant was summoned to show cause why the plaintiff, "as such administrator, should not have execution." *Cronin v. Murphy*, 1 Ir. Jur. 231, Ex.

The practice of reviving judgments by *nuls* in ejectment, is irregular. *Ashley v. Ejector*, 2 Ir. L. Rep. 264, Q. B.

The writ of *sci. fa.* was tested on the 25th of November, 1837, and directed to the sheriff of C. and recited a judgment of Michaelmas Term, 1806, by O. against W.; that O. died, having by his will appointed two executors, who obtained probate and assigned the judgment to the plaintiff; that W. had died seized, &c., and the *sci. fa.* commanded the sheriff to make known to the heir and terre-tenants of W., &c. The sheriff returned that he had warned H. W., the heir of the conusor, and certain terre-tenants within his bailiwick, naming them. H. W. pleaded (*per se*) the 3 & 4 W. 4, c. 27, s. 40. Replication, a judgment of revivor in Easter Term, 1819. Held, that this case was governed by that of *Ottiwell v. Farran*, (2 Ir. L. Rep. 110), and that the statute ran from the date of the revival. *White v. White*, 3 Ir. L. Rep. 118, note, Ex.

Variance.—The judgment commenced:—"County of the city of Dublin; to wit, H. D., of S., in the county of Galway, was attached to answer R. K., of Loughrea, in said county." And the writ of *sci. fa.* commenced:—"To the sheriff of the county of the city of Dublin, greeting, &c. Whereas, B. K. of Loughrea, in said county." Held, on plea of *nul tiel record*, that there was a fatal variance in the description of cognizee of the judgment. *Kelly v. Dolphin*, 1 Ir. L. Rep. 352, C. P.

A *Sci. Fa.* recited a judgment, "by reason of a certain plea of trespass on the case, as for costs and expenses." The judgment on record was for damages, sustained by reason of the non-fulfilment of several assumptions and promises, and for costs and expenses. Held, upon a plea of *nul tiel record*, that this was no variance. *Agricultural Bank v. Nugent*, 5 Ir. L. Rep. 357, Q. B.

Judgment.—See STATUTE OF LIMITATIONS.

A. having confessed a judgment, died, and a *sci. fa.* to revive same having issued at the suit of the administrator of the conusee against the heir and terre-tenants of A.—B. was summoned as tenant of the lands, and judgment was had upon the *sci. fa.* Held that the court could not look behind the judgment in *sci. fa.*, and that if B. had any title to plead, he should have pleaded it to the *sci. fa.* *Keane v. Barry*, 8 Ir. L. Rep. 211, Q. B.

A rule *nisi* to mark judgment will be granted against the terre-tenants, notwithstanding a plea "that A. is heir, and that no writ was issued to summon him," it being not verified by affidavit. *Hogg v. Armstrong*, 1 Ir. L. Rep. 178, Q. B.

A judgment of revival, of Trinity Term, 1823, was ordered now (1840) to be enrolled as of that Term, though the original pleadings in *scire facias* were not forthcoming; it appearing to the court that the party had done all that he had to do, to have the judgment regularly entered, and that it was through an omission in the officer it had not been done. *Martin v. McCausland*, 2 Ir. L. Rep. 201, C. P.

Costs.—See *COSTS*.

A personal representative residing out of the jurisdiction, will be ordered to give the defendant in a *sci. fa.* security for costs. *O'Brien v. Upton*, 4 I. L. Rep. 419, C. P.

A *sci. fa.* against the heir and terre-tenants is a personal action, within the provisions of the 3 & 4 Vic. c. 105, s. 57, so that if a plaintiff enter a *nolle prosequi* against any of the terre-tenants served with the *sci. fa.* they are entitled to their costs. *M'Nevin v. Dolphin*, 5 Ir. L. Rep. 329, C. P.

II.—RECOGNIZANCE.

Pleading.—Payment is a bad plea to a *sci. fa.* on a recognizance. *Reg. v. Walker*, 1 Ir. L. Rep. 381, Ch., (Petty bag side.)

In a *sci. fa.* on a crown bond or recognizance, Held, on plea of *nul tiel* record, that it is unnecessary to set forth the condition of the bond or recognizance, it appearing from the uniform course of precedents in the office to be the practice to omit the condition. *The Attorney-General v. Upton*, 7 I. L. Rep. 505, Ex.

Semble, that such a practice is borne out by the authorities. *Ib.*

SEARCHES.—See PRACTICE (JUDGMENT.)

SECURITY FOR COSTS.—See COSTS.

SEQUESTRATION AND SEQUESTRATOR.

Sequestration when issued.—A sequestration having issued in 1838 against a beneficed clerk on a judgment on a bond, and marked for the principal sum and interest then due, which sum was not levied or paid until 1842. The court gave the plaintiff liberty to issue a new execution for the amount of the interest which had accrued between 1838 and 1842, being short of the penalty of the bond. *Thacker v. Williams*, 6 Ir. L. Rep. 97, C. P.

Where a beneficed clergyman had been discharged as an insolvent debtor, the court held that a judgment creditor whose debt had been returned in the schedule might legally issue a *fi. fa.* for the purpose of obtaining a return of *nulla bona*, and thereupon issue a *levari de bonis ecclesiasticis*. *Mills v. Horner*, 7 Ir. L. Rep. 212, C. P.

Death of bishop pending sequestration.—Where a *levari* had been sent to a bishop, and he had issued a sequestration thereon. Held, that on the death of that bishop, the *levari* and the sequestration issued thereon were in full force, and it was not necessary to revive the same. Held also, that on the death of the bishop his successor became responsible for the due application of the profits of the benefice under such *levari* and sequestration. *Hogg v. Archbishop of Tuam*, 6 Ir. L. Rep. 460, Q. B. [See as to removal. *Dawson v. Symmons*, 12 Jur. 1072, Q. B.]

A judgment creditor issued a sequestration against an incumbent, and thereupon went into possession of his benefice. The bishop of the diocese subsequently issued a sequestration for non residence

against the same incumbent. Held, that the sequestration for non residence had the effect of suspending the creditors sequestration, and that the bishop was entitled to apply the proceeds of the benefice, in the first instance in defraying the necessary expenses of serving the cure, and in paying the costs which he has incurred in relation to his sequestration. *Middleton v. Maxwell*, 1 Ir. Jur. 198, Q. B. [Crampton, J., *dissentiente*.]

A sequestrator is liable to account for an arrear of rent-charge which became due while he was in possession. *Ib.*

Where the possession of the sequestrator ended on the 5th of March, 1844, no apportionment of the rent-charge which accrued between the 1st of November, 1843, and that date, could be made so as to charge the sequestrator. *Ib.*

A sequestrator is not liable for the gale which became due previous to his appointment. *Ib.*

Account by.—The court will treat a sequestrator as its officer, and as such will make him account before it on a summary application. *Waldron v. Garrett*, 1 Ir. L. Rep. 118, Ex.

The court has jurisdiction to order a sequestrator, appointed by the bishop pursuant to a *levari*, to account before its officer. *Garstin v. Williams*, 3 Ir. L. Rep. 512, Ex.

Such account may be enforced by the defendant, though the plaintiff has satisfied the judgment. *Ib.*

The sequestrator having, with the knowledge of the defendant, accounted in the Ecclesiastical Court, and specific over-charges having been pointed out in such account, it was ordered that the account in the Ecclesiastical Court be taken as correct with liberty to the defendant to sur-charge and falsify it. *Ib.*

It is no objection to an order on a sequestrator to account that, during the time, he was sequestrator in other causes under writs of *levari* issued forth of other courts of law. *Ib.*

Upon the death of the bishop the sequestrator is bound to account to his successor for the proceeds of the benefice which became due after the death of the bishop. *Hogg v. Archbp. of Tuam*, 6 Ir. L. Rep. 460, Q. B. [See *Waldron v. Garrett*, 1 J. & C. 69.]

The Court of Queen's Bench will not direct a sequestrator to account until the bishop certifies what he has done under the writ of *levari*. *Walker v. Darcy*, Bl. D. & O. 187, Q. B.

See, as to the difference of the practice in the Courts of Queen's Bench and Exchequer of issuing writs of sequestration *Walker v. Darcy*. *Ib.*

A judgment creditor, who had obtained the sequestration of a benefice, is entitled to be paid the fruit of his execution in priority to a claim of the debtor's successor in the benefice, for the value of delapidations found under a commission of delapidation. *Casey v. Horner*, 10 Ir. L. Rep. 221, Q. B. [Baker v. Swayne, 1 Jon. & Car. 231, is not law.]

The court granted a writ of sequestration to the bishop without a writ of *fi. fa.*, it appearing from the records of the court that the sheriff (to whom such writ, if issued, must have gone) had recently returned *nulla bona* to a *fi. fa.* sued out of this court against the defendant by another creditor. *Smyth v. Armstrong*, 10 Ir. L. Rep. 447, Ex.

Where a sequestrator has been ordered to account

for the sums which he has received, he ought not, pending the confirmation of the Master's report, to pay over to the bishop the money in his hands; and if he does the court will, notwithstanding such payment, compel him to bring in the amount. *Galbraith v. Pilkington*, 10 Ir. L. Rep. 473, Ex.

SERVANT AND MASTER.

In an action on a special contract for dismissing without notice a farm-servant who had been hired for a year. Plea, first, that the plaintiff did not properly conduct himself, and did not obey the lawful and reasonable commands of the defendant, in relation to the services to be performed; secondly, that the plaintiff, whilst in the service of the defendant, was intoxicated, and incapable of attending to the business of the defendant; thirdly, that the plaintiff, whilst in the service of the defendant, had performed the services in a negligent and careless manner. Held, that the first was bad on special demurrer, as being uncertain, and too general; Held also, that the second and third were bad on general demurrer, as the facts alleged by those pleas did not amount to a justification of the dismissal. *Wilson v. Brereton*, 5 Ir. L. Rep. 466, Q. B.

SET OFF.

H. J. H. sued as accommodation-acceptor of a bill of exchange drawn on him by G., the defendant, for £50 in the usual form, and averred that he was damaged to the amount thereof with interest. The declaration contained the usual money counts, and the bill of particulars claimed only the amount of the bill and interest. The defendant pleaded the general issue, and gave notice of set off. At the trial defendant's counsel admitted the plaintiff's claim as set forth in the special count, (the money counts not being relied upon,) and gave the following memorandum, stamped with a penalty and an agreement stamp, in evidence of the set off: "My dear Sir—You have given me this day £280, which I undertake to return to you next week. This money you have given me on behalf of Sir G. G. out of the trust-money of Miss G., which you hold for her." "H. J. H. To Sir G. G." Held, that the defendant's set off should be allowed, as the plaintiff might have recovered under the money counts, and he could not deprive the defendant of his set off by declaring specially. *Hamilton v. Gould*, 1 Ir. L. Rep. 171, Q. B.

An application for further particulars must be upon affidavit. *Wilson v. Ramsay*, 1 Ir. L. Rep. 37, Q. B.; and see *Acc. Darley v. Murphy*, 2 Ir. L. Rep. 381.

In an action by executors the defendant served a notice of set off, stating among other credits, certain acceptances by defendant of the drafts of the testator, the dates of which were furnished, the court refused an order for further particulars of set off. *Cowen v. Stephens*, 6 Ir. L. Rep. 124, Ex.

The proper means of procuring such information is by a bill of discovery. *Ib.*

If a bill of costs be pleaded as a set off, the court has a discretion to order them to be taxed, without the plaintiff giving an undertaking to pay the amount. *Alker v. Dunne*, 9 Ir. L. Rep. 105, Q. B.

SETTING ASIDE PROCEEDINGS—See PRACTICE.

SHERIFF—See INTERPLEADER. TRESPASS.

Sheriff of the city of Dublin, 3 & 4 Vic. c. 108.]—By the 26th G. 3, c. 19, (Ir.), constituting the ballast corporation of Dublin, the sheriffs of the city of Dublin, for the time being, were appointed members of the said body. The Municipal Act (3 & 4 Vic. c. 108), though it alters the mode of appointment of the sheriff, does not affect his right to be a member of the Ballast Board. Such right is incident to his office of sheriff, and he holds the same position the two sheriffs formerly had. *Reg. v. Borough*, 7 Ir. L. Rep. 57, Q. B.

Practice, and duties of Sheriff generally.]—The Sheriffs levied a certain sum under an execution, and before they paid it over to the plaintiff, received two notices from creditors of the defendant, stating that the latter was a bankrupt, and cautioning them against paying the said sum to the plaintiff; and it appeared that the sheriffs had delayed the execution of the writ, and sale of the defendant's goods, and did not appear to have acted *bonâ fide*. The court refused, with costs, a motion by the sheriffs to lodge the sum in court till the adverse claims were decided. *Ramsden v. Coury*, 2 Ir. L. Rep. 175, Q. B.

A sheriff, against whom an order for a fine, for not returning a writ of *habere facias possessionem* had been obtained, and under which possession had been given, applied for a duplicate writ, and stated in his affidavit that the original had been lost, and could not be found since the execution of it. His motion was granted upon payment of all costs. *Donnelly v. Malone*, 2 Ir. L. Rep. 262, Q. B.

The sheriffs levied an execution in July, when they received notice from a third party, a creditor of the defendant, not to pay the amount, on an allegation that the defendant had committed an act of bankruptcy, and that it was intended to have a commission issued, but no steps were taken in this respect. On the sheriff moving that the time for returning the *fi. fa.* be extended, offering to lodge the amount levied in court. The court refused the motion, but without costs, there being no collusion. *Power v. O'Brien*, 4 Ir. L. Rep. 8, C. P.

The special bailiff of a sheriff need not employ an auctioneer, or have a license to act as such himself, for the purpose of selling under civil bill decrees. *Reg. v. Martin*, 4 Ir. L. Rep. 153, Q. B.

Quære, is the 46th section of the 6 & 7 W. 4, c. 75, repealed by the 1 Vic. c. 43, s. 3. *Ib.*

Where it had been sworn that a writ had been delivered to the returning officer of the sheriff, and a conditional rule entered requiring the sheriff to return it; the court refused to discharge the rule on an affidavit of the sub-sheriff denying the reception of the writ by him or the sheriff. Held also, that the sheriff could not object to the regularity of the writ for want of the indorsement required by the 43rd general rule, on the ground of its not having been stated in the affidavit on which the conditional rule was obtained, that it had been so indorsed. *Knipe v. Patterton*, 5 Ir. L. Rep. 181, Q. B.

Where the sheriff deducted, from the proceeds of

a sale under an execution, a sum of money which he in the first instance retained on account of auctioneer's fees, but which he subsequently claimed to be entitled to on account of extra expenses incurred in laying on the execution, he was ordered upon motion to refund the sum so retained, and to pay over the amount to the execution creditor, but in consequence of delay on the part of the latter in bringing forward the motion; the court withheld the costs of the application. *Hayden v. Barton*, 5 Ir. L. Rep. 410, Ex.

The court, in such a case, possesses a summary jurisdiction over its officer which it will exercise upon motion without putting the party aggrieved to his action against the sheriff. *Ib.*

A sheriff may maintain an action for his fees for executing a *ca. sa.* against either the plaintiff or defendant in the original cause of action. *Bagot v. Malone*, 5 Ir. L. Rep. 454, Q. B.

A sheriff seizing and selling under a *fi. fa.* more than sufficient to satisfy the amount of the execution, does not thereby render himself liable to an action of trespass. *Hughes v. Browne*, 7 Ir. L. Rep. 492, Ex.

A sub-sheriff having made a levy under a writ of *fi. fa.* was allowed, under the 9 & 10 Vic., 64, to lodge in court the monies levied, deducting therefrom the costs of the motion, he having been served with notices by claimants adverse to the plaintiff, calling upon him, on pain of personal responsibility, not to pay over these monies to the plaintiff. *Burke v. Darcy*, 9 Ir. L. Rep. 287, C. P.

An attachment for non-compliance with an order of this court, will be issued to the sheriff, the court taking no notice of the sub sheriff. *Ib.*

The court will always presume in favour of a sheriff, where there is a doubt as to the regularity of the proceedings. *Connell v. Mahon*, Bl. D. & O. 211, Ex.

Where a *capias* had been placed in the hands of a sheriff for the arrest of a defendant, and he thereupon waited on the defendant, and told him that a writ had been lodged with him for his arrest, and the defendant thereupon paid to the sheriff the sum indorsed on the writ, in lieu of special bail, Held that such a proceeding did not amount to an arrest. *Browne v. Ibbotson*, 9 Ir. L. Rep. 66, Q. B. [Perin, J. *dissentiente*.]

The court will not attach the sheriff for non-compliance with an order which has not been personally served upon him; service upon the returning officer is not sufficient. *Wilson v. Fair*, 10 Ir. L. Rep. 227, C. P.

Returns by Sheriff.—A sheriff will not be ordered to make a return of a writ of *ca. sa.* against three defendants, where he has arrested two of them, and the plaintiff entered into a compromise with one of the defendants, and took securities from him for part of the debt, and then discharged him, and the other defendant escaped; and where there were contradictory affidavits as to whether the bailiffs who affected the arrest were not special bailiffs of the plaintiff. *Dwyer v. McKeogh*, 1 Ir. L. Rep. 3, Q. B.

The sheriff will be directed to amend his return to a writ of *sci. fa.* if it appears that any person

having an interest, has not been returned as served. *O'Brien v. Fitzgerald*, 1 Ir. L. Rep. 200, C. P.

Goods seized under a *fi. fa.*, and an arrear of rent due on the premises claimed by the landlord, the sheriff is not bound to specify in his return the goods seized, or the amount of their value; it is sufficient if he state the amount of the rent claimed, and avers that the value of the property in execution is not equal thereto. *Needham v. Kelly*, 3 Ir. L. Rep. 181, C. P.

The sheriff is bound to return a *sci. fa.*, though his fees for serving the writ have not been paid. He has no right to delay a Queen's writ for such cause. *Deacon v. Scott*, 3 Ir. L. Rep. 343, Ex.

The court will make an order on sheriffs to pay the costs of a conditional fine, entered against them for not returning a writ, together with the costs of the motion, on which the order is obtained. *Cash v. Robertson*, 3 Ir. L. Rep. 352, Ex.

A sheriff having returned to a *testatum fi. fa.* "that the defendant hath not any goods in my bailiwick, whereof I can cause to be levied the damages, &c." The court ordered him to amend his return with costs. *Cowper v. Cullinane*, 6 Ir. L. Rep. 98, C. P.

A sheriff returned that he had seized goods under the writ of *fi. fa.* to a certain amount in value; but that he had been served with a notice by the landlord of a year's rent being due, amounting to a much larger sum of which he had given notice to the plaintiff. Held, the plaintiff being desirous of issuing a *ca. sa.* should have issued a *condemnation capias*, and was irregular in calling upon the sheriff to amend his return by returning *nulla bona*. *Anonymous*, 6 Ir. L. Rep. 152, C. P.

If a sheriff's return be good on the face of it and there is no case of neglect or of clear collusion, the court will not order the sheriff to answer a hostile affidavit but will leave the plaintiff to his remedy by action for a false return. *Davis v. Roberts*, 6 Ir. L. Rep. 206, C. P.

A sheriff's return to a *testatum distringas* set aside as being contrary to form. *Kearn v. Lord Charleville*, 8 Ir. L. Rep. 223, Q. B.

An attachment will not be granted against a sheriff for not making a return to a writ of *elegit* the sheriff being ignorant where the lands were, and the plaintiff refusing to point them out. *Collins v. Watters*, Bl. D. & O. 178, Q. B.

A return by the sheriff not in accordance with the usual practice of the court will be set aside. *Kennedy v. McKillop*, Bl. D. & O. 189, Q. B.

The court will direct the sheriff to amend his return when he gives no answer or raises no question as to the truth of the plaintiff's statements. *Wilson v. Fair*, Bl. D. & O. 226, C. P.

The sheriff will be compelled to return a writ of *sci. fa.* though his fees for serving it upon the heir and terre-tenants be unpaid. *Lees v. Nolan*, 9 Ir. L. Rep. 284, C. P.

Quære, if the sheriff be entitled to fees for serving tenants of the lands other than those named and required to be served as terre-tenants in a list furnished by the plaintiff to the sheriff. *Ib.*

A sheriff to whom a writ of *fi. fa.* has been directed and execution levied thereon, and who made no return

during his shrievalty, on motion by the defendant will be required to make a return to that writ, though more than six months out of office. *Crocker v. Hughes*, 9 Ir. L. Rep. 289, Ex.

The court will as of course direct the sheriff's return to a *sci. fa.* to be amended, where by mistake there was a return of *nil* instead of *service*. *Hayden v. O'Ryan*, 1 Ir. Jur. 264, Ex.

The practice that a sheriff, more than six months out of office, will not be required to make a return to a writ directed to him whilst in office, applies only to motions on behalf of plaintiff. *Id.*

Where a notice of motion has been served upon a sheriff to compel him to return a writ of *fi. fa.* he will have to pay the costs though the return be filed before the motion is moved. *Delany v. Meara*, Bl. D. & O. 275, Q. B.

To a writ of *fi. fa.* the sheriff returned the delivery of prior writs to his predecessor and to himself; seizure by the predecessor, in whose hands goods remained for want of purchasers, and that there were not any other goods and chattels within his bailiwick at the time of the delivery to him of the said annexed writ, or at any time since whereout he could levy the sum mentioned or any part thereof. Held a bad return. *Prendergast v. Lord Glengall*, 1 Ir. Jur. 69, C. P.

Actions against.—A sheriff had levied money on an execution on a judgment, where the warrant had not been filed within 21 days, pursuant to the provisions of the 3 & 4 Vic. c. 105, s. 13, and paid over the amount levied to the assignees of the conusor, who had filed his petition in the Insolvent Court. Held, that though this petition was afterwards dismissed on the application of the insolvent, such dismissal did not divest the right of his assignee so as to give a right to the execution-creditor against the creditors for the amount of the levy. *Madden v. Ball*, 8 Ir. L. Rep. 104, C. P.

In an action against a sheriff, the first count in the declaration stated the recovery of a judgment by the plaintiffs, the issuing of a *fi. fa.* thereon, the delivery of it to the sheriff, and that he seized thereunder the goods of the debtor and levied the amount and averred as a breach that he had not the money so levied in court on the return of the writ, nor had paid the same to the plaintiffs, and that he falsely returned *nulla bona*. The second count after stating the recovery of the judgment, the issuing of the *fi. fa.* and the delivery of it to the sheriff, averred, that though there were before the return of this writ goods of the debtor in the defendant's bailiwick, whereof he ought to have levied the money endorsed on the writ, and assigned as a breach that he would not levy the money and returned *nulla bona*. Held, that supposing the false return to be an essential part of the evidence in such action, it was not one exclusively for a false return, and consequently the plaintiffs might bring their action in the county in which the return was filed, or where the matters of fact necessary to be proved occurred. *Hennessy v. Synge*, 10 Ir. L. Rep. 184, Q. B.

The sheriff seized, on the 23rd of April, under a writ of *fi. fa.* founded on a judgment upon a bond and warrant of attorney. A. B. the insolvent, was arrested at his own request, at the suit of another

creditor, before the sale, which took place on the 23rd of May. On the 15th of June, he presented his petition to the Insolvent Court; on the following day the order was made vesting his property in the plaintiff. In an action of trover against the sheriff by the assignee, Held, that the sheriff was not liable under the 48th section of the 3 & 4 Vic. c. 107, and that the vesting order had no relation to the date of the arrest. *Lindsay v. Going*, 1 Ir. Jur. 278, Ex. Ch.

In an action of trespass and false imprisonment against the sheriff, who pleaded the general issue, the plaintiff's counsel stated the case to be an abuse in the mode of executing a writ of *ca. sa.*, and gave in evidence, among other things, certain notices, served by plaintiff on the defendant, which recited and admitted that she had been arrested on such a writ. Held, that the defendant having omitted to prove said writ, the judge ought to have directed the jury to find for the plaintiff. *Deering v. Palmer*, 4 Ir. L. Rep. 421, C. P.

Sheriff's fees.—On the construction of the 6th Anne c. 7, Ir. Held, that the defendant, not the plaintiff, is liable to pay the poundage of the sheriff. *Couper v. Gould*, 2 Jones 475, Ex.

Actions for abuse of process.—See TRESPASS.

SKERRIES LIGHT—See TOLLS.

SOLICITOR—See ATTORNEY.

The same solicitor should not be concerned for parties whose rights and interests are adverse. And where the solicitor filed an answer for one party, admitting the claim of the other. Held, that he could not maintain an action for the costs incurred, in his capacity as solicitor of the former. *O'Brien v. Graham*, 5 Ir. L. Rep. 406, Ex.

Lien for costs.—Where the object of a suit is attained before judgment, the attorney will not be permitted to proceed with the suit for the costs alone; his lien does not arise till after judgment. *Lyons v. Wilkinson*, 1 Ir. Jur. 270, Ex.

Actions for negligence.—If an attorney be authorized by his client to have a joint and several bond and warrant of attorney executed by two persons, one of whom only executed it at the time, no breach of duty arises from the non-entry of the judgment, till it be executed by both; and when the duty has arisen, i. s. damages is sufficient for a mere non-feazance. *Baker v. Carroll*, Bl. D. & O. 60, N. P. [Per Brady, C. B.]

Where an order of a court of equity directed a defendant to pay money before a certain day, and to indemnify a third party against his costs, his solicitor having money in hands for that purpose, is guilty of a breach of duty in not paying it; but he is not bound to indemnify. *Nison v. Hudson*, Bl. D. & O. 65, N. P. [Per Brady, C. B.]

Semble.—Where a declaration in case sets out an order to pay money alone; and that produced, is to pay money and indemnify, it is no variance; and if the declaration set out both grounds, and but one is proved, the defendant is entitled to a

verdict; and if both be stated, the plaintiff should show on which the attachment issued. *Ib.*

STAMPS—See DEED.

A letter of attorney, empowering a person to receive rents, and serve notice to quit, requires two separate stamp duties. *Booth v. McGowan*, 4 Ir. L. Rep. 188, Ex.

Semble—That a letter or power of attorney to receive rents, and to distrain, being incidental and ancillary to the power to receive the rents, requires but one. *Ib.*

Upon the trial of an ejectment under the order of a court of Equity, the question to be tried being whether an accepted proposal was for a term of 21 or 31 years. Held, that the proposal might be given in evidence, though not stamped. *Harding v. Macnamara*, 4 Ir. L. Rep. 190, Ex.

Where leasehold premises were conveyed to a trustee, in order, out of the rents, to pay head-rent, and the costs incurred in an equity suit; and also the costs of the deed of conveyance, and of registering the same, and then to pay the sum of £300 with interest. Held, that a stamp for £1 10s. was sufficient on such conveyance. *Lysaght v. Warren*, 10 Ir. L. Rep. 269, Q. B.

Premises were demised for three lives renewable for ever, at a yearly rent and fine. In a subsequent part of the lease, the timber trees growing upon the premises were conveyed to the lessee. The stamp upon the lease was admitted to be sufficient for the lease and fine. Held, that the part of the trees which had already been demised, did not change the character of the lease, so as thereby to render it a conveyance; and consequently that no additional stamp was required. *Peacock v. O'Grady*, 1 Ir. Jur. 363, Q. B.

If there be no cause in court, the affidavit upon which a *fiat* is sought to be obtained, requires a two-shilling stamp; but if a cause be pending, no stamp is necessary. *Plunket v. Plunket*, 4 Ir. L. Rep. 366, Q. B.

STATUTES.

Construction of.—Held by five judges that in the construction of statutes the court would rather strain the words in order to arrive at the construction evidently intended by the policy of the Legislature than either omit them, or declare the state of facts which had occurred to be a *casus omissus*. *Reg. v. Sugden*, 1 Ir. Jur. 58, Ex. Ch.

Where two statutes have the same purview, and inflict different punishments for the same offence, the punishments are not to be taken as cumulative, but the latter statute is to be taken as expressing the intention of the Legislature, and therefore, so far as relates to the punishment, repealing the former one. *Attorney General v. Dunn*, 1 Ir. L. Rep. 357, Ex.

When the language of an Act of Parliament is equivocal or obscure, usage, when universal and unvarying may be called in aid to explain it. *Nagle v. Ahern*, 3 Ir. L. Rep. 41, Ex.

It is dangerous to look out of the words of the Act, (3 & 4 Vic. c. 105,) for an equity in particular cases, the best equity is to construe the Act in

such a way as to meet general cases. *Cohen v. O'Donovan*, 3 Ir. L. Rep. 88, Q. B. [Per Cramp-ton, J.]

In construing the terms of a special act of parliament, the court is bound to see that the transaction sought to be affected by it, is within the plain and ordinary meaning of these terms. *Attorney General v. Cathew*, 3 Ir. L. Rep. 149, Ex.

My opinion is in accordance with that of Lord Tenterden in *Brandling v. Barrington*, (6 B. & B. 475), "That there is always danger in giving effect to what is called the equity of a statute; it is much safer and better to rely on, and abide by the plain words; although the Legislature might have provided for other cases, had their attention been brought to them." *Reg. v. Savage*, 3 Ir. L. Rep. 482, Q. B. (note.) [Per Perrin, J.] See *Murphy v. Leader*, 4 Ir. L. Rep. 139, Q. B.

Though I admit that the title of a statute cannot control the manifest enactments of it, yet it is the duty of the court to call it in aid, when it can throw a light on an ambiguity in any of its provisions. *Daniel v. Bingham*, 4 Ir. L. Rep. 293, Q. B. [Per Torrens, J.]

STAYING PROCEEDINGS—See PRACTICE.

STET PROCESSUS—See PRACTICE, (JUDGMENT AS IN CASE OF NON-SUIT.)

STOCK—See CHARGING ORDER.

STOPPAGE IN TRANSITU.

By the custom in the spirit trade in the City of Dublin where whiskey is bonded in the Queen's Stores, the party selling gives to the purchaser certain request notes, on the faith of which the price is paid, and which constitutes a sufficient authority to the store-house keeper to deliver the whiskey to the holder of them. The defendant having sold six puncheons of whiskey to A. B., and having got his acceptance for the amount handed him six request notes. A. B. sold the same to the plaintiff, giving him the request notes, the plaintiff takes two puncheons out of the stores, and on application for the remainder discovered that the defendant had, on the acceptances of A. B., being dishonoured, taken out the remaining four. Held, that trover lay at the suit of the plaintiff for the four puncheons, and that he had such a possession as put an end to the stoppage in transitu. *Croher v. Lawder*, 9 Ir. L. Rep. 21, Q. B.

SUBLETTING.

Quære, is letting in con-acre generally, a breach of a covenant against sub-letting. *Lord Westmeath v. Hogg*, 3 Ir. L. Rep. 27, C. P.

SUBPENA—See ATTACHMENT.

SUBSTITUTION OF SERVICE—See PRACTICE (PROCESS.)

SUGGESTION—See BOND. COSTS.

SUPERSEDEAS—See MANDAMUS.

SURETY—See WARRANT OF ATTORNEY.

A bond (after reciting that R. F. Q. had been appointed by the plaintiffs—as directors of the National Bank—to be accountant at their bank, at L.; and that the defendant had, with other persons, agreed to enter into the obligation as his sureties,) contained the following condition:—That the said R. F. Q. should, from time to time, and at all times, faithfully account for, pay, and deliver up to the court of directors of the said society, or to such other person or persons as such court should appoint, and in such place as said court should direct, all and every such sums of money as he, the said R. F. Q., had been, or at any time thereafter should, while he continued in the service of the said society, exclusively, or be employed for or on account of any local bank in connection with them. Plea, performance. Held, that it was not necessary, in an action against the surety of a defaulting accountant, for the plaintiffs to aver in their replication that the directors had appointed a person by whom, or a place in which the accounts were to be taken. *Stanhope v. Mathews*, 4 Ir. L. Rep. 125, C. P.

Held also, on special demurrer, that the plaintiffs having averred that R. F. Q. was employed by the said society as accountant in the branch bank at M., and that he continued in the service of the said society exclusively as such accountant from, &c. it was not necessary to aver an appointment of R. F. Q. to the office of accountant at M., or that he had accepted of the said office. *Ib.*

Sureties in a bond with a trader under the 3 & 4 Vic. c. 105, s. 8, conditioned to pay the amount of debt and costs, which might be recovered against the principal, or to render himself, were allowed to render him after judgment, in discharge of the conditions of the bond. *Buld v. Coyne*, 6 Ir. L. Rep. 214, Ex.

SURRENDER.

G. T. having demised a house and premises, from June, 1827, for 30 years to G. H. in consideration of £1200 and £500 a-year, brought an ejectment for non-payment of rent in 1838, and gave this lease in evidence, the defendant gave in evidence a deed which was produced by the attorney of the lessor of the plaintiff, pursuant to notice, and which expressed to be between G. H. of the one part and G. T. of the other, dated the 27th of July, 1829, and two drawing-rooms, part of the demised premises, were thereby surrendered to G. T. It was executed by G. H. alone, and contained the following proviso: "Provided always, nevertheless, and it is hereby declared and agreed by and between the said parties to these presents to be the true intent and meaning thereof, and the same are upon the express condition that nothing herein contained shall in any manner prejudice or affect the covenant for payment of the said yearly rent of £500, or any other covenant in said lease contained, on the part of the tenant, his executors, &c. to be done, &c. or any of the

clauses, conditions or agreements therein contained, or any of the remedies for the recovery of, or the enforcing of the said covenants, conditions, &c. on the part of the said G. T., but that the entire of the said yearly rent shall still be, and continue payable out of same, and the said covenants, &c. shall be, and continue in full force, &c. as to all the residue of said demised premises, and not hereby surrendered; and that said G. T. shall have all the like remedies for the recovery of said rent, and enforcing said covenants as if these premises had not been made, &c. Signed G. H." Held that this deed of surrender did not operate to destroy the right of re-entry. *Thompson v. Home*, 1 Ir. L. Rep. 179, Q. B.

Covenant for rent due; Plea, a surrender of the premises, and that the plaintiff accepted the same. Replication, that the defendant did not surrender, and that he did not accept the same, to which the defendant demurred for duplicity. Held, that the surrender and the acceptance constituted but one entire matter of defence, and that therefore the replication is good. *Purdon v. Dickson*, 2 Ir. L. Rep. 351, Q. B.

Quære, what is evidence of the surrender of a lease by operation of law. *Lord Shannon v. Lord Stoughton*, 3 Ir. L. Rep. 521, Ex. Ch.

L. lessee *pur autre vie* assented to a new letting by the landlord of a part of the demised premises to M., who entered into possession accordingly, but there was no surrender in writing of the interest of L. Held, that this constituted a valid surrender by Act and operation of law within the statute of Frauds (7 W. 3, c. 12, Ir.) of the interest of L. in the part so demised to M. *Lynch v. Lynch*, 6 Ir. L. Rep. 181, Ex.

The doctrine of surrender by Act and operation of law as laid down in *Thomas v. Cook*, (2 B. & Al. 119,) in the case of a chattel interest recognized and applied to the case of a freehold. *Ib.* [See *Creagh v. Blood*, 3 Jon. & Lat. 133, Ch.]

As to the effect of a clause of surrender, see *De Burgho v. Gabbett*, 1 Ir. Jur. 276, Q. B.

TAXATION—See COSTS.

TAXES.

On Public Buildings.—See RATES.

TEMPORALITIES (CHURCH ACT)—See ECCLESIASTICAL LAW.

Where an order of the Lord Lieutenant and Privy Council, made under the Church Temporalities Act, disappropriating the rectory of E. from the dignity of the treasurership of the Cathedral Church of St. M.; contained a recital distinguishing the rents from the other revenues of the rectory, and where the operative words of the order in Council were "the said parish or rectory of E., together with the rectorial tithes thereunto belonging." Held, that according to the construction of the order, the word "rectory" did not include the glebe lands, and therefore they did not pass to the Ecclesiastical Commissioners, but continued annexed to the treasurership. *Foster v. Wilson*, 7 Ir. L. Rep. 197, Ex.; S.C. affirmed, *Ib.* 231, Ex. Ch.

The Lord Lieutenant and Privy Council have the power, under the Church Temporalities Act, to make a partial disappropriation by disuniting the tithes or glebe lands from the rectory. *Ib.*

—◆—
TENANT—See LANDLORD AND TENANT.

—◆—
TENDER.

Lodgment of Money under Plea of.—If a defendant bring money into court under a plea of tender, and the plaintiff do not take it out till the defendant establish a cross-demand for the costs of a judgment in the action in his favour, the court will direct the money to be paid to him in liquidation of that demand. *Dore v. —*, 1 Ir. Jur. 271, Ex.

A notice of motion to draw money lodged, upon a plea of tender, where the action has not been discontinued is regular, and where the opposite party would not sign a consent, and appeared on the motion, it was granted with costs. *Chadwick v. Daly*, 5 Ir. L. Rep. 176, C. P.

Pleas of Tender.—See PLEADING.

—◆—
TERM'S NOTICE TO PROCEED—See PRACTICE.

—◆—
TIME.

Computation of Time.—When part of a conditional order was that it should be served upon defendant's attorney six days before term. The order was served upon the 19th of May, and Term began on the 24th. Held, that the service was bad, and that a new order should be obtained. *Murphy v. Lord Carberry*, 1 Ir. L. Rep. 9, Q. B.

Where a statute provided that notice of an appeal should be given to the adverse party at least "within one week" before such appeal was to be heard. Held that notice given on the 22nd for the 29th of the same month was insufficient. *Reg. v. Sweeny*, 2 Ir. L. Rep. 278, Q. B.

—◆—
TITHE COMPOSITION.

Pleading.—Debt for tithe composition—The first count stated that T. R. and others, (tenants of the defendant), during a certain period, had been in the occupation of lands specified in the applotment, and thereby made chargeable with the yearly sum of £8 16s. 8d., as tenants from year to year to the said defendant, who, as having the first estate greater than such tenancy from year to year, was liable to the composition. Plea—That all the lands, whereof the said T. R. was tenant to defendant, before the 6th of August, 1832, by indenture of demise between defendant and T. R., were demised to T. R. for a term still subsisting; and so defendant saith, that during the period aforesaid, he had not the first estate greater than a tenancy from year to year, in the said lands so chargeable with the yearly sum of £8 16s. 8d., *modo et formâ*, as the plaintiff in his first count alleged. Held, that the averment in the declaration was distributive, and therefore, the plea was bad as not answer-

ing the whole of the count. *Pennefather v. Lee*, 1 Ir. L. Rep. 25, Ex.

Since the passing of the 1 & 2 Vic. c. 119, the plaintiff, in an action for tithe composition, must show by his declaration, that he comes within some of the exceptions mentioned in that act; otherwise the declaration will be bad upon general demurrer. Thus the counts for tithe composition, and for tithes bargained and sold, contained in a declaration, which was entitled as of Hilary Term, 1839, were held to be bad; but a general demurrer taken to the whole declaration was over-ruled, upon the ground of its containing a count upon an account stated, which was held to be free from objection; for though it described the plaintiff as rector, and the defendant as occupier of land within the parish, it did not necessarily follow that it was conversant about the tithe or tithe composition. Plea, stating that parcel of the sum demanded was claimed for arrears of tithe composition, due for the three years immediately preceding 1834, was held to be bad, the right to recover for those years not having been barred by the implied operation of the 1 & 2 Vic. c. 119. *Beresford v. Loughnan*, 1 Ir. L. Rep. 364, Ex.

Where, in an action for tithe rent-charge, the plaintiff was described in the declaration as rector, and the proof was, that he was both rector and vicar. Held to be no variance. *Crosthwaite v. Conlan*, 5 Ir. L. Rep. 534, Q. B.

What estate is liable.—A mortgagor in possession of mortgaged premises, chargeable with the tithe rent-charge prior to the execution of the mortgage, and held under a lease of lives renewable for ever, was held liable to such rent-charge. *Crosthwaite v. Conlan*, 5 Ir. L. Rep. 534, Q. B. [Perrin, J., *dubitante*.]

Semble—To render a party entitled to an equitable interest liable for the tithe rent-charge, it must be an interest of a clear, absolute, unquestionable nature. *Ib.*

Applotment.—A. and B., joint commissioners appointed under 4 G. 4, c. 99, duly made and lodged a certificate of composition in 1831, but made no applotment thereon, A. having been subsequently appointed a sole commissioner under the 2 & 3 W. 4, c. 119, adopted that certificate, and duly made and lodged an applotment in 1833, pursuant to the latter act; B. afterwards affixed his signature, in the registry of the diocese, to the applotment made by A. alone, as sole commissioner. Held, first, that the applotment of A., as sole commissioner under the 2 & 3 W. 4, c. 119, was invalid and void; and that at the time of such appointment, and of his making the applotment, as such sole commissioner, his authority as one of the joint commissioners originally appointed under the 4 G. 4, c. 99, was still subsisting and valid. Secondly—That the applotment made by A., as such sole commissioner, notwithstanding his intention to act in making it under the 2 & 3 W. 4, c. 119, must be taken to have been made by virtue of his valid authority under the 4 G. 4, c. 99. Thirdly—That B. had authority, by affixing his signature to the applotment made by A. alone, to adopt it as his own

ct, though he had taken no part in the actual duty of making it. Fourthly—That the applotment having been made, it became the only standard for measuring the amount of composition payable by the parties thereto, and had reference back to the period of making such composition. Semble—That until the making of the applotment, it was optional with the party entitled to the composition, but not imperative on him, to resort to the provisions of the 1 G. 4, c. 99, regulating the payments of composition according to the grand jury cess. *Armstrong v. Kilikelly*, 1 Ir. L. Rep. 270, Ex.

An applotment book stated the quantity of land contained in each of several holdings, and the gross amount of tithe composition charged thereon respectively, but omitted to specify the acreable amount of such composition. Held, that the applotment was not therefore invalid. Defendant on all former occasions having paid his composition for the said land, and previous to the action promised to pay. Held, it was not open to him to object to the applotment. *Purcell v. Wigmore*, 1 Ir. L. Rep. 318, Ex.

Certificate of Composition.—Where the rector of the parish was the sole claimant of the tithes. Held, that a certificate of the tithe composition under the 4 G. 4 c. 99, s. 25, was sufficiently certain, though it did not name or describe the party to whom such composition, or any portion thereof, was payable. *Lodge v. Creagha*, 1 Ir. L. Rep. 315, Ex.

A tithe-payer will not be allowed to set up, as a defence, the title of a third party not named in the certificate of composition. *Lord Shannon v. Stoughton*, 3 Ir. L. Rep. 521, Ex. Ch.

Evidence.—The presumption of a defendant's liability to tithe composition, arising from his possession of the lands, is not rebutted by the statement of the plaintiff's witness, the land agent of the defendant, that there had been an outstanding lease, and that the defendant had entered into the possession of the land upon a parol surrender, without any instrument in writing; the defendant, in such circumstances, not falling within either of the exceptions contained in the 12th section of the 2 & 3 W. 4, c. 119, being neither tenant from year to year, nor at will, within the meaning of the act. *Lord Shannon v. Stoughton*, 3 Ir. L. Rep. 521, Ex. Ch.

As to what is evidence of the liability of the defendant in an action for tithe composition. *Ib.*

Statutes of Limitation.—The 3 & 4 W. 4, c. 27, s. 2, does not apply to claims for tithe composition, as between the tithe claimant and the owner of land, but only to estates in tithe. *Lord Shannon v. Hodder*, 2 Ir. L. Rep. 223, note, Ex.; *Lord Shannon v. Stoughton*, 3 Ir. L. Rep. 521, Ex. Ch.

TOLLS.

Vessels sailing from Cork to Dublin, through St. George's Channel, are not subject to the toll given by the 3 G. 2, c. 36 (the Skerries act) to the proprietor of the Skerries light-house, *Boyce v. Jones*, 4 Ir. L. Rep. 231, Q. B.

TRAVERSE—*See* PLEADING. MANDAMUS. QUO WARRANTO.

TREAT (NOTICE TO.)—*See* PUBLIC COMPANY. RAILWAY.

TRESPASS—*See* INSOLVENT.

I. TRESPASS.

II. TRESPASS FOR MESNE RATES.

A landlord may justify in an action of trespass *qu. cl. f.*, under the general issue, not only an entry to distrain, but also the continuing in possession beyond the time that was necessary for the purposes of the distress. *Purcell v. Nolan*, 1 Ir. L. Rep. 258, C. P.

In an action of trespass for assault and battery, the defendant cannot, under the general issue, give in evidence by way of mitigation of damages, matter of defence, which, if pleaded, would amount to a justification. *Pugolas v. Holland*, 3 Ir. L. Rep. 533, Ex.

In an action of assault and battery brought by A. against B. & C., it appears that A. came to the house of B. to enter into a final settlement for some debts he owed him, and for which the latter agreed to take one-fourth as a composition. A. B. & C. were in B.'s office, engaged in this arrangement for some time, when B. had to go out to his shop to a customer, and soon after, an altercation having arisen between A. & C., who was the book-keeper and relative of B., C. committed the assault complained of, which was of a violent character, and lasted twenty minutes. It appeared there was no cause of quarrel immediately between A. & C. The dispute arose altogether out of the settlement between A. & B.; and that the shop in which B. was, during the entire of the assault, was adjoining the office in which it was committed, and was only separated from it by a glass door, which was partly open and from which C. called for a rope to hang the plaintiff, which was thrown to him by a person in the shop; and there was great reason to infer that B. could hear, if not see nearly all that occurred in the office. The learned judge who tried the case, directed the jury, that if B. ordered the assault, or encouraged it, or expressed approbation of it, or gave countenance to it, or did anything to adopt it as his own, they should find a verdict against him; and added he should be surprised if they found against B. The jury found against B. On motion to set aside this verdict for misdirection, and as being against law and evidence. Held, that the question for the jury, was correctly left to them in the preliminary part of the learned judge's charge; and though the court disapproved of the strong expression of opinion by the learned judge, thought it did not amount to a misdirection. Held also, the verdict was not against the weight of evidence. [*Crampton, J., dissentiente.*] *Treanor v. Campbell*, 3 Ir. L. Rep. 387, Q. B.

In an action of trespass and false imprisonment against the sheriff, who pleaded the general issue, the plaintiff's counsel stated the case to be an abuse

in the mode of executing a writ of *ca. sa.*, and gave in evidence, among other things, certain notices, served by plaintiff on the defendant, which recited and admitted that she had been arrested on such a writ. Held, that the defendant having omitted to prove said writ, the judge ought to have directed the jury to find for the plaintiff. *Deering v. Palmer*, 4 Ir. L. Rep. 421, C. P.

Semble—That the omission by the landlord to give a bill of particulars of distress, under the 6 & 7 W. 4, c. 75, even if necessary, would render the landlord a trespasser *ab initio*. *Daly v. Bloomfield*, 5 Ir. L. Rep. 65, Q. B.

In trespass for false imprisonment, it appeared that on the 19th of September, 1833, the plaintiff being then in the custody of the sheriff of Kildare, at the suit of J. S. M. and others, the defendant issued a *ca. sa.* against him on foot of a judgment previously obtained. During the year 1839 the plaintiff, being still in confinement, obtained in various ways discharges from several of the writs under which he was detained, and amongst others from that of defendant, which, together with the judgment under which it was issued, was set aside by an order of the court on the 23rd of November, 1839. There was slight evidence that the judgment was set aside for misconduct on the part of the defendant or his attorney. Under these circumstances upon the question whether the plaintiff having been in lawful custody at the suit of other creditors, during all the time that the defendant's detainer was laid on, an action of trespass did not lie at the suit of the plaintiffs against the defendants. Pennefather, C. J. and Perrin, J. were of opinion that it did not. [Burton and Crampton, J. J. *dissentientibus*.] *Coppinger v. Bradley*, 5 Ir. L. Rep. 257, Q. B.

But by reason of the admission of illegal evidence, misdirection of the learned judge, and excessive damages, the court awarded a *venire de novo*. [Pennefather, C. J. *dissentiente*, holding that judgment should be entered for the defendant.] *Ib.*

Quære, would an action on the case lie under the circumstances of the case? *Ib.*

"It is wrong to say that no man shall be made a trespasser by mere construction of law, it is true no man can be a trespasser in any sense when no trespass has been committed, but when a trespass is committed persons may, by construction of law, be parties to that trespass; it is upon this principle that the advisers of a trespass before the act, and the assenters to it afterwards, are trespassers; all are principals in trespass, and one may then be a trespasser in relation to an act which he had advised or directed, although the man by whom the act is done is no trespasser at all, as in the familiar instance of the execution of a false writ by a sheriff—the sheriff is justified by the writ, but the party who gave it to be executed may be a trespasser." *Ib.*

In a declaration in trespass *q. c. f.* containing two counts for entering the plaintiff's close, and digging drains, &c., and two counts *de bonis asportatis*, and another for expulsion, the defendant pleaded and proved at the trial leave and license to do the acts complained of, viz. to scour the drains. Held, that it was not competent for the plaintiff to rely on evidence of a revocation of the license after the com-

mencement of the work, there having been no new assignment. *Wily v. Boyd*, 5 Ir. L. Rep. 421, C. P.

In an action of trespass on the case, the declaration stated, that A. being possessed of a certain quarry, B. wrongfully and injuriously obstructed him in the use and enjoyment of it, by turning large quantities of water upon the same. A. on the trial proved that B. had stopped up a drain which A. had opened to prevent the water from flowing into the quarry, and also that B. had filled a pipe that had been sunk in order to drain the quarry. Held, that such acts being immediate injuries, an action on the case could be sustained, but that the trespass *vi et armis* was the proper remedy. *Scott v. Nelson*, 5 Ir. L. Rep. 207, Q. B.

Semble, where an injury is done to the soil and freehold, plaintiff has no election, but must bring trespass *vi et armis*. *Ib.*

"It appears to the court it should have been an action of trespass *vi et armis*. The distinguishing circumstance is that in this form of action the injury should be wilful, forcible, and the consequence immediate, although if there be consequential damage that will go as an aggravation of the trespass, but will not convert it into an action of trespass on the case, and in this case there is also an injury to lands." *Ib.* [Per Pennefather, C. J.]

To a declaration in trespass *q. c. f.* for breaking &c., the plaintiff's close, and erecting pens and tables there, the defendant pleaded the single plea of the general issue, and at the trial proved a demise for a term of years of the *locus in quo* in the following terms:—"All that and those part of the house known as No. 119, North King street, corner of Smithfield, consisting of the small room of the bar of said house, fronting Smithfield, &c., together with the front part of said premises, extending from said office to the centre of the said Smithfield market, &c., and to be used by said R. B. (plaintiff) as a stand for the sale of cattle and hay, according to the usage of Smithfield market." And also gave evidence of a custom for the owners of houses in Smithfield, to let their frontage to salesmasters at a rent; and of the commission of the trespass complained of. On the other hand, the defendant gave evidence of no such usage being in existence in Smithfield, which was a public market; and some evidence of no title in the lessor of the plaintiff to demise the frontage. And the judge directed the jury, that if they believed that on a market day, the plaintiff had taken possession of the *locus in quo*, and was in actual possession of the said frontage demised to him; and while so in possession, the defendant entered thereon against the will of the plaintiff, they should find for the plaintiff. Held, that the said direction was correct, and that it was not competent for the plaintiff, on the pleadings as framed, to raise any question beyond that of possession of the premises by the plaintiff, and the commission of the act of trespass while he was in that possession. *Dubitante*, Doherty, C. J.; and *dissentiente*, Torrens, J., the latter of whom held that the judge ought to have distinguished between a right to exclusive possession, which would have enabled the plaintiff to have maintained the action, and a mere right over the surface of the soil, which

would have been only a right of easement; and to have submitted to the jury, that if they believed there was a right to exclusive possession, they should find for the plaintiff; but that if he had but a right to a mere easement, the action was not maintainable, and they should find for the defendant. *Burris v. Coffey*, 6 Ir. L. Rep. 298, C. P.

"If an action of trespass *quare clausum fregit* is brought, and the plaintiff show a possession, and the defence intended to be set up is, that at some remote period the ground in question was conferred on the public by the owner in fee, for a market, the defendant is not at liberty to give evidence to sustain such a defence on the plea of the general issue; the question ought to be raised on the pleadings, as I have said, by a special plea that the *locus in quo* was a public market, and that being such, the defendant was justified in entering thereon, and exposing his cattle on it for sale." *Ib.* [Per Jackson, J.]

An exclusive possession in the plaintiff is necessary to be proved in a possessory action, and no case has been cited to show, nor is there any that I am aware of, establishing that where a party has a mere right over the surface of the soil, without a right to make use of the soil itself, or of its produce natural, or otherwise, for his own purposes, that an action of trespass can be maintained. *Ib.* [Per Torrens, J.]

But there is no case that I can discover, nor has any been cited in the argument, in which a mere right of enjoyment over or on the surface of the soil, without any right to appropriate it to usufructuary purposes, or to derive usufructuary enjoyment from it, has been held to give such an exclusive possession as to enable the party to bring trespass. *Ib.* [Per Torrens, J.]

A city attachment having issued against A., and having been placed in the hands of the city marshal to execute, he seizes the goods of B. The execution creditor—not being present at the seizure, and not having given the marshal any indemnity—is not liable in an action of trespass *de bonis asportatis* at the suit of B. *Smith v. Holbrooks*, 9 Ir. L. Rep. 155, Q. B.

Where an ejectment had been brought for non-payment of rent, and the demise laid in May, and a consent for judgment given, with stay of execution until the November following, when the *habere* was executed, though the landlord had entered in the August previous, and sold the crop sold by the tenant. Held that the landlord could not be made liable in an action of trespass *de bonis asportatis* for selling the crop. *Nugent v. Phillips*, 8 Ir. L. Rep. 17, Q. B. [See *Baldwin v. Irvine*, 1 Ir. Jur. 215, Ex.]

Held, also, that where a landlord recovers in ejectment, his title has reference to the day of the demise, and the tenant is a trespasser from that period. *Ib.* [Perrin, J., *dissentiente*.]

The declaration stated that the defendant while driving a carriage, drove with force and violence against another carriage, on which the plaintiff was sitting, and forced it with a great shock, over a raised part of the road, and caused it to sway and incline to over-turn; and thereby with force and violence

caused the plaintiff to be greatly terrified, and to be put in great peril and apprehension of the said carriage overturning; and from reasonable apprehension of the said carriage overturning, then and there to fall towards to, and upon the ground; and in so falling, one of the legs of the plaintiff, without his will, then and there struck against one of the wheels of the lastmentioned carriage, by means whereof the said leg was fractured. Held, to be a count in trespass *vi et armis*, and not in case. *Spear v. Chapman*, 8 Ir. L. Rep. 461, Ex. Ch.; S. C. *Ib.* 278, Ex.

Pleading.—In an action of trespass *qu. cl. fr.* Pleas—first the general issue—second, as to ejecting, expelling, &c., *actio non*, because he was lawfully possessed of the said premises, and the plaintiff having entered thereon, and unlawfully taken possession of the said premises, and without the license of the defendant, he expelled her therefrom. Held, that this plea was bad upon demurrer; because it did not shew a better title than plaintiff had; and because it purported to be a justification; yet it did not show title to warrant a justification. *Tucker v. Kirwan*, 4 Ir. L. Rep. 376, Q. B.

In trespass *qu. cl. fr.*, where there are several counts, stating distinct trespasses, in different closes and at different times, it is sufficient, even on special demurrer, to justify in one plea the several trespasses—such plea appearing on the face of it to treat the trespasses, times, and closes, as several and distinct. *Kirwan v. Joy*, 8 Ir. L. Rep. 500, Q. B.

Trespass for an assault and battery, by riding a certain horse against the plaintiff. Plea, that the defendant was riding in a careful manner along the public highway; and whilst so riding, the plaintiff negligently, carelessly, and improperly walked along and across the middle of the highway, and thereby came in contact with the said horse, and was thereby knocked and thrown down, and bruised and injured &c., as in the declaration mentioned, without any default on the part of the defendant; and that the said hurt was occasioned by the negligent, careless and improper conduct of the plaintiff, and not by the default of the defendant; and that if the plaintiff had exercised due care, the same would not have happened. Held bad on special demurrer as amounting to the general issue; and also that it was bad as purporting to be in confession and avoidance, and yet did not admit the trespass, or state any circumstances to justify it. *Ball v. Mathews*, 10 Ir. L. Rep. 316, Q. B.

Trespass—Plea, that after the committing of the trespass, and before the exhibiting of the bill, it was agreed between plaintiff and defendant, that the latter should do and perform certain work, which was then agreed upon, and furnish materials for the same, for the plaintiff, in satisfaction and discharge of the trespass. Averment—That in pursuance of the agreement, the defendant did and performed the work, and found and provided materials for the same for the plaintiff; and that the plaintiff accepted and received such work and materials in full satisfaction and discharge of the trespass. Demurrer, upon the grounds that neither

the nature of the agreement, nor particulars of the work performed, had been stated with sufficient certainty. Held, that the plea was good; first, because the statement of the agreement was immaterial, and could not have been traversed by the plaintiff; and secondly, that a statement of the particulars of the work would have been objectionable, as falling within the rule prohibiting the introduction into pleading of matters of evidence. *Craig v. Byrne*, 7 Ir. L. Rep. 500, Ex.

Evidence.—In an action of trespass in a several fishery, a person relying on the 19th section of the 5 & 6 Vic. c. 106, as giving him title to erect a stake weir, must prove the previous written consent of the landlord to such erection. A letter of the landlord, without any date, authorising such erection, and no evidence offered *aliunde*, of such letter having been written before the erection of the weir, was held not to be admissible evidence for that purpose. *Lord Templemore v. Allen*, 8 Ir. L. Rep. 199, Q. B.

In an action of trespass, the plaintiff claimed a several fishery in a navigable river, and in proof thereof, gave in evidence certain patents and ancient documents, showing that certain weirs and *gurgites* within those limits, had been granted to the party under whom the plaintiff claimed; and the judge at the trial, refused to tell the jury that this passed a continuous fishery within the limits claimed; but left it to them to say, whether the right to that several fishery was in the plaintiff; and whether the place where the defendants fished was within the limits claimed. Held, that this did not amount to a misdirection. *Gabbett v. Clancy*, 8 Ir. L. Rep. 299, Q. B.

Quere, did the word *gurgites* pass a several fishery within the boundaries. *Ib.*

The plaintiff in proof of his title, proved the execution of a lease to him of the *locus in quo* by a corporation; which lease, to make it valid, required the consent of certain parties thereto, and recited that such consent had been obtained. Held, that such was sufficient proof of its validity, without proof of such consent, which the jury might presume, evidence to the contrary not having been given, and the *onus probandi* lying on the party who asserted the invalidity of the instrument. *Ib.*

A *fiat* for a lease of the fishery, granted by Queen Elizabeth, with proof of payment of rent under the lease, Held to be sufficient evidence to presume a seisin in the crown, without proof of enrolment of this lease. The want of enrolment is an objection to the validity of the lease, not to its admissibility as evidence. *Ib.*

Held that an inquisition taken in 1614, was sufficient evidence, as a matter of reputation of the existence of a certain place, without proof of the commission on which it was grounded. *Ib.*

In an action of trespass on the case, the plaintiff declared that he was possessed of a certain messuage, by reason whereof he ought to have benefit of turbary in a certain common; and in proof of that right, relied on a lease demising to him certain lands, together with benefit of turbary in a bog convenient to the demised premises in common with

the other tenants of the lessor. Held, that there was no variance between the right claimed in the declaration, and that which passed by the lease. *Metcalf v. Rorke*, 8 Ir. L. Rep. 137, Q. B.

Quere, does a grant amount to a grant of common appendant or appurtenant. *Ib.*

Costs, 2 G. 1, c. 11 ss. 14 & 15.]—When, on the trial of an action for trespass, at which the defendant did not appear, some evidence was given that the defendant asserted title to the premises at the time of the trespass, and the plaintiff took a verdict for nominal damages. The judge refused to certify under the 2 G. 1, c. 11, ss. 14 & 15. *McDonnell v. McDonnell*, 3 Ir. L. Rep. 182, C. P.

This is not a question for the court, but for the judge at *nisi prius*. *Ib.*

The 2 G. 1, c. 11, s. 15, comprises but two species of action—assault and battery, and trespass *qu. cl. fr.* In an action of trespass, brought by plaintiff against the defendant, for driving a coach against one upon which the plaintiff was riding, by reason of which he was thrown to the ground, and broke his leg; the jury having found for the plaintiff with 6d. damage, and 6d. costs; and the judge having refused to certify that the trespass was voluntary and malicious. Held, that the plaintiff was entitled to the full costs of the suit. *Spear v. Chapman*, 8 Ir. L. Rep. 461, Ex. Ch. S. C. *Ib.*, 278, Ex.

II. TRESPASS FOR MESNE RATES.

In an action of trespass for mesne profits, in which the general issue only is pleaded, the judgment in ejectment is conclusive evidence of the plaintiff's title, whether that judgment has been obtained on verdict, or by default. *Armstrong v. Nolan*, 2 Ir. L. Rep. 96, Ex.

In trespass for mesne profits, when there was a plea of the general issue, two pleas of *liberum tenementum*; and a plea of no property in the plaintiff, the court will order the latter to be taken off the file, on the ground that it is an unnecessary plea. *Jack v. Swift*, 3 Ir. L. Rep. 7, Q. B.

Semble—The plea of no property, concluding to the country, to a declaration in trespass for mesne profits, is a bad plea. *Ib.*

Where a defendant in ejectment, pending the proceedings, entered into an agreement subsequent to the service of ejectment, with the agent of the lessor of the plaintiff, to give a consent for judgment, with a stay of execution, and that he should have the crops. Held, in an action of trespass for mesne rates, that this agreement did not preclude the plaintiff from recovering nominal damages for the trespass, antecedent to the date of the agreement. *Baldwin v. Irvine*, 1 Ir. Jur. 215, Ex.

Evidence.—Where an action of trespass for mesne rates is brought against a party, who let judgment in ejectment go by default, an attested or examined copy of the affidavit of the service of the ejectment, is sufficient evidence of the fact of such service, in the action for mesne profits. *Armstrong v. Norton*, 2 Ir. L. Rep. 96, Ex.; and see

cc., *Earl of Listowell v. Greene*, 3 Ir. L. Rep. 65, Ex.

TROVER.

A vessel belonging to a number of part owners, was forcibly taken by the minority out of the possession of the majority, and sent by the former upon foreign voyages, on one of which it was ultimately lost. Held, that trover could not be maintained. One tenant in common of a chattel, cannot maintain trover for it against his co-tenant while the right of recaption remains; but when that right has been put an end to by the act of the co-tenant, an action of trover lies. *Knight v. Coates*, 1 Ir. L. Rep. 13, Ex.

Damages.—If an agreement be made concerning goods, and in fraud of that agreement the goods be taken possession of, it is a conversion, and the value of the property being the amount to be recovered, where the property converted was bills of exchange, the jury were directed to include in the damages the interest then due. *McKeever v. McKain*, Bl. D. & O. 80, N. P. [Per Brady, C.B.]

In an action of trover for a paid bill of exchange, the owner is entitled to substantial damages. *Dunne v. Thorpe*, Bl. D. & O. 128, N.P. [Per Pigot, C.B.]

TRUSTEES—See JUDGMENT. (ASSIGNMENT.)

TURBARY—See TRESPASS. (EVIDENCE.)

Cutting for sale.—See *De Burgho v. Gabbett*, 1 Ir. Jur. 276, Q. B.

UNDERTAKING.

To give material evidence.—See PRACTICE. MOTION TO CHANGE VENUE.

UNION—(ACT OF)

The court will not permit a plea, calling in question the power of the Imperial Parliament to bind Ireland, to be argued; but will direct it to be taken off the file, though no motion for that purpose has been made by the opposite party. *Clarke v. Kelly*, 1 Ir. Jur. 294, C. P.

USE AND OCCUPATION—See ASSUMPSIT.

VARIANCE—See DIFFERENT ACTIONS. PLEADING. PRACTICE.

VENDOR AND PURCHASER—See DEEDS, JUDGMENTS. (PRIORITIES.)

VENIRE DE NOVO—See PRACTICE.

VENUE—See PLEADING. PRACTICE.

VERDICT—See PRACTICE.

Aider by Verdict.—The case of *Sweetapple v. Jesse*, (2 N. & M. 36; S. C. 5 B. & Ad. 31), shows the unanimous opinion of the twelve judges in England to have been, that the court will presume only such circumstances as it was essentially necessary for the plaintiff to have proved, to support his declaration; that after verdict we cannot presume that anything not in the declaration, or necessarily to be inferred therefrom, was proved at the trial. *Barry v. Cambie*, 6 Ir. L. Rep. 57, Ex. Ch.

WARRANT OF ATTORNEY—See PRACTICE. (JUDGMENT.) STAMP.

Entering Judgment.—The court allowed judgment to be entered upon an old bond and warrant, which had been executed to the obligee, as a security against a judgment entered on another bond, in which he was a surety for the obligor, that it might be assigned as counter security to the purchaser of certain lands of the obligee. *Chambers v. Bateson*, 3 Ir. L. Rep. 365, C. P.

Where the warrant of attorney was joint, the court would not allow the obligee to enter judgment against the surviving obligor, though the obligor who had died was a minor when he executed the bond and warrant. *Anonymous*, 1 Ir. L. Rep. 36, C. P.

Upon a motion to enter up judgment against one of three obligors in a bond, it appeared that the bond was in terms joint and several, and the warrant was to confess a "judgment or judgments, &c.," on "a declaration or declarations;" but in other respects purported to be joint. Held, that from the terms of the warrant, it might be inferred that the parties had several judgments in their contemplation, as well as a joint judgment; and leave was given to enter up a separate judgment. *Wallace v. Russell*, 2 Ir. L. Rep. 15, Q. B.

Judgment cannot be entered upon a joint bond and warrant, against the survivor of two obligors; but the party will be left to his action on the bond. *Coleman v. Cox*, 2 Ir. L. Rep. 16, Q. B.

A motion on behalf of the wife to enter up judgment in the names of the trustees of a marriage settlement, upon a bond and warrant of the husband's, passed for the amount of the wife's property; and it appeared that the trustees refused to enter judgment; that one of them had issued an attachment against the obligor's goods, and that the sum secured on the bond would be lost; but the trustees had not received specific notice of this motion. The application was refused. *Campion v. Campion*, 2 Ir. L. Rep. 13, Q. B.

The Court of Exchequer will allow judgment to be entered on a Kerry bond, at the suit of the executor of the obligee. *Adams v. Houston*, 2 Ir. L. Rep. 241, Ex.

Judgment will not be entered on a bond and warrant more than twenty years old, on a general allegation of interest having been paid within that time. The affidavit should state by whom interest was paid. *Creed v. Creed*, 3 Ir. L. Rep. 61, C.P.

Judgment was not entered on a bond against the

surviving obligor, the bond being lost, and the terms of the warrant being only to enter up "one or more judgments on a declaration to be filed." *Harris v. Young*, 3 Ir. L. Rep. 377, C. P.

Semle—That a warrant of attorney for a judgment in debt for money had and received, does not authorise the entering of judgment in debt upon a bond. *Otway v. Thynne*, 3 Ir. L. Rep. 540, Ex.

The court will not allow judgment to be entered on a warrant of attorney reciting a bond collateral therewith, where in fact, no bond had been executed. *Connor v. Connor*, 4 Ir. L. Rep. 315, Ex.

The court on the application of the *cestui que trust*, permitted judgment to be entered on a bond and warrant of attorney, executed to the obligee as a trustee, no payment having been made on foot thereof to the latter. *Tyrrell v. Magill*, 5 Ir. L. Rep. 98, C. P.

The court refused to enter a judgment against the survivor of two obligors, in a joint and several bond, when the warrant was to enter up "a judgment on one or more declaration or declarations, to be filed against us." *Magee v. Magill*, 5 Ir. L. Rep. 186, C. P.

The court will not allow judgment to be entered up, without the production and filing of the warrant of attorney, as required by the 39th general rule, though it was sworn in an uncontradicted affidavit, to have been executed, and to be in the possession of a third party, from whom it could not be obtained. *McEwen v. Earl of Charleville*, 6 Ir. L. Rep. 144, C. P.

A bond and warrant having been executed by a father and son, on the marriage of the latter, to secure to the wife a sum exceeding the amount of her fortune, in the event of the bankruptcy or insolvency of the obligors, or either of them; and the son having committed what was contended to be an act of bankruptcy, the court granted an absolute order to enter judgment against the father alone, notwithstanding that the bond and warrant had been executed nineteen years since, on the suggestion by counsel of an apprehension that the available property of the father might be conveyed away before a conditional order could be made absolute. *Kennedy v. Davis*, 6 Ir. L. Rep. 113, C. P.

Separate judgments cannot be entered on a joint and several bond, where the warrant authorises only one declaration to be filed. *Anonymous*, 8 Ir. L. Rep. 12, Q. B.

Judgment cannot be entered against two surviving obligors, on a joint bond executed by three, with warrant authorising an appearance "for us, to confess one or more judgments, on one or more declarations to be filed against us." *Stanfield v. Wilson*, 8 Ir. L. Rep. 100, Ex.

A warrant of attorney had been executed by an insolvent, under the provisions of the 1 & 2 G. 4, cap. 59, s. 28, to authorise the entering up a judgment against him. This court allowed judgment to be entered on that warrant, under an order of the Insolvent Court, though more than twenty years had elapsed. *Campbell v. Regan*, 8 Ir. L. Rep. 191, Q. B.

Judgment was entered, against the defendant, on a bond by virtue of a warrant of attorney, which

bond and warrant were executed by the defendant to the plaintiffs, whilst the former was in custody on mesne process at the suit of the latter, and without the presence of an attorney. The defendant, having been subsequently arrested on foot of the judgment, took the benefit of the Insolvent Acts, and returned the judgment in his schedule. Held, that by returning the judgment in his schedule, the defendant waived their irregularity. *Dobson v. McDeid*, 1 Ir. L. Rep. 236, Ex.

3 & 4 Vic. c. 105.]—A memorandum of satisfaction under the 18th section of the 3 & 4 Vic. c. 105, ordered to be entered on a warrant of attorney filed pursuant to the 12th section of the same statute. *Dower v. Dumphy*, 6 Ir. L. Rep. 128, Ex.

Such an order may be made by a single judge or by the court itself. *Id.*

P. and J. M. executed a bond to the plaintiff in the penal sum of £600, with warrant of attorney to confess judgment, the plaintiff writing to them the following letter: "Gentlemen, you have this day executed to me your bond, with warrant of attorney, for confessing judgment, in the penal sum of £600, now, I hereby declare that such bond, and any judgment to be entered thereupon, has been passed to me as a collateral security only for any overdue bills which I may hereafter discount for you, and for no other object." Separate judgments were entered on this bond within twenty-one days of its execution, but the warrant was not filed, nor was the letter to the defendants written upon the same paper as the warrant. The defendants having become bankrupts, Held, that such judgment was good against their assignees, and came within the saving clause of the 13th section of the 3 & 4 Vic. c. 105. *Conlan v. McAnaspie*, 10 Ir. L. Rep. 295, Ex.

Semle, that the above letter amounted to a defeazance within the 14th section of the statute. *Id.*

Semle, that the provisions of the 14th section apply to warrants of attorney collateral with bonds. *Id.*

Practice.]—A warrant of attorney, on which judgment had been entered, was allowed to be taken off the file for the purpose of entering judgment thereon in England upon the terms of vacating the judgment in this country. *Wall v. Lighburne*, 4 Ir. L. Rep. 177, Ex.

WARRANTY—See ASSURANCE.

When a horse was purchased, and after a month's trial returned to the vendor as unsound, (the horse being warranted,) but is not received by him. Held not sufficient to rescind the contract. *Cripps v. Smith*, 3 Ir. L. Rep. 277, Q. B.

The declaration stated that in consideration that the plaintiff, at the request of the defendant, had then and there bought a horse of him, he then and there promised that the horse was sound. Held good on special demurrer, for that the sale and warranty were contemporaneous, and the statement in the declaration was not an averment of a sale being had before the promise was made. *Smythe v. Morrissey*, 10 Ir. L. Rep. 213, Q. B.

WASTE.

Cutting Bog.—When waste, see *De Burgho v. Gabbett*, 1 Ir. Jur. 276, Q. B.

WEIGH-MASTER.

In 1847, the mayor and aldermen of the city of Limerick "nominated and appointed under hand and seal Alderman John Vereker, and the Hon. C. S. Vereker to be joint weigh masters of said city." John Vereker being then mayor of the city, and the Hon. C. S. Vereker an infant; it was admitted that the former took the oath required by the statute, and filled the office until his death in 1840, and that the tolls were in the corporation of the city. Held, that under the 4 Anne, c. 14, the appointment was in the mayor, and that the office of mayor and weigh-master were not incompatible. *Honan v. Vereker*, 10 Ir. L. Rep. 64, Ex.

Held, that under the third section of the above statute, requiring that "there shall be appointed in every city one honest and discreet person who shall be weigh-master," an appointment of an infant or of two persons to the office is invalid, and that therefore the title of the Hon. C. S. V. determined on the death of J. V. in 1840. *Ib.*

Quære, would a *quo warranto* information, at the relation of the plaintiff, have been maintainable for the office in question within the statutes 19 Geo. 2, c. 12, and 38 Geo. 3, c. 2. *Ib.*

WEIRS—See CRIMINAL LAW. (NUISANCE.)

WILL.

Construction.—The testator devised all his properties to his daughter for her life, "and in case she died without issue," then to his three nieces, daughters of his sister, "and in case any of them should die, the said properties to revert to the survivors or survivor of them, and in case the three should die" then to any other child his said sister should have, and then bequeathed the above properties to the issue of his daughter, "and in case she has more than one child to go share and share among them, and in case all her issue should die the said properties to revert as above between his nieces, Held, that the nieces took under this will as tenants in common and not as joint-tenants. *Scully v. O'Brien*, 1 Ir. L. Rep. 287, Q. B.

R. assignee of a lease for three lives devised the lands to trustees for his wife for life, remainders over for the whole of his interest. Held, that the wife was assignee for her life of the testator's entire interest. *Mauinsell v. Russell*, 2 Ir. L. Rep. 205, Ex.

The testator after devising an annuity to his wife charged on part of his real estate, devised a portion of that estate together with the other parts of his real estate to W. T. and his heirs, "but if W. T. shall die in the lifetime of my wife or afterwards without issue or heirs male lawfully begotten, living at his death, or if living who shall happen to die before they attain twenty-one; then I devise my estate and interest thereon to P. T. and his heirs, and further after my wife's death I devise to the said P. T. and his heirs my fee-simple estate in A. and

my free-hold property in B., but if P. T. shall die without heirs male lawfully begotten in the lifetime of W. T., then I devise such my estates so devised to P. T., to W. T. and his heirs, and if W. T. shall die without such heirs as herein already mentioned, then after the death of the survivors of them I devise my said estates to my sisters S. and A. F. and their heirs. Held, that W. T. and P. T. in the original devises to them, took estates in fee or quasi fee subject to an executory devise over. Held W. T. having died in the lifetime of P. T. without leaving issue male, P. T. took in the estates devised to W. T. an estate in fee or quasi in fee subject to an executory devise over. Held, that S. T. having survived A. T. who died in the lifetime of P. T. unmarried and without issue, the said S. T. took in all the premises devised, an estate in fee or quasi fee by way of executory devise. *Tisdall v. Tisdall*, 2 Ir. L. Rep. 41, Q. B.

The testators being seized in fee of certain free-hold premises, devised same to trustees their heirs, &c., "upon trust to receive and take the rents, &c., thereof, and pay and apply the same unto my dear Marianne for her own sole and separate use, notwithstanding any future husband she may marry, and that her receipt only to my trustees shall be good and effectual discharges from time to time for the same and from and immediately after the decease of my said dear wife, in trust for such person or persons, and in such manner and form as my dear wife shall by any deed or will duly executed and attested, give, direct and appoint the same, and I give, devise and bequeath unto my said dear wife all and singular my goods, chattels, moneys, debts, to me owing, moneys in the funds and effects and property of what nature or kind soever, the same be for her own sole and absolute use for ever," and he appointed his wife sole executrix. Held, that under the clause of the will which terminates with the words "direct and appoint the same," the testator's wife took in the freehold premises thereby devised to her an estate for her life only, with a power of appointment by any deed or will duly executed and attested, supposing such estate to be legal and not equitable. Held also, that under the clause of the said will commencing with the words "and I give devise and bequeath unto my said dear wife," she took an estate in fee-simple in said freehold premises contingent upon her not executing the power of appointment given to her by said will, and supposing such estate to be legal and not equitable. *Bowyer v. Blair*, 2 Ir. L. Rep. 149, Q. B.

The testator having two sons Robert and Marcus devised as follows "I leave and bequeath to my said son Robert during the term of his natural life, all my estate right title and interest of and to the lands of C., &c., and in case my son Robert shall marry with the consent of his mother (if living,) then I devise the same to any issue he may happen to have by his wife, in such manner as he shall by deed or will direct, limit, or appoint; and for want of such appointment to go equally among them share and share alike, but in case my son Robert shall die without issue then and in that case it is my will that the said lands of C. &c., shall go to my son Marcus his heirs and assigns for ever." Held, that Robert

took an estate tail with a vested remainder in fee to Marcus. *Martin v. M'Clausland*, 4 Ir. L. Rep. 340, C. P.

Held, that an estate in remainder, after an estate tail in possession, was bound by a judgment, though the same never came into possession of the conu-
sor. Ib.

A testator having several children, bequeathed to his daughter, M. G., £1000, to be paid by instalments of £100 *per annum*, out of the farms and lands of B. and F., held by lease for three lives; which lands of B. and F., testator willed and bequeathed unto his son E. F., subject to the payment of the above £1000, as before recited, to his daughter M. G. After devising and bequeathing the residue of his real and personal estate to and among his other children, the testator concluded his will with the following clause: "I will, that in case of any of my children not having lawful issue at the time of his or her death, that anything I will to them, should go, share and share alike, among my sons and daughters." Held, that E. G. took an absolute estate quasi in fee, with an executory devise over to his brothers and sisters, in the event of his dying without issue, living at the time of his death. *Geary v. Synan*, 5 Ir. L. Rep. 509, Ex.

E. G. died without issue. Held, that the limitation over to the testator's sons and daughters extended to all of them, giving them, in the contingency provided for, the absolute interest in the lands of B. and F., and was not restricted to such of them only as were living at the death of E. G.
Ib.

Devise, In case my wife should be now, or at the time of my death, pregnant, I leave and bequeath my said estate to the said daughter, and my daughters M. and A., share and share alike, subject, &c.; and my will is, that if any of my said daughters, or all of them, should die without issue male, then, and in that case I bequeath all my said estate to my brother A. N. for life." The will concluded thus—"And in case all or any of my daughters should leave male issue, my will is, that such issue should inherit my said estate according to priority of birth—the eldest son of my eldest daughter to succeed first; the issue male of my eldest daughter to be preferred to the issue of the younger—and failing male issue from any of my daughters, then to my brother A. aforesaid." No child having been afterwards born—Held, that the daughter M. and A. took an estate in tail male, as tenants in common, with cross-remainders by implication; and that, by the last clause of the will, there was not an intention sufficiently indicated that the issue male should take as purchasers. *Nixon v. Blake*, 6 Ir. L. Rep. 325, Q. B.

Semle, if the issue of the daughters took by purchase, an ultimate remainder in tail would vest in each daughter expectant on the determination of the estates tail to the first and other sons. *Ib.*

A., by will of September, 1802, devised the lands of K., C. and P. to trustees, to the use of his

son H., for life, remainder to the trustees to preserve contingent remainders; remainder from the death of H., to other trustees, for a term of 500 years, to raise portions for the younger children of H., and subject thereto; remainder to the first and other sons of H. in tail male; remainder to M. for life; remainder to the first and other sons of H., in tail male; remainder to the testator's daughters in fee. The will contained a jointuring and leasing power to each devisee, when in the enjoyment of the lands; and a power was given to each, except H., to charge £2000 for younger children. The testator, subsequently to the execution of this will, married a second wife, and upon that marriage vested the lands of K. and P. in trustees, to secure her jointure; and by a codicil executed after this marriage, he revoked any former bequest or devise he had made to H., and then devised the lands of K. and P. to H. for life, subject to the jointure settled on testator's wife; remainder to trustees to preserve contingent remainders to the first and other sons of H., in tail; remainder to M. in fee; and he directed that this and every other codicil, should be taken and annexed to, and form part of his will. Held, that the term of five hundred years, created by the will of 1802, was not a subsisting term. *Daly v. Daly*, 9 Ir. L. Rep. 303, Q. B. [Perrin, J., *dissentiente*.]

A. seized of the reversion in fee, devised it to B, his nephew, "in as full a manner as he could convey it" to be enjoyed by his heir and his heirs male for ever. Held that B. took an estate in tail male. *Roche v. O'Brien*, 1 Ir. Jur. 156, Ex. Ch.

WITNESS.

Commission to examine.—See EVIDENCE.

WORK AND LABOUR—See SERVANT AND MASTER. ASSUMPSIT.

WRIT.

Assistance.—To induce the court to grant a writ of assistance to effect service of a summons in ejectment, it must be shown to the court that there is actual danger in attempting the service. *Maher v. Ejector*, 10 Ir. L. Rep. 78, Ex.

Of Capias.—See EXECUTION. ARREST.

Of Ca. Sa.—See EXECUTION.

Of Elegit.—See EXECUTION.

Of Restitution.—See EJECTMENT. RESTITUTION.

Corrigenda et Addenda.

Documents—for See PRACTICE, read PRODUCTION OF DOCUMENTS.

p. 118, *Daly v. Kelly*, for 2 Ir. L. Rep. 299, read 4 Ir. L. Rep. 16, C. P.

124, *Anonymous*, Bl. D. & O., for 205, read 207.

109, *Bolton v. Cooke*, Bl. D. & O. for 43 read 4.

94, After *Burke v. Cooney*, 6 Ir. L. Rep. read 204, C. P.

41, 106, for *Brien v. Lord Ponsonby*, read *Bruce v. Lord Ponsonby*, 7 Ir. L. Rep. 422, Q. B.

1, *Bryan v. Campbell*, 7 Ir. L. Rep. 408, Q. B., read *Byrne v. Campbell*. *Ib.*

93, *Burris v. Coffey*, 6 Ir. L. Rep., for 398 read 298.

104, *Crawford v. McDonnell*, 4 Ir. L. Rep., for 194 read 104.

67, *In re Daly*, 1 Ir. L. Rep., for 238 read 283.

70, *Davis v. Bell*, Bl. D. & O. for 180 read 160.

Doe v. M'Egan, Bl. D. & O., for 206 read 205.

142, for *Armstrong v. Nolan*, read *Armstrong v. Norton*.

67, *Archbishop of Dublin v. Eaton*, for 1 Ir. L. Rep. 168, read 3 Ir. L. Rep. 168.

59, for *Fordel v. Ejector*, 3 Ir. L. Rep. 347, Ex., read *Voidei v. Ejector*.

33, before 1 Ir. Jur. 288, read *Grubb v. McKenna*.

43, *Ryan v. McMaster*, 6 Ir. L. Rep. for 106, read 195.

127, *Reg. v. McCullon*, for 8, read 9 Ir. L. Rep. 27.

127, *Reg. v. McNaghten*, for 8, read 9 Ir. L. Rep.

127, *Reg. v. Moran*, for 8, read 9 Ir. L. Rep.

104, After *Anonymous*, Bl. D. & O. 183, C. P. read S. C. *Sadlier v. O'Brien*, 9 Ir. L. Rep. 285, C. P.

41, *Smith v. Ryan*, 9 Ir. L. Rep. for 205, read 235.

ADMINISTRATION.

A will in which no executor was named, and by the Court of Prerogative administration to the deceased, as in case of actual intestacy, was granted to one, and by the same court that administration was afterwards revoked, and administration *cum testamento annexo* granted to another. Held, that the first administration was voidable only, and not void. Secondly, that the mesne acts of the first administrator, if done in due course of administration, were valid. And, thirdly, that it lies upon the party impeaching those acts to show that they were not so done. *Bevan v. Lloyd*, 10 Ir. L. Rep. 228, C. P.

Quære, as to the distinction between revocation upon citation and revocation upon appeal. *Ib.*

Letters of administration to a deceased person were, as in case of actual intestacy, granted to A. The defendant made a *bonâ fide* payment to A., the administrator, on account of a debt due to the deceased, subsequently, a will made by the deceased, and in which no executor was named, having been produced, the letters of administration to A. were upon citation revoked, and letters of administration *cum testamento annexo* were granted to B. Held, in an action by B. against the defendant, that the payment on account to A., the first administrator, was valid, and that B., the second administrator, could recover the balance only. *Maguire v. Denham*, 10 Ir. L. Rep. 240, Q. B.

ARREST.

Privileged Persons.—The privilege of an officer of the Queen's Bench from arrest is co-extensive with that of an attorney, and where the admittance to his house was obtained, and his arrest effected under the pretence of his being wanted by A., his assistant in the office, the court will not presume the defendant supposed he was wanted on office business. *Magrath v. Cooper*, Bl. D. & O. 141, Q. B.

Where a defendant in execution paid the debt and costs, and the plaintiff refused to discharge him except on the condition of his paying the sheriff's fees. Held, in an action for maliciously detaining the creditor in prison, that the condition was regular, the defendant being liable to the payment of the poundage of the sheriff. *Dunne v. Thorpe*, Bl. D. & O. 128, N. P. [Per Pigot, C. B.] [See *Cowper v. Gould*, 2 Jon. 475, Ex.]

ATTORNEY—See SOLICITOR.

COSTS.

Laches—43 Geo. 3, c. 46, s. 3.]—A defendant had been arrested, and lodged in court a sum of money, in lieu of special bail, and judgment had been marked on a verdict found for an amount less than the sum claimed by the plaintiff, and the costs had been taxed and certified. Held that an application by the defendant, under the 43 G. 3, c. 46, s. 3, that he should be allowed the costs of the trial, was too late. *Solomon v. Pitt*, 9 Ir. L. Rep. 172, Q. B.

Taxation.—Upon a motion in which two counsel were engaged and costs given generally, the taxing-officer allowed fees and briefs for one only, the court refused to review the taxation. *Bacon v. Greer*, Bl. D. & O. 188, Q. B.

The court has no jurisdiction to review a taxation by the Master under the 52nd section of the Lands Consolidation Acts, (8 Vic. c. 18.) *Tennant v. Borough of Belfast*, Bl. D. & O. 191, Q. B.

The court will not upon taxation allow as against the unsuccessful party more than the usual jury allowance, though such allowance was consented to by the parties. *Molloy v. Brown*, Bl. D. & O. 231, Q. B.

In a *qui tam* action the court will restrain the officer from taxing the costs of the defendant upon judgment as in case of non-suit. *Semple v. Gray*, Bl. D. & O. 232.

The court will refer it to their officer to review his taxation of fees allowed to a sheriff, on process to compel appearance by a corporation, but refused to refer it to him to review, on the ground that he only allowed three shillings to a surveyor and engineer employed by plaintiff to make a plan, and for which he was paid £6 6s. and £3 3s. for his attendance as a witness. *Power v. Great Southern and W. R. C.*, Bl. D. & O. 236, Ex.

The expenses of a witness to prove a deed will not be allowed when the proof can be made by a person whose duty it is to be present at the time. *Cockburne v. Molloy*, Bl. D. & O. 287, Ex.

CRIMINAL LAW.

Felony—23 & 24 Geo. 3 c. 20, s. 2.]—Unlawfully

and feloniously to carry away with intent to prevent the flour from being taken to the place of shipment is a felony within the 23 & 24 Geo. 3 c. 20 s. 2, notwithstanding the parties who committed the offence may have had another object also in view in committing the offence. *Moloney v. Power*, 10 Ir. L. Rep. 538, Q. B.

DEBTOR AND CREDITOR.

Composition bills.—In 1844 M. being indebted to the plaintiff in £46 13s. 5d., gave him in payment a bill for the amount drawn by one S. on the defendant, and accepted by him for the accommodation of M. When this became due, M. paid £10 on account, and gave a fresh bill for £30; and in April, 1845, being then indebted to the plaintiff in this latter bill then overdue, and in £6 13s. 5d., the balance of the former, he entered into an agreement, whereby the plaintiff, and others of his creditors, agreed to accept a compromise of 10s. in the pound, payable by instalments, and secured by the joint notes of M. and the defendant; but afterwards, to induce the plaintiff to sign the agreement, M. gave him as security for his entire demand, two acceptances of the defendant's, for £18 and £19 17s. 1d., respectively; whereupon he signed the agreement. When the first of these bills became due, M. paid £10 on account of it, and subsequently the balance of that bill being unpaid, and the second bill over-due, gave, in payment of the entire balance and interest thereon, two fresh acceptances of the defendant (who was an accommodation acceptor throughout), one for £13 13s., the other for £14 14s. Assumpsit against the acceptor upon this latter bill. Held, that the action could not be maintained, the bill being only a fresh security given to the plaintiff on foot of a transaction which was originally contrary to public policy. *Rooney v. Armstrong*, 10 Ir. L. Rep. 291, Ex.

MAGISTRATE.

The court will not grant an order upon magistrates to take informations against a party charged with an offence, unless it appear that the informations of the parties applying were tendered to the magistrates in writing, and the informations so tendered, must be brought before the Court where the application is made. *Ex parte Hughes*, 1 Ir. L. Rep. 292, Q. B.

PRACTICE.

Appearance.—Where an appearance is entered, but no notice of it served under the 108rd General Rule, the plaintiff cannot enter a parliamentary appearance, but may proceed upon that already entered. *Price v. Flattery*, 3 Ir. L. Rep. 499, Q. B.

Setting aside proceedings.—The affidavit of a defendant seeking to set aside proceedings, on the ground of non-service of the process, must contain a positive denial of his having had notice of the writ, and must also state circumstances from which the court may be satisfied that the process server has been either guilty of perjury, or been mistaken. *Lewis v. Henry*, 6 Ir. L. Rep. 218, Ex.

Setting aside process.—Service of a writ will not be set aside for want of a date. *Lucky v. Downing*, 5 Ir. L. Rep. 593, Q. B.

Where three separate writs had issued against three defendants, and three appearances had been entered, it is no ground of irregularity to join the defendants in one declaration. *Walker v. Clarke and others*, 10 Ir. L. Rep. 201, Q. B.

Rule for non-pros.—If proceedings instituted in a superior court, be removed to an inferior jurisdiction, at the instance of the plaintiff, and with the defendant's implied consent, the defendant cannot afterwards enter a rule for *non-pros.* in the court above. *Taylor v. Cruise*, 1 Ir. Jur. 263, C. P.

Notice of trial.—Where there has been four clear days notice of countermand of trial, the defendant will not be entitled to any costs incurred. *Irwin v. Meenaghan*, 3 Ir. L. Rep. 285, C. P.

New trial.—An application to set aside a verdict, and for a new trial, on the grounds of surprise, and the discovery of new evidence, must be founded on affidavit. *Hall v. Thorpe*, 1 Ir. Jur. 238, Q. B.

Judgment.—The court will not order satisfaction to be entered on record of a judgment, on a warrant of attorney of one of the trustees, the other disclaiming having ever accepted the trust, and being out of the jurisdiction and refusing to act. *Irwin v. Irwin*, 3 Ir. L. Rep. 273, C. P.

Error, assignment of.—Where, on a writ of error, brought on a judgment in ejectment, which had been commenced in the county of D., the error assigned was, that before and at the time of the *teste* of the *venire*, and thence until and at the time of the trial, the lands in question were situated in the county of L., and not in the county of D., without stating that at the time of the ejectment brought the premises were in the county of D. Held, that this assignment of error was insufficient. *Heywood v. Reynolds*, 7 Ir. L. Rep. 409, Q. B.

REVENUE.

Certiorari—Judgment.—A party is too late in taking objections to a notice of appeal after having submitted to the jurisdiction of the court, and appearing on the notice.—Where a judgment amounts to an acquittal, and part thereof is erroneous, such part may be rejected as surplusage, and it will not vitiate the judgment. *Reg. v. Cassidy*, 6 Ir. L. Rep. 436.

STOCK.

The court will not substitute service of a conditional order to impound stock, under the provisions of 3 & 4 Vic. c. 105, ss. 23, 24, on the executors of a will, in whose name the stock was standing, in the dividends of which the judgment debtor (who was out of the jurisdiction) had a life interest, where it did not appear that the said executors had ever paid any of the said dividends to the debtor since his interest therein had accrued. *Guinness v. Armit*, 3 Ir. L. Rep. 165, C. P.

Quare, is service on the attorney, who transacts the law business of the judgment debtor, who is out of the jurisdiction, good service. *It.*

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